

GULAMHUSSEIN AND ANOTHER
v.
COHEN AND ANOTHER

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 180/2001
DC COLOMBO NO. 3800/SpI
SEPTEMBER 27, 2001

Civil Procedure Code – Section 104 – Order on party to declare by affidavit the documents filed with the United States Inland Revenue Services – Are tax returns privileged documents?

Held:

- (1) The tax returns filed with the United States Inland Revenue Services, and the audited accounts without doubt the property of the Government of the United States of America – Is beyond the reach of the petitioner-respondents.
- (2) It is apparent that these documents are in fact not in the possession of the respondents, in which event respondents cannot be required to produce the documents not in their possession.

Per Udalagama, J.

"I am of the view that tax returns by the very nature are privilege documents and such returns are normally submitted in confidence, in such instances the parties are not entitled to as of right to require the opposing party to tender such documents/copies thereof."

APPLICATION in Revision from the order of the learned District Judge of Colombo.

Romesh de Silva, PC with *Harsha Amerasekera* for the petitioner.

K. Kanag Isvaran, PC with *Anil Tittawella* for the respondents.

Cur . adv. vult.

November 15, 2001

UDALAGAMA, J.

The 1st to 2nd respondents-petitioners by their petition dated 18. 07. 2000 to this court filed this application for revision praying, *inter alia*, to set aside the order of the learned District Judge dated 04. 07. 2000 and to direct the petitioners-respondents to declare by affidavit the documents called for in the relevant notice in particular all the tax returns filed with the United States Inland Revenue Services and/or copies thereof in the possession of the said petitioners-respondents.

This application made to the court below was rejected by the learned District Judge by the impugned order journalized on 04. 07. 2000 (J.E. 55).

When this application was taken up for inquiry by this court to decide the matter of leave, the learned President's Counsel appearing for both parties moved to tender written submissions.

Considering the written submissions filed thereafter, I am inclined to the view that the application of the petitioner to the District Court under the provisions of section 104 of the Civil Procedure Code to declare by way of affidavit all tax returns filed with the aforesaid United States Inland Revenue Services and audited accounts obviously pertaining to the documents in the custody of the United States Inland Revenue Services and without doubt the property of the Government of the United States of America, is beyond the reach of the petitioners-respondents.

Besides, it is seen from the affidavit filed by the respondents-petitioners that these documents so required by the petitioners are in fact not in the possession of the respondents, in which event the respondents cannot be required to produce the documents not in their

possession. This factual position appears to have been accepted by the learned District Judge and as such this court would be slow to interfere with such finding of fact.

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I am also of the view that tax returns by their very nature are privileged documents and such returns are normally submitted in confidence. In such instance I would hold that the parties are not entitled to as of right to require the opposing party to tender such documents or copies thereof.

More importantly, these documents are not referred to in the respondents-petitioners pleadings and as such the respondents are not entitled to an order as prayed for by them.

In the above circumstances I would not interfere with the impugned order of the learned District Judge dated 04. 07. 2000 as the said ⁴⁰ order appears to have been based on established principles of law, and subsequent to the proper use of discretion.

Leave to appeal is refused with costs fixed at Rs. 5,250.

NANAYAKKARA, J. – I agree.

Application refused.