

AFR
(Judgment reserved on 08.09.2015)
(Judgment delivered on 08.01.2016)

Court No. - 37

Case :- WRIT TAX No. - 179 of 2012

Petitioner :- D.S. (India) Jewelmart Pvt. Ltd.

Respondent :- Union Of India And Others

Counsel for Petitioner :- S.D. Singh,Manu Ghildyal

Counsel for Respondent :- C.S.C, Income Tax,B.J. Agarwal,Dhananjay Awasthi

AND

Case :- WRIT TAX No. - 180 of 2012

Petitioner :- Mridul Garg Also Spelt Mardul Garg And Others

Respondent :- Union Of India And Others

Counsel for Petitioner :- S.D. Singh,Manu Ghildyal

Counsel for Respondent :- C.S.C, Income Tax,B.J. Agarwal

AND

Case :- WRIT TAX No. - 181 of 2012

Petitioner :- Mayank Chaturvedi And Others

Respondent :- Union Of India And Others

Counsel for Petitioner :- S.D. Singh,Manu Ghildyal

Counsel for Respondent :- C.S.C, Income Tax,B.J. Agarwal

Hon'ble Tarun Agarwala,J.

Hon'ble Surya Prakash Kesarwani,J.

(Per: Surya Prakash Kesarwani,J.)

We have heard Sri S.D. Singh learned senior counsel along with Sri Akhilesh Kumar Pandey for the petitioner and Sri Ashok Kumar along with Sri Shubham Agarwal learned counsel for the Income Tax Department.

The first two writ petitions being Writ Tax No.179 of 2012 and Writ Tax No.180 of 2012 have been filed by the assesseees challenging the search and seizure operation

conducted by the Income Tax Authorities on 23rd and 24th December, 2011 at the premises, namely, D.S. (India), Jewelmart Pvt. Ltd. 2 Kamta Vihar Colony, Masani Road, Mathura and residential premises, under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), while the third writ petition being Writ Tax No.181 of 2012 has been filed by the counsel of the petitioners of the aforesaid two writ petitions.

Learned counsel for the petitioner submits that a survey was conducted on 23.12.2011 at the aforesaid premises of M/s D.S. (India) Jewelmart Pvt. Ltd., which was converted into search. The search was conducted on 23rd and 24th December, 2011. The search so conducted was wholly unauthorised and illegal in the absence of any proper authorisation and foundational requirement of any information in possession of the authorities which may lead to reason to believe that the petitioners were in possession of any money, bullion or jewellery or other valuable articles which represent undisclosed income. He further submits that the search was nothing but a counter blast to the complaint lodged by the

petitioners on 12.10.2011 before the Chief Commissioner of Income Tax, Kanpur by Fax message and also through speed post, as mentioned in paragraph nos. 10,11, and 12 of the first two writ petitions and an application under Section 156 (3), Cr.P.C. filed by the petitioners against Sri M.K. Srivastava, Additional CIT Range-3, Mathura and two other officers of the Income Tax Department in the Court of Chief Judicial Magistrate, Mathura. He further submits that the search was conducted at Mathura, while the authorization of such search and seizure was issued by the income tax authority at Kanpur, on 23.12.2011 without looking into any material for recording his satisfaction for grant of authorisation. He further submits that the search was also conducted in the office of the petitioners of the first two writ petitions without existence of any circumstances or material for the search under Section 132 of the Act. The said search was conducted with malafide intention to harass the petitioners and the advocate in which large number of files of the counsel relating to his other clients were taken away by the respondent authorities.

In support of his submission Sri S.D. Singh relied upon

the judgments of Hon'ble Supreme Court in the case of CIT v. Nand Lal Tahiliani¹, CIT v. Vindhya Metal Company², Union of India v. Ajit Jain³ and the judgment of this Court in the case of Ganga Prasad Maheshwari & others v. CIT⁴, Nand Lal Tahiliani v. CIT⁵, Gyanendra Prakash Gupta v. Union of India and others⁶, CIT v. Smt. Vandana Verma⁷, Harbhajan Singh Chadha and others v. DIT⁸ and in the case of Rich Udyog Network Ltd. v. CCIT⁹.

Sri Ashok Kumar, learned counsel for the department refers to paragraph Nos. 13 and 14 of the counter affidavit and reply thereof in paragraph no.18 of the rejoinder affidavit and submits that huge quantity of Gold and Ornaments were found at the time of survey, under Section 133A of the Act, on 23.12.2011 in the business premises of M/s D.S. (India), Jewelmart Pvt. Ltd. 2 Kamta Vihar Colony, Masani Road, Mathura in which one of the family members of the Director, namely, Sri Saurabh Agrawal was present who firstly,

1 (1988) 172 ITR 627 (SC)

2 (1997) 224 ITC 614 (SC)

3 (2003) 260 ITC 80 (SC)

4 (1983) 139 ITR 1043 (Allid.)

5 (1988) 170 ITR 552 (Allid.)

6 (2008) UPTC 673 (Allid.)

7 (2011) 330 page 533 (Allid.)

8 2015 (3) ADJ 613

9 (Civil Misc. Writ Petition (Tax) No.458 of 2015, decided on 7.7.2015)

prevented the officers to enter into the premises, and even being asked, has not disclosed any information about the huge quantity of Gold and Ornaments etc. or the books of account. He refers to various paragraphs of the counter affidavit and the papers of the file “for grant of authorization for search” which have been produced in original by the department before this court. He contends that the authorisation was granted by the competent authority after fully satisfying the conditions of grant for authorisation under Section 132 of the Act. He submits that the search was wholly valid.

In support of his submission Sri Ashok Kumar relied upon the decision of this Court in the cases of **Rich Udyog Network Ltd. v. CCIT, decided on 7.7.2015**, judgment of this Court in the case of **D.S. (India) Jewelmar Pvt. Ltd. v. Union of India and others** decided on 19.4.2012 and the judgment of Hon'ble Supreme Court in the case of **Director General of Income Tax (Investigation) and others v. Spacewood Furnishers Pvt. Ltd. and others**¹⁰ and the judgment in the case of **Vinod Goel and others v. Union of**

¹⁰ (2015) 374 ITR 595

India and others¹¹.

We have carefully considered the submissions of the learned counsel for the parties and perused the record.

Briefly stated, the facts of the present cases are that according to the petitioners, Sri Mridul Garg was initially carrying on business of jewellery in proprietorship under the name and style of M/s D.S. Jewelers. Sri Ashok Kumar Garg and Sri Saurabh Agarwal were doing job work of jewellery. Subsequently, Sri Saurabh Agarwal started hotel business in the assessment year 2010-2011 but his income was below assessable limits. On 07.09.2011, Sri Mridul Garg and his father Sri Ashok Kumar Agarwal formed a Private Ltd. Company in the name of M/s D.S. (India) Jewelmart Private Ltd., which took over the entire business of the proprietary concern of the petitioner Sri Mridul Garg. The said company also opened its show-room at 2, Krishna Nagar, Mathura and allegedly on 12.10.2011, an Income Tax Inspector came to the show-room of the petitioner. Allegations and counter allegations have been made with respect to the said incident

11 2001(252) ITR 29 (SC)

of 12.10.2011, to which we are not concerned in the present writ petitions.

On 23.12.2011, a survey under Section 133-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') was intended to be conducted by the income tax authorities of the business-cum-residential premises of Sri Ashok Agarwal, Sri Mridul Garg, Sri Saurabh Agarwal and the business premises of D.S. Jewellers, Kamla Vihar Colony, Masani Road, Mathura and also at Krishna Nagar opposite Mehta Nursing Home, Gowardhan Road, Mathura. When the authorities reached the business premises of M/s D.S. (India) Jewelmart Private Ltd. Krishna Nagar, Gowardhan Road, Mathura, Sri Saurabh Agarwal S/o Sri Ashok Kumar Agarwal along with few individuals (employees of the shop) was present in the shop/show-room. Sri Saurabh Agarwal refused to sign the authorisation under Section 133-A. He also refused to give any statement nor produced any books of accounts. During the course of the survey, stock of huge jewellerys were noticed but even on being asked, neither any books of accounts nor stock register nor inventory were produced.

When the computers were checked, no hard-disks were found therein. Sri Saurabh Agarwal stated that he had no knowledge of business activity of M/s D.S. (India) Jewelmart Private Ltd.

During the course of survey of the premises 2-Kamla Vihar Colony, Masani Road, Mathura, Sri Ashok Kumar Agarwal, who is father of Sri Mridul Agarwal and Sri Saurabh Agarwal, made a statement on oath in the survey under Section 133-A(1) of the Act showing his total ignorance about the business, books of accounts, assets and source of income etc. In the aforesaid residential premises in occupation of Sri Mridul Garg, certain papers relating to business were found.

In view of the facts as briefly noted above, the A.C.I.T.-IV/ Authorised Officer under Section 133-A immediately submitted a report to the C.I.T.-I, Agra through proper channel dated 23rd December, 2011. Thereafter, the C.I.T.-II, Agra submitted a report to the Director of Income Tax (Investigation), Kanpur concluding that in view of the information in possession of the department in the survey under Section 133-A of the Act, there is possibility of availability of documents indicating undisclosed income and unaccounted stock in the premises.

Immediately thereafter, the J.D.I.T. (Inv.), Agra submitted two satisfaction notes for the purposes of search operation relating to M/s D.S. (India) Jewelmart Private Ltd. The satisfaction note was perused and thereafter approval was granted by the Director of Income Tax (Investigation), Kanpur on 23.12.2011. Thereafter, warrant of authorisation was issued by the competent authority for search under Section 132 of the Act.

When the search was conducted, jewellery of a value of Rs.6,71,20,091/- was found as against the closing stock of Rs.1,12,70,801/- as on 31.03.2011. No documentary or legal evidence including stock register could be produced by the petitioners. Neither Sri Ashok Kumar Agarwal nor his two sons could explain and support the jewelleries and valuables found in the premises by any documentary evidence. The handwritten notes and certain papers found during the search in the premises of Sri Mayank Chaturvedi allegedly indicated manipulation of papers. Statements of Sri Ashok Kumar Agarwal, Sri Mridul Agarwal (Mridul Garg) and Sri Saurabh Agarwal were also recorded under Section 132(4) of the Act.

Sri Saurabh Agarwal, in his statement, admitted that sometimes he used to look-after the business of the company on behalf of his father but he alleged that he had no knowledge of the business. He also stated that books of accounts of his business were prepared by Sri Mayank Chaturvedi. In his another statement dated 24.12.2011, he stated that he had no knowledge that from where, the print-out accounts were brought. With regard to the question of the property at Gowardhan Road he stated that presently he is not able to remember. Various questions were either not replied or were vaguely replied by him. In his statement under Section 132, Sri Ashok Agarwal being Director either could not explain anything or showed ignorance.

In the search proceedings, of the office premises of Sri Mayank Chaturvedi, Advocate (M/s Anupam Associates), 139 files of various assesseees including some personal files of Sri Chaturvedi were found. There was no allegation of non-cooperation by the aforesaid Sri Chaturvedi or indication of any material in possession of the competent authority under Section 132 of the Act giving rise to believe of the

circumstances as mentioned in clauses (a)/(b)/(c) of Sub-Section (1) of Section 132 of the Act. Even during the course of search nothing material was found from the possession of Mayank Chaturvedi, Advocate.

From the facts as briefly noted above and the original files as produced before us, we are of the opinion that the competent authority had reason to believe and formed his opinion for taking action under Section 132 of the Act, based on relevant materials. The information on which the competent authority had formed his opinion is based on relevant material in so far as the petitioners of the aforesaid first two writ petitions are concerned. Thus the authorisation for search was lawfully issued.

The words “reason to believe” finds mentioned in Section 132(1) of the Act. It means a belief and existence of reasons for that belief, which must be in good faith and not based on suspicion. The belief should be based on information in possession of the authorising authority. In the present set of facts, we find that the competent authority had reason to believe under Section 132(1) of the Act based on relevant

information and material, in the matters relating to petitioners of the aforesaid first two writ petitions.

In the case of **Director General of Income Tax (Investigation) and others Vs. Spacewood Furnishers Pvt. Ltd. and others**¹², Hon'ble Supreme Court considered the scope of interference by the High Court under Article 226 of the Constitution of India in matters relating to search and held as under:

“18. The High Court by the impugned order dated 9.12.2011 has taken the view that in the present case there are four satisfaction notes of four different authorities. One of the said authority i.e. Assistant Director is not the competent authority under Section 132 of the Act. The Additional Director and the Director who are competent authorities to issue the warrant of authorization, though had recorded their satisfaction, have not taken the final decision to issue the authorization and each such authority had passed on the file to his immediate superior, namely, the Additional Director to the Director and the Director to the Director General. The High Court further held that it is eventually the Director General who took the decision to issue the search warrant but the said decision was not on the basis of its own satisfaction but on the basis of the satisfaction recorded by the Director of Income Tax (Investigation). Consequently, the High Court held that the

12 (2015) 374 ITR 595 (SC)

satisfaction mandated by Section 132 of the Act was not that of the authority who has issued the search warrant, thereby vitiating the authorization issued.

19. The High Court further held that each of the satisfaction notes was in loose sheets of paper and not a part of a single file maintained in proper sequence and order with due pagination. Therefore, according to the High Court, it is possible that the file containing the satisfaction note(s) was manipulated and thus is of doubtful credibility.

20. The High Court also held that the materials indicated by the department in the counter affidavit and the additional affidavit filed before it were at variance with what was revealed by the satisfaction note(s) placed before the Court. Even if the satisfaction notes alone are to be gone by, the essential details with regard to source of information; the persons who were interrogated and with whom discreet enquiries were made are not disclosed. The necessary information revealed by such interrogation and discreet enquiries with regard to over invoicing, market information etc. are not indicated. Materials like high growth, high profit margins, doubts about international brand and details thereof etc. as mentioned in the satisfaction note(s) are admitted and known facts and therefore could not have induced the requisite belief. The above constitutes the broad basis on which the High Court thought it proper to cause inference with the measures undertaken by the Revenue against the assessee.

21. Before we advert to the specific reasoning of the High

Court, one specific aspect of the opinion expressed by the High Court needs to be taken note of inasmuch as the precise position in law in this regard needs to be clarified. The above aspect is highlighted by the following observations of the High Court expressed in paragraph 6 of the impugned order¹³:-

“We, however, express that when the satisfaction recorded is justiciable, the documents pertaining to such satisfaction may not be immune and if appropriate prayer is made, the inspection of such documents may be required to be allowed.”

22. In the light of the views expressed by this Court in ITO vs. Seth Brothers (supra) and Pooran Mal (supra), the above opinion expressed by the High Court is plainly incorrect. The necessity of recording of reasons, despite the amendment of Rule 112 (2) with effect from 1st October, 1975, has been repeatedly stressed upon by this Court so as to ensure accountability and responsibility in the decision making process. The necessity of recording of reasons also acts as a cushion in the event of a legal challenge being made to the satisfaction reached. Reasons enable a proper judicial assessment of the decision taken by the Revenue. However, the above, by itself, would not confer in the assessee a right of inspection of the documents or to a communication of the reasons for the belief at the stage of issuing of the authorization. Any such view would be counter productive of the entire exercise contemplated by Section 132 of the Act. It is only at the

stage of commencement of the assessment proceedings after completion of the search and seizure, if any, that the requisite material may have to be disclosed to the assessee.

23. At this stage, we would like to say that the High Court had committed a serious error in reproducing in great details the contents of the satisfaction note (s) containing the reasons for the satisfaction arrived at by the authorities under the Act. We have already indicated the time and stage at which the reasons recorded may be required to be brought to the notice of the assessee. In the light of the above, we cannot approve of the aforesaid part of the exercise undertaken by the High Court which we will understand to be highly premature; having the potential of conferring an undue advantage to the assessee thereby frustrating the endeavor of the revenue, even if the High Court is eventually not to intervene in favour of the assessee.

24. Having clarified the above issue in the manner indicated, we may turn to the reasons assigned by the High Court for its decision. The view expressed by the High Court with regard to the satisfaction note(s); the alleged absence of a final decision to issue the authorization at the level of the Additional Director and the Director; the absence of any satisfaction of the Director General who, according to the High Court took the decision to issue the authorization are all seriously flawed. The different steps in the decision making process is lucidly laid down in the

instructions contained in the search and seizure manual published by the department, relevant part of which has been extracted above. The steps delineated have been scrupulously followed. Besides we may take note of the fact that the Additional Director was not one of the competent authorities under Section 132 on 8.6.2009 (date of his note) inasmuch as it is by the Finance Act, 2009 effective from 19th August, 2009 that the Additional Director came to be included amongst the authorized officials though with retrospective effect from 1.10.1998. The reading of the relevant part of the satisfaction note of the Director goes to show that on the basis of materials produced satisfaction was duly recorded by him that authorization for search should be issued. The file was put up before the Director General (Investigation) for accord of administrative approval as required by Notification dated 7.3.2001. In fact, the requirement to obtain administrative approval is prompted by the need to provide an additional safeguard to the tax payer. A careful reading of the order of the Director General would go to show that all that he did was to record the view that the satisfaction of the Director, Income Tax (Investigation) was reasonable and therefore administrative approval should be accorded. The view taken by the High Court, therefore, cannot be sustained.

25. The possibility of manipulation of the records as found by the High Court also does not commend to us for acceptance. There is no basis, whatsoever, for coming to any such conclusion. Suspicion ought not to be the basis of any judicial order and this is where the High Court seems to have erred.

26. The remaining findings of the High Court with regard to the satisfaction recorded by the authorities appear to be in the nature of an appellate exercise touching upon the sufficiency and adequacy of the reasons and the authenticity and acceptability of the information on which satisfaction had been reached by the authorities. Such an exercise is alien to the jurisdiction under Article 226 of the Constitution.”

In the case of **Union of India Vs. Agrawal Iron Industries**¹⁴, Hon'ble Supreme Court held as under:

“7. In this context, we may profitably refer to the decision in Pooran Mal V. The Director of Inspection (Investigation), New Delhi and others¹⁵, wherein the Constitution Bench, while upholding the constitutional validity of Section 132 of the Act opined thus: (SCC p.356, para 8)

"Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. The process is widely recognized in all civilized countries. Our own Criminal Law accepted its necessity and usefulness in Sections 96 to 103 and Section 165 of the Criminal Procedure Code. In M.P. Sharma v. Satish Chandra¹⁶ the challenge to the power of issuing a search warrant under Section 96(1) as violative of Article 19(1)(f) was repelled on the ground that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. As pointed out in that case a search by itself is not a restriction on the right to hold and enjoy property though a seizure is a restriction on the right of possession and enjoyment of the property seized. That, however, is only

¹⁴ (2014) 15 SCC 215

¹⁵ (1974) 1 SCC 345 : 1974 SCC (Tax) 114

¹⁶ AIR 1954 SC 300 : 1954 Cri LJ 865

temporary and for the limited purpose of investigation".

8. Thereafter, proceeding with the ratiocination, the Court ruled that the provision has inbuilt spheres. Proceeding to enumerate the spheres and other consequent facets, the Court ruled: (Pooran Mal case¹⁷ Scc pp.357-58, para 11)

"11.....In the first place, it must be noted that the power to order search and seizure is vested in the highest officers of the department. Secondly, the exercise of this power can only follow a reasonable belief entertained by such officer that any of the three conditions mentioned in Section 132(1)(a),(b) and (c) exists. In this connection it may be further pointed out that under sub-rule (2) of Rule 112, the Director of Inspection or the Commissioner, as the case may be, has to record his reasons before the authorisation is issued to the officers mentioned in sub-section (1). Thirdly, the authorisation for the search cannot be in favour of any officer below the rank of an Income Tax Officer. Fourthly, the authorisation is for specific purposes enumerated in (i) to (v) in sub-section (1) all of which are strictly limited to the object of the search. Fifthly when money, bullion, etc. is seized the Income Tax Officer is to make a summary enquiry with a view to determine how much of what is seized will be retained by him to cover the estimated tax liability and how much will have to be returned forthwith. The object of the enquiry under sub-section (5) is to reduce the inconvenience to the assessee as much as possible so that within a reasonable time what is estimated due to the Government may be retained and what should be returned to the assessee may be immediately returned to him. Even with regard to the books of account and documents seized, their return is guaranteed after a reasonable time. In the meantime the person from whose custody they are seized is permitted to make copies and take extracts. Sixthly, where money, bullion, etc. is seized, it can also be immediately returned to the person concerned after he makes appropriate provision for the payment of the estimated tax dues under sub-

17 Pooran Mal Vs. Director of Inspection (Investigation), (1974) 1 SCC 345 : 1974 SCC (Tax) 114

section (5) and lastly, and this is most important, the provisions of the Criminal Procedure Code relating to search and seizure apply, as far as they may be, to all searches and seizures under Section 132. Rule 112 provides for the actual search and seizure being made after observing normal decencies of behaviour. The person in charge of the premises searched is immediately given a copy of the list of articles seized. One copy is forwarded to the authorising officer. Provision for the safe custody of the articles after seizure is also made in Rule 112. In our opinion, the safeguards are adequate to render the provisions of search and seizure as less onerous and restrictive as is possible under the circumstances.

9. *In District Registrar and Collector, Hyderabad and Another V. Canara Bank and Others*¹⁸, while referring to Section 132 of the Act, it has been ruled that: (SCC p.523, para 51)

"51. ... There are safeguards. Section 132 uses the words 'in consequence of information in his possession, has reason to believe'. Section 132(1-A) uses the words 'in consequence of information in his possession, has reason to suspect'. Section 132(13) says that the provisions of the Code of Criminal Procedure, relating to searches and seizure shall apply, so far as may be, to searches and seizures under Sections 132(1) and 132(1-A). There are also Rules made under Section 132(14). Likewise Section 132-A(1) uses the words "in consequence of information in his possession, has reason to believe". Section 133 which deals with the power to call for information from banks and others uses the words "for the purposes of this Act" and Section 133(6) permits a requisition to be sent to a bank or its officer".
(emphasis in original)

10. *The provision contained in Section 132(1) of the Act enables the competent authority to direct for issue of search and seizure on the basis of formation of an opinion which a reasonable and prudent man would form for arriving at a conclusion to issue a warrant. It is done by way of an interim measure. The search and seizure is not confiscation. The articles that are seized are the subject of*

18 (2005) 1 SCC 496

enquiry by the competent authority after affording an opportunity of being heard to the person whose custody it has been seized. The terms used are 'reason to believe'. Whether the competent authority had formed the opinion on the basis of any acceptable material or not, as is clear as crystal, the High Court has not even remotely tried to see the reasons. Reasons, needless to say, can be recorded on the file and the Court can scrutinize the file and find out whether the authority has appropriately recorded the reasons for forming of an opinion that there are reasons to believe to conduct search and seizure. As is evincible, the High Court has totally misdirected itself in quashing the search and seizure on the basis of the principles of non-traverse. ”

The judgments relied by learned counsel for the petitioners do not support the case of the petitioners of the first two writ petitions and the judgment so relied are clearly distinguishable on facts.

In view of the above discussion, we find that the conditions for conducting search under Section 132 of the Act were fully satisfied in the case of petitioners of Writ Tax No.179 of 2012 and Writ Tax No.180 of 2012.

With regard to the petitioners of Writ Tax No.181 of 2012, we find that there was no material or information in possession of the income tax authorities as required under Section 132 (1) of the Act giving rise to the existence of any circumstances as specified in Clauses (a)/ (b)/ (c) of sub-

Section (1) of Section 132 of the Act and as such the search was illegal and unauthorised.

In view of the aforesaid, we find no merit in Writ Tax No.179 of 2012 and Writ Tax No.180 of 2012 and consequently both these writ petitions are dismissed.

Writ Tax No.181 of 2012 succeeds and is hereby allowed. The search and seizure operation conducted against the petitioners of this writ petition on 23.12.2011 to 24.12.2011 are held to be illegal and without jurisdiction. Consequently, the seized personal files and files of other clients of the petitioner- Sri Mayank Chaturvedi, Advocate and other things belonging to him shall also be released to him forthwith and the restriction by order dated 24.12.2011 imposed on operation of bank locker in Punjab National Bank shall also be lifted forthwith.

The original files as produced by the respondent-Income Tax Department are returned to the learned departmental counsel.

Order Date :- 08.01.2016
NLY

(Surya Prakash Kesarwani,J.)

(Tarun Agarwala,J.)