

(1974) 01 KAR CK 0007
In the Karnataka High Court
Case No : Writ Petition No. 1003 of 1973

Bafna Textiles

APPELLANT

Vs

Income Tax Officer, Assessment-4, Circle II

RESPONDENT

Date of Decision : 10-01-1974

Acts Referred:

Income Tax Act, 1961 — Section 132, 132 (1) (c), 132 (5), 142 (1)

Citation : (1975) 98 ITR 1 : (1974) 2 KarLJ 112

Hon'ble Judges : V.S. Malimath, J

Bench : Single Bench

Advocate : K. Srinivasan, for the Appellant; S.R. Rajashekhara Murthy, for the Respondent

Judgement

Malimath, J.—The petitioner, Messrs. Bafna Textiles, represented by its partner, has challenged in this writ petition the order dated March 6, 1973, passed by the Income Tax Officer (Assessment-4), Circle II, Bangalore, u/s 132(5) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), by which a sum of Rs. 1 lakh belonging to the petitioner has been retained.

2. On the 6th of December, 1972, one Shri Mahendra Kumar was carrying cash of Rs. 1 lakh when he was apprehended by the Central Excise Authorities at Salem, near Valaypatty and the cash of Rs. 1 lakh found on the person of Shri Mahendra Kumar was seized. On the 8th of December, 1972, the Commissioner of Income Tax for Mysore at Bangalore issued a warrant of authorisation u/s 132(1) of the Act and rule 112(1) of the Income Tax Rules, 1962 (hereinafter referred to as "the Rules") to Shri V. Kalyan Sundaram, I Income Tax Officer, Circle II, Salem-4, to search and seize the money of Messrs. Bafna Textiles, C. S. Street, Bangalore, which represents the income which has not been disclosed for the purpose of the Income Tax Act and which he has reason to suspect is to be found at the office of the Assistant Collector of Central Excise, Salem. In response to the aforesaid warrant of authorisation, the authorised officer seized Rs. 1 lakh from the office of the Assistant Collector of Central Excise, Salem. It is not disputed that, though

the cash of Rs. 1 lakh was seized by the excise authorities from the person of Shri Mahendra Kumar, the said amount belongs to the petitioner. The petitioner's advocate, Shri J. Jeshtmal, was addressed a letter by the Assistant Collector of Central Excise, Salem Division, Salem-7, on the 14th of December, 1972, whereby he was informed that Rs. 1 lakh seized from Shri Mahendra Kumar, Bangalore, by the Central Excise Officers of Salem, has since been transferred to the Commissioner of Income Tax, Bangalore, on a warrant issued by him and that, therefore, further correspondence in that behalf should be made with the Income Tax department, Bangalore. The Income Tax Officer, Assessment-5, Circle II, Bangalore, issued a notice to the petitioner u/s 132(5) of the Act read with rule 112A of the Rules requiring it to explain the nature of the possession and the source of acquisition of Rs. 1 lakh seized by the Income Tax department. By letter of the petitioner's advocate dated January 8, 1973, a reply was given to the aforesaid notice, wherein it is stated that an amount of Rs. 1 lakh is available as cash in the books of accounts seized by the Income Tax department and that, therefore, the said amount be returned to the petitioner. On the 6th of March, 1973, the Income Tax Officer, Assessment-4, Circle II, Bangalore, made an order u/s 132(5) of the Act retaining the entire amount of Rs. 1 lakh on the ground that the tax liability of the petitioner is greater than Rs. 1 lakh. It is the said order that is challenges in this court by the petitioner.

3. Shri K. Srinivasan, learned counsel appearing for the petitioner, contended that the seizure of cash of Rs. 1 lakh in this case by the Income Tax department is illegal and invalid and that, therefore, the impugned order made u/s 132(5) of the Act is also illegal and invalid. To appreciate this contention, it is necessary to set out sub-section (1) to (5) of section 132 of the act as follows :

"132. (1) Where the Director of inspection or the Commissioner, in consequence of information in his possession, has reason to believe that -

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account, or other documents which will be useful for, or relevant to, any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purposes of the Indian Income Tax Act, 1922 (11 of 1922), or

this Act (hereinafter in this section referred to as the undisclosed income or property),

he may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income Tax Officer (hereinafter referred to as the authorised officer) to -

(i) enter and search any building or place where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe almirah or other receptacle for exercising the power conferred by clause (i) where the keys thereof are not available;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing.

(2) The authorised officer may requisition the services of any police officer or any officer of the Central Government, or of both, to assist him for all or any of the purposes specified in sub-section (1) and it shall be the duty of every such officer to comply with such requisition.

(3) The authorised officer may, where it is not practicable to seize any books account, other documents, money, bullion, jewellery or other valuable article or thing, serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.

(5) Where any money, bullion, jewellery or other valuable article or thing (hereinafter in this section and section 132A referred to as the assets) is seized under sub-section (1), the Income Tax Officer, after affording a reasonable opportunity to the person concerned for being heard and making such enquiry as may be prescribed, shall, within ninety days of the seizure, make an order, with the previous approval of the Commissioner, -

(i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;

(ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income Tax Act, 1922 (11 of 1922), or this Act;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of section 230A in respect of which such person is in default or is deemed to be in default,

and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amount referred to in clauses (ii) and (iii) and for with release the remaining portion, if any, of the assets to the person from whose custody they were seized :

Provided that if, after taking into account the materials available with him, the Income Tax Officer is of the view that it is not possible to ascertain to which particular previous year or year such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized :

Provided further that where a person has paid or made satisfactory arrangements for payment of all the amounts referred to in clauses (ii) and (iii) or any part thereof, the Income Tax Officer may, with the previous approval of the Commissioner, release the assets or such part thereof as he may deem fit in the circumstances of the case."

4. The warrant of authorisation was issued in this case by the Commissioner of Income Tax, Mysore at Bangalore, on 8th December, 1972, u/s 132(1)(i) and (ii) of the Act and rule 112(1) of the Rules. The Commissioner can, under sub-section (1) of section 132, authorise an Income Tax Officer to search any building or place where he has reason to suspect that money is kept and to seize such money as is found as a result of such search. That power can be exercised by the Commissioner only when he is in possession of information from which he has reason to believe that any person is in possession of any money, etc., which represents income or property which has not been disclosed for the purpose of the Indian Income Tax Act, 1922, or the Act. When in pursuance of the warrant of authorisation issued u/s 132(1) the authorised officer seizes the money then the Income Tax Officer becomes entitled to take action under sub-section (5) of section 132 of the Act. The Income Tax Officer can, after affording reasonable opportunity to the person concerned, for being heard and making an enquiry in accordance with the rules, pass an order within the prescribed time with the previous approval of the Commissioner, estimating the undisclosed income in a summary manner and calculating the amount of tax on the income so estimated and specifying the amount that will be required to satisfy the liability and

retaining in his custody such part of the seized amount of cash as in his opinion is sufficient to satisfy the liability and to release the remaining amount to the person from whose custody the money was seized. The summary assessment made u/s 132(5) is subject to final and regular assessment. It is, therefore, clear that section 132 of the Act confers special powers on the Income Tax department to seize and retain cash, etc., belonging to a person even before passing a regular order of assessment against him. The power to make summary assessment and to retain the amount can be exercised under sub-section (5) of section 132 of the Act by the Income Tax Officer only when the money, etc., has been validly seized under sub-section (1) of section 132. If the seizure of the amount u/s under section 132(1) is invalid, the Income Tax Officer will not have jurisdiction to exercise powers conferred on him by section 132(5) of the Act.

5. The commissioner can empower the authorised officer to search and seize money u/s 132(1)(c) only when the following conditions are satisfied :

(1) The Commissioner must have reason to believe on the information in his possession, that the person is in possession of money, etc.

(2) That the said money, etc., represents wholly or partly income or property which has not been disclosed for the purpose of the Indian Income Tax Act, 1922, or the Act.

6. It is, therefore, clear that the seizure contemplated is of that money which represents either wholly or partly income which has not been disclosed for the purpose of the Income Tax Act. It is also clear that the money sought to be seized must be in the possession of the person who has committed a default by not disclosing the same for the purpose of the Act. It is only against such person that an order u/s 132(5) of the Act can be made. If, therefore, a person who has not disclosed particular income or property for the purpose of the Act, is not in possession of such undisclosed money, the Commissioner cannot issue a warrant of authorisation u/s 132(1)(c) of the Act. It is, therefore, necessary for the Commissioner, before issuing a warrant of authorisation, to be satisfied on the basis of the information he has, that the defaulting person is in possession of the money in respect of which he has committed default vis-a-vis the Act.

7. The contention of Shri Srinivasan is that even if it assumed for the sake of argument that the Commissioner had reason to believe on the basis of information in his possession that the petitioner had not disclosed for the purpose of Income Tax a sum of Rs 1 lakh, he could not have issued any warrant of authorisation for search and seizure unless he had reason to believe that it is the petitioner who was in possession of the said amount of Rs. 1 lakh. It was argued that the amount of Rs. 1 lakh which was being carried by Shri Mahendra Kumar having been seized by the excise authorities, the petitioner stood divested of his possession and that, until the petitioner got back possession of the said money, the seizure of the said money by the Income Tax department could not have been effected.

8. It is not disputed that it is only when the Commissioner has reason to believe that the defaulting person is in possession of money which represents either the income or property not disclosed for the purpose of the Act that a warrant of authorisation of search and seizure of the same can be issued. But the stand taken by Shri S. R. Rajasekhara Murthy for the revenue is that, notwithstanding the seizure by the excise authorities, the legal possession of the money continued with the petitioner and that, therefore, the Commissioner was competent to issue a warrant of authorisation for search and seizure of the said money. When the money is seized from a person, he is divested of the possession. The person from whom the money is seized cannot, from the moment of seizure, be regarded as a person in possession of the said money. As explained by the Supreme Court in *Gian Chand v. State of Punjab*, the expression "seize" means to take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing. The person from whom the money is seized loses possession of the same when the person seizing the money acquires the right or power to control or regulate the use of the money. When the money of the petitioner was seized from his agent, Shri Mahendra Kumar, by the excise authorities, the excise authorities acquired the right to control the use and possession of the money seized. During the subsistence of the seizure, the petitioner lost the right to control the use and possession of the said money. As long as the money stood seized by the excise authorities, the petitioner could not command the said money or use or possess the said. Hence, it is impossible to take the view that even after the seizure of the money by the excise authorities, the possession of the money still continued with the petitioner. I am fortified in this view of mine by the observations of the Supreme Court in *Durga Prasad v. H. R. Gomes, Superintendent (Prevention), Central Excise, Nagpur*. Though that was a case in which the Supreme Court was construing the provisions regarding seizure under the Customs Act, the said decision is of valuable of the judgment, the assistance for understanding the effect of seizure. In paragraph 8 of the judgment, the Supreme Court has observed that the legal effect of the order of seizure was the transfer of the legal possession to the person effecting the seizure. It is further laid down that such a change of possession need not necessarily involve a physical transfer of possession and that as a matter of law on and from the date of seizure the authority exercising the seizure was entitles to exercise the full incidents of possession over the document seized in case. During the subsistence of the seizure by the excise authorities of the cash in question, therefore, the excise authorities had the legal right to exercise all the incidents of possession over the same. When the excise authorities are, by such seizure, clothed with all the incidents of possession, it is impossible to contend that the person from whose possession the money was seized by the excise authorities must still be regarded as a person in possession of the money.

9. In this case, the money was seized by the excise authorities on the suspicion that an excise offence had been committed, entitling them to seize the money.

The excise authorities under the relevant law could take appropriate action, if there has been contravention of law, and either confiscate the, money or otherwise deal with the same in accordance with law. If, however, it transpired that no offence as such had been committed justifying the authorities to retain the money seized by them, they were under a legal obligation to return the money to the person from whom it was seized. Until the money seized is thus released, the legal possession continues with the excise authorities. In this case, it is nobody's case that any order was made by the excise authorities, who had seized the money, releasing the same from seizure and directing the money being given to the person from whom it was seized. I fail to see how money already seized by one department of the Government of India under one set of laws can, during the subsistence of such seizure, be seized by another department of the same Government under the provisions of the Act. If seizure of money seized by one department under one set of laws is permitted to be seized by another department under another set of laws, it is obvious that the same will lead to unwholesome conflict of authority. If, in this case, the excise authorities needed the money seized by them for the purpose of confiscation or otherwise proceeding in accordance with the law, they will be prevented from exercising their powers in respect of the money they have already seized, merely because the Income Tax department requires the same money for taking action in accordance with the relevant provisions of the Act. The power conferred by section 132 is not an overriding power which can be exercised notwithstanding anything contained to the contrary in any other law. The exercise of power u/s 132 cannot, therefore, come in the way of exercise of powers by another authority under another set of laws under which the money had already been seized. Similar situations may arise when the money or articles are attached and produced before courts in criminal cases. If before the criminal case is disposed of, the authorities under the Act invoke their powers u/s 132 of the Act and seize the money or articles attached and produced in the court and pass orders u/s 132(1) and (5) of the Act, the same will have the effect of interfering with the course of administration of criminal justice. A construction which results in such an absurd situation must, at all events, be avoided. This is another reason which compels me to take the view that money or articles already seized by another authority under another law cannot be seized u/s 132(1) of the Act, inasmuch as during the subsistence of such seizure the legal possession vests with the authority which had seized the same and not with the person from whom the same was seized. The view which I have taken accords with the view taken by the Calcutta High Court in *Laxmipat Choraria v. K. K. Ganguli and K. E. Johnson v. Laxmipat Choraria* and by the Punjab & Haryana High Court in *Commissioner of Income Tax v. Ramesh*, with which I respectfully agree, on the question of the competence of the authorities under the Act to effect search and seizure u/s 132 of the Act of money or property already seized or attached by another authority under another set of laws.

10. Shri S. R. Rajasekhara Murthy invited my attention to decisions of some

other High Courts wherein a contrary view has been taken. He invited my attention to the decision of the Kerala High Court in *Krishnan Sukumaran v. Enforcement Officer, Cochin*. That was a revision petition u/s 139 of the Criminal Procedure Code. It was held in that case that, if a property which an Enforcement officer functioning under the Foreign Exchange Regulation Act, 1947, is entitled to seize or otherwise take possession of u/s 19G of the Act is in the custody of a court or any other authority, what that officer has to do under that circumstance is to move the court or the authority for handing over possession of the property for any lawful purpose and it is the duty of the court or the authority to hand it over to the officer if it does not require it for some lawful purpose. That was not a case of construing the provisions of section 132(1) of the Act. All that is laid down is the, if the property is in the possession of the court or any other authority and if such court or authority does not require the possession of the same for any lawful purpose, it should hand over the same to the officer entitled to seize or otherwise take possession under any other provision of law. The question as to whether an authority functioning under one enactment is entitled to seize the property already seized by another authority under another law during the subsistence of such seizure did not arise for consideration in that case. Hence, the said decision has no direct bearing on the question involved in this case.

11. The next decision relied upon is that of the High Court of Madras in *Mohammed Kunhi v. Mohammed Koya*. That was a criminal revision petition u/s 439 of the Criminal Procedure Code against the order passed by the Magistrate u/s 523 of the Code. In that case, currency notes were seized by the police on suspicion that he had committed a cognizable offence. He was arrested and produced before the Magistrate of Madras along with the amount seized. The Inspector of police having found on investigation that no cognizable offence has been made out, dropped the proceedings after intimating the Income Tax department. The Income Tax Commissioner empowered the authorised officer to search and seize the amount u/s 132(1) of the Act. In pursuance of the said authorisation, the Income Tax Officer filed a petition in the Court of the Magistrate claiming to be the person entitled to the amount in court deposit and requesting the court to hand over the same to him. The Magistrate passed an order u/s 523 directing the delivery of the amount to the Income Tax Officer. It is the said order that was challenged in revision before the High Court. The High Court of Madras came to the conclusion that if the Income Tax Officer is clothed by statute with the power to seize the amount in court deposit, he would be a person entitled to possession of the amount because seizure is the process by which possession is procured and it would be idle to draw a distinction between person entitled to possession and a person entitled to seize. It further held that if the court is convinced that the Income Tax Officer has the power u/s 132 of the Income Tax Act to seize the money in court deposit, it would be a wholly needless and empty ritual to ask him to wait till after the court has refunded the amount to the party and then allow the officer to seize the amount from him the

moment it is handed over to him. It further held that if the property which an officer is entitled to seize under the law is in the custody of a court, the officer has only to move the court for handing over possession of the property for any lawful purpose and it is the duty of the court to hand it over to the officer if it does not require it for some lawful purpose. The power of seizure u/s 132 of the Act is a power to be unilaterally exercised and against the wishes of the person from whom the money or property is seized. The exercise of the power u/s 132 cannot, therefore, be made to depend upon the question as to whether the money sought to be seized u/s 132 was required by the court for other proceedings or not. If the Income Tax department has the power u/s 132(1) of the Act to seize the property attached and produced before the Magistrate in a criminal case, full effect has to be given to it whether or not the court where the money attached and lying in a criminal case, requires it for the criminal case pending before it or not. In that event, the exercise of the power u/s 132 will have the effect of impeding the course of administration of justice. The very concept of seizure u/s 132(1) of the Act involves the idea of divesting another person of possession which he is not willing to part with. With great respect, I find it difficult to agree with the view taken by the High Court of Madras.

12. The next decision relied upon is that of the Madhya Pradesh High Court in *Pannalal v. Income Tax Officer*. It was held that where currency notes and gold ornaments were seized by the Collector of Customs under the Gold Control Act from the assessee but the currency notes were ordered to be released as there was no contravention of the Gold Control Act in respect of the notes, the possession of the notes by the Collector of Customs must be held to be for and on behalf of the assessee so as to attract section 132 of the Act. The facts of that case are clearly distinguishable. That was a case where the notes seized under the Gold Control Act were ordered to be released as it was found that there was no contravention of the Gold Control Act. It is after such an order releasing the seized notes from seizure that the provisions of section 132(1)(c) of the Act were invoked. It is in these circumstances that it was held that though the notes were in the immediate possession of the Collector of Customs and Central Excise, they were held for and on behalf of the petitioner. But, in the present case, it is not the case of the revenue that any order releasing any money seized by the excise authorities was passed on the ground that there has not been any contravention of law justifying further retention of the money seized.

13. For the reasons stated above, I hold that the seizure of the cash of Rs. 1 lakh by the Income Tax department u/s 132(1)(c) of the Act is illegal and invalid, as the said amount was not in the possession of the petitioner, it being in the legal possession of the excise authorities at Salem. No valid order u/s 132(5) of the Act could be made except in respect of money validly seized u/s 132 of the Act. Hence, the impugned order dated March 6, 1973, of the Income Tax Officer, (Assessment-4), Circle II, Bangalore, exhibit 4, is also illegal and invalid. Shri Srinivasan prayed for the issue of a direction to the respondent to pay the amount of Rs. 1 lakh retained by them to the petitioner, on the ground that such

retention is illegal. As the amount was not seized by the Income Tax department from the petitioner, no such direction can be issued. But, as the retention of the amount by the Income Tax department is illegal, it would be appropriate to direct the respondent to return the amount to the excise authorities at Salem from whom the said amount was seized.

14. As I am allowing this writ petition on the ground that the seizure in this case is illegal, it is not necessary to consider the other grounds raised by the petitioner.

15. For the reasons stated above, this writ petition is allowed and the impugned order of the Income Tax Officer (Assessment-4), Circle II, Bangalore, dated March 6, 1973, exhibit 4, is hereby quashed and a writ in the nature of mandamus is issued directing the respondent to return the amount of Rs. 1 lakh to the Assistant Collector of Central Excise, Salem, from whom it was seized under a warrant of authorisation issued by the Commissioner of Income Tax, Mysore, Bangalore, dated December 8, 1972. The petitioner is entitled to his costs. Advocate's fee Rs. 200.