
(1973) 08 CAL CK 0023
In the Calcutta High Court
Case No : Appeal No. 49 of 1971

K.E. Johnson and Others

APPELLANT

Vs

Laxmipat Choraria and Another

RESPONDENT

Date of Decision : 10-08-1973

Acts Referred:

Income Tax Act, 1961 — Section 132, 132(5)

Citation : 77 CWN 926 : (1974) 93 ITR 489

Hon'ble Judges : B.C. Mitra, J;A.K. Janah, J

Bench : Division Bench

Advocate : B.L. Pal and Ajit Sen Gupta, for the Appellant;P.P. Ginwalla, Sankar Ghosh (Jr.) and T.K. Basu, for the Respondent

Judgement

Janah, J.—This appeal is against a judgment and order dated November 20, 1970, by which the rule obtained by respondent No. 1 was made absolute by the trial court.

2. The facts relevant for the purpose of the present appeal are as follows :

3. One Laxmipat Choraria was apprehended by the customs officials at the Palam Airport at Delhi upon his landing at the airport from an internal flight on January 13, 1967, with Rs. 3,60,000. The residence and the office premises of Choraria at Bombay were searched by the Bombay customs authorities on the same evening. As a result of the search Indian currency notes amounting to Rs. 8,700 were recovered from the residence of Laxmipat Choraria and Indian currency notes amounting to Rs. 34,074 were recovered from his office premises at Bombay. The customs authorities carried out the search under the provisions of Section 105 of the Customs Act, 1962, as the customs authorities reasonably believed that the moneys in the hands of Choraria represented the sale proceeds of smuggled goods. It appears that during the search the officers of the Income Tax department were also present. On February 14, 1967, the Income Tax authorities at Bombay served a warrant of authorisation u/s 132 of the Income Tax Act, 1961, issued by the Commissioner of Income Tax, Calcutta. Under the

authority of the said warrant issued by the Commissioner of Income Tax, Calcutta, the aforesaid sum of Rs. 42,744 was purported to have been seized by the Income Tax authorities and was taken away by them from the customs authorities. Thereafter, on February 22, 1967, a notice was issued requiring Laxmipat Choraria to submit an explanation in writing as to the nature of possession and source of acquisition of the money seized by the Income Tax authorities from the customs authorities at Bombay. This notice was issued u/s 132(5) of the Income Tax Act, 1961. An answer to this notice was sent by the authorised representative on behalf of Laxmipat Choraria stating that the said notice was issued without jurisdiction because such a notice could be issued only if there had been a seizure u/s 132(1) of the Income Tax Act, 1961. Thereafter, an order was passed u/s 132(5) of the Income Tax Act, 1961, by which it was held by the Income Tax Officer, "B " Ward, Hundi Circle, Calcutta, that Rs. 32,274(?) represented undisclosed income of the assessee and in the absence of any evidence as to to which previous year or years the income belonged it was assessed at the rate prevailing at the relevant assessment year, namely, 1966-67. In the application under article 226 of the Constitution, the respondent No. 1, who was the petitioner in the trial court, challenged the notice, dated February 22, 1967, issued u/s 132(5) of the Income Tax Act, 1961 (annexure " C" to the petition), and also the order, dated May 12, 1967, passed u/s 132(5) of the Income Tax Act, 1961 (annexure " E " to the petition).

4. The learned judge in the trial court quashed the said notice and the order, holding that the authorisation issued was beyond the scope of Section 132 and, as such, it was illegal, with the result that there was no valid seizure under Sub-section (1) of Section 132 and, therefore, the income tax Officer could not make any order under Sub-section (5) of that section. It is the correctness of this decision which has been challenged in this appeal filed on behalf of the Commissioner of Income Tax, West Bengal, the Income Tax Officer who made the order under section, 132(5) and the Union of India,

5. Before we proceed further it is necessary to set out the relevant portion of Section 132 of the Income Tax Act, 1961:

"132. Search and seizure.--(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, or under Sub-section (1) of Section 131 of this Act, or a notice under Sub-section (4) of Section 22 of the Indian Income Tax 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, 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, 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 powers 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

(3) The authorised officer may, where it is not practicable to seize any such books of account, other document, 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 subsection

(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 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 amounts referred to in Clauses (ii) and (iii) and forthwith 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 years 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

(7) If the Income Tax Officer is satisfied that the seized assets or any part thereof were held by such person for or on behalf of any other person, the Income Tax Officer may proceed under Sub-section (5) against such other person and all the provisions of this section shall apply accordingly

(9) The person from whose custody any books of account or other documents are seized under Sub-section (1) may make copies thereof or take extracts therefrom in the presence of the authorised officer or any other person empowered by him in this behalf, at such place and time as the authorised officer may appoint in this behalf.

(10) If a person legally entitled to the books of account or other documents seized under Sub-section (1) objects for any reason to the approval given by the Commissioner under Sub-section (8), he may make an application to the Board stating therein the reasons for such objections and requesting for the return of the books of account or other documents . .."

6. Mr. Pal, learned counsel appearing in support of the appeal, has contended that there is nothing in Section 132(1)(c) to indicate that the money, bullion, jewellery, etc., which represents the income or property which has not been disclosed must be of the person in whose possession it is found. According to him, if the Director of Inspection or the Commissioner has reason to believe that any money, bullion, jewellery or other valuable article or thing represents income or property which has not been disclosed, he can issue an authorisation for its seizure irrespective of the person in whose possession it may be found. He,

therefore, contends that if there is any such money, bullion, jewellery, etc., anywhere, it may be seized by the Income Tax authorities irrespective of the fact whether the person whose undisclosed income or property it might represent is in possession of it or not. In other words, the contention of the learned counsel for the appellant is that, if any money, bullion, jewellery, etc., is in possession of any person and such money, bullion, jewellery, etc., represents either wholly or partly the income or property which has not been disclosed, then search and seizure can be made whoever the person in whose possession such money, bullion, jewellery, etc., may be, and whatever the nature of his possession may be, whether voluntarily made over to him, or whether he himself is the owner thereof, or possession of such money, bullion, jewellery, etc., has been taken by another under some provisions of law. In support of this argument, Mr. Pal has referred to the different expressions used in Sub-sections (3), (9) and (10) of Section 132. Sub-section (3) uses the words "person who is in immediate possession", Sub-section (9) uses the expression " the person from whose custody " and Sub-section (10) uses the words " if a person legally entitled to ". We do not think that the aforesaid different expressions used in Sub-sections (3), (9) and (10) are of any assistance to Mr. Pal. Sub-section (3) contemplates a case where it may not be practicable for the authorised officer to seize the books of account, other documents, money, bullion, etc., and it empowers the authorised officer to serve an order on the owner or the person who is in immediate possession or control of such books of account, or documents, money, bullion, etc., not to remove, part with or otherwise deal with it. The owner or the person in whose custody the books of account or other documents, etc., have been kept may not be available for being served with an order contemplated in Sub-section (3) and the said sub-section makes provision for the order to be served upon the person who is in immediate possession, or control thereof. Similarly, Sub-section (9) gives the person from whose custody any books of account or other documents have been seized a right to make copies thereof or take extracts therefrom in the presence of the authorised officer. Under Sub-section (10) a person legally entitled to the books of account or other documents seized under Sub-section (1) has been given a right to make an application to the Board asking for the return of the seized books of account if he has any objection to the approval given by the Commissioner under Sub-section (8) for retaining such books of account for a period exceeding 180 days from the date of the seizure. These sub-sections, therefore, contemplate different situations and so different expressions have been used to refer to the person on whom an order may be served under Sub-section (3) and the persons on whom a right has been conferred by Sub-section (9) or Sub-section (10). Such use of different expressions in the three sub-sections, in our Opinion, has very little to do with the point which Mr. Pal is contending for.

7. Mr. Pal has challenged the correctness of the view taken by the trial court to the effect that there cannot be an order u/s 132 in respect of the goods or moneys or documents which are in the custody of one department of the

Government under a legal authority. He has relied upon the decision in *Gian Chand and Others Vs. The State Of Punjab*, and has contended that it is the unilateral act of the persons seizing which is the very essence of the concept of seizure. According to him, when the Income Tax authorities issued the warrant of authorisation it was the unilateral act on their part to seize the money and such authorisation was issued without, any reference to *Laxmipat Choraria*. He, therefore, contends that there was a valid seizure u/s 132 of the Income Tax Act, 1961. In our opinion, this case is not of much assistance to the appellant in support of the contention which has been raised in this appeal. In that case, the question which arose for consideration was whether the possession obtained by the customs department by goods being "conveyed to and deposited at the nearest customs house" within the last words of the second paragraph of Section 180 of the Sea Customs Act, 1878, are the goods which had been seized under that Act within the opening words of Section 178A. Section 180 of the Sea Customs Act, 1878, provides as follows :

"When any things liable to confiscation under this Act are seized by any police-officer on suspicion that they have been stolen, he may carry them to any police station or court at which a complaint connected with the stealing or receiving of such things has been made or an enquiry connected with such stealing or receiving is in progress, and there detain such things until the dismissal of such complaint or the conclusion of such enquiry or of any trial thence resulting.

In every such case, the police officer seizing the things shall send written notice of their seizure and detention to the nearest customs house ; and immediately after the dismissal of the complaint or the conclusion of the enquiry or trial, he shall cause such things to be conveyed to, and deposited at, the nearest customs house, to be there proceeded against according to law."

8. The relevant portion of Section 178A of the Sea Customs Act, 1878, is as follows:

"Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

9. Section 178 of the Act which empowers the Customs Officer to effect a seizure of goods suspected to be smuggled goods provides :

"178. Any things liable to confiscation under this Act may be seized in any place in India either upon land or water, or within the Indian customs waters, by any officer of customs or other person duly employed for the prevention of smuggling."

10. In the case before the Supreme Court it was held that a seizure under the Act is one for which the authority to seize is conferred by the Act and in the context it could be referred to as a seizure u/s 178. The seizure from the owner

of the property u/s 180 is not a seizure under the Act but by a police officer effecting the seizure under other provisions of the law. It was further held that the delivery of the goods to the customs authorities under the latter part of Section 180 is not seizure under the Act within the meaning of Section 178A. The Supreme Court upon an interpretation of the relevant provisions of the Sea Customs Act, 1878, held that when the goods are delivered to the customs authorities by the Magistrate they are not taken from the possession of the persons accused in a criminal case so as to throw the burden of proof on them. It was held that when the goods were seized by the police they ceased to be in the possession of the accused and passed into the possession of the police. The Supreme Court further held:

" The suggestion that the goods continued to be, at that stage, in the possession of the accused does not embody a correct appreciation of the law as regards possession. A " seizure" under the authority of law does involve a deprivation of possession and not merely of custody and so when the police officer seized the goods, the accused lost possession which vested in the police. When that possession is transferred, by virtue of the provisions contained in Section 180 to the customs authorities, there is no fresh seizure under the Customs Act. It would, therefore, follow that, having regard to the circumstances in which the gold came into the possession of the customs authorities, the terms of Section 178A which requires a seizure under the Act were not satisfied and consequently that provision cannot be availed of to throw the burden of proving that the gold was not smuggled, on the accused."

11. On behalf of the appellant reliance was also placed upon the decision in *Durga Prasad v. Superintendent (Prevention), Central Excise, Nagpur* AIR 1966 S.C. 1209. Learned counsel for the appellant contends that if there can be a seizure of goods by the same department which had already been seized by that department, then there is nothing to prevent one department of the Government from seizing goods which had already been seized by another department. In that case the Assistant Collector of Customs and Central Excise, Nagpur, granted an authorisation to the Superintendent of Customs and Central Excise, Nagpur, to seize and take possession of all gold ornaments, etc., which were relieved to have been kept in contravention of the Gold Control Rules and also account books and documents from the premises of the appellant in that case. The documents were seized by the Superintendent of Customs and Central Excise and after a few days these were sent to Delhi temporarily for translation by the departmental Hindi officer. While the documents were at Delhi the Collector of Customs, Nagpur, made an order of seizure on 6th September, 1963, u/s 110(3) of the Customs Act, 1962. The first authorisation by the Assistant Collector of Customs was granted under Rule 126-L(2) of the Defence of India (Amendment) Rules. The Collector of Customs made an order of seizure on 6th September, 1963, and thereafter he made a second order of seizure on 11th September, 1963, with regard to the same documents, on the ground that he was at first under the impression that the documents were under the custody of the

Superintendent of Customs, but later on he came to learn that the Superintendent of Customs had already made over documents to the custody of the Assistant Collector of Central Excise, Nagpur. On the authority of this case it was submitted before us by Mr. Pal that the seizure by the Income Tax authorities u/s 132(1) of the Income Tax Act, 1961, was quite valid and legal. Mr. Ginwalla, learned counsel for the contesting respondent, has, on the other hand, contended that the Supreme Court found in that case that the authorisation issued by the Assistant Collector of Customs under Rule 126-L(2) of the Defence of India (Amendment) Rules, 1963, was without jurisdiction because that rule did not empower the Assistant Collector of Customs to seize and take possession of the documents in the premises of the appellants. That being so, Mr. Ginwalla contended that there was no seizure in the eye of law and, therefore, possession of the documents remained with the appellant in that case, and the subsequent order of seizure made u/s 110(2) of the Customs Act was valid, and the documents were legally seized. According to learned counsel for the contesting respondent the Supreme Court in that case did not hold, as contended by Mr. Pal, that articles which have once been legally seized can again be seized by the same department or by another department of the Government. In that case the first seizure was illegal and so it was invalid in law and, hence, the articles remained in the possession of the person from whom these were purported to have been seized, and, therefore, these articles could be lawfully seized. It was contended on behalf of the respondent that one department of the Government cannot seize any article from another department, because "seizure" involves deprivation of "possession. Possession by the customs department, it was argued, was possession by the Union of India and, therefore, the Union of India through another department cannot seize goods which are in its own possession. It was further contended that to hold otherwise, would be to defeat the provisions of the Act under which the first seizure of the goods is made. It was also contended that if such a view is taken then there might be any number of "seizure" of the same goods by the different departments.

12. Let us now examine this contention advanced on behalf of the respondent with reference to the provisions of Section 132 of the Income Tax Act, 1961. The opening words of Section 132 are "where the Director of Inspection or the Commissioner has reason to believe that any person is in possession of any money, bullion, etc. " In the present case at the time when the warrant of authorisation was issued, it was known to the Commissioner of Income Tax who issued the warrant of authorisation that the books of account, other documents, money, bullion, etc., in respect of which the warrant of authorisation was issued had already been seized by the customs department. Could it be said in such a case that the Commissioner of Income Tax had reason to believe that Laxmipat Choraria was in possession of such money, bullion, jewellery, etc. ? In our view the answer must be in the negative. Because, as soon as there was a valid seizure by the customs authorities, Laxmipat Choraria could no longer be said to be in possession of the money in question, as the very concept of seizure

involves a deprivation of possession. In the facts of the present case, therefore, it cannot be said that the Commissioner of Income Tax had or could have reason to believe that Laxmipat Choraria was in possession of the money. Once there was a valid seizure of the money by the customs department, Choraria was deprived of possession of that money and its possession was with the Union of India through the customs department. The Commissioner of Income Tax could not, therefore, have reason to believe that Choraria was in possession of the money in question. The warrant of authorisation, as it stands, could only be issued if Choraria was in collusion with the customs department. Nothing has been stated in the warrant of authorisation or in the affidavit-in-opposition which was filed on behalf of the appellants as to how the Commissioner of Income Tax had reason to believe that Choraria was in possession of the money in question, which had already been seized by the customs department.

13. Learned counsel for the appellants contended before us that even after the seizure of the money by the Income Tax department, Choraria was in possession of the money because the customs department was the bailee in respect of that money. -Alternatively, it was argued that the customs department was in possession of the money and the Income Tax authorities were entitled to seize the same from the customs department u/s 132 of the Act. Mr. Ginwalla, learned counsel for the contesting respondent, on the other hand, argued that once the money was seized in accordance with law by the customs department it came into the possession of the Union of India through the customs department. He contended that if it is held that possession of the seized goods rests with the particular officer or the department to which he belongs then the provisions of Subsection (1) and Sub-section (5) of Section 132 cannot be reconciled. If the seizure is by the Deputy Director of Inspection or the Inspecting Assistant Commissioner or the Assistant Director of Inspection under Sub-section (1) of Section 132 then it is not possible for the Income Tax Officer to retain in his custody such assets or part thereof under Sub-section (5) of that section. That possession of the asset seized u/s 132(1) rests with the Union of India is also clear from Section 132A which provides for payment of interest by the Central Government. Our conclusion, therefore, is that upon the seizure of the money by the customs department, Choraria lost his possession of the money and it came into the possession of the Union of India. It is difficult to see how the Union of India which was in possession of the money could again seize it through another department, namely, the Income Tax department.

14. Let us now turn to the provisions of Section 132 of the Income Tax Act, 1961, to find out whether that section contemplates seizure of money as in this case. Sub-section (5) of Section 132 empowers the Income Tax Officer to make certain orders in respect of the money, bullion, etc., which has been seized under Sub-section (1), after affording a reasonable opportunity to the person concerned. Clause (iii) of that sub-section refers to the existing liability in respect of which such person is in default or deemed to be in default, and authorises the Income Tax Officer to retain such portions of the seized asset as are sufficient to

satisfy the amounts referred to in Clauses (ii) and" (iii) and to release the balance to the person from whose custody it was seized. This obviously means that if the person from whose possession money, bullion, etc., was seized is not found then it is to be returned to the person from whose custody it was seized. The second proviso to Section 132(5)(iii) provides that if a person has paid or has made satisfactory arrangement for payment of all the amounts referred to in Clauses (ii) and (iii) or any part thereof, the Income Tax Officer may release the assets or such part thereof as he thinks fit. Sub-section (II) of Section 132 gives a right to any person who objects to an order made under Sub-section (5) to apply to the notified authority for appropriate relief in the matter. Similarly, Sub-section (9) gives a right to the person from whose custody any books of account or other documents are seized under Sub-section (1) to make copies thereof or take extracts therefrom and Sub-section (10) gives a right to a person legally entitled to the books of account and other documents seized under Sub-section (1) to make an application to the Board if he objects to the approval given by the Commissioner under Sub-section (8). Under Sub-section (7) if the Income Tax Officer is satisfied that the seized assets or any part thereof were held by such person or on behalf of any other person, the Income Tax Officer may proceed under Sub-section (5) against such other person. The provision of Sub-section (7) is, therefore, an exception to the other provisions of Section 132 which contemplates that the money, bullion, etc., must be seized from the person before he, i.e., that person, can be fixed with the liability. If it was intended that although the money, bullion, etc., may be seized from one person some other person can be proceeded against, then there was no necessity of making an exception in Sub-section (7), and in that case the provision of Sub-section (7) becomes superfluous. All these provisions, in our opinion, indicate that Section 132 proceeds on the basis that the seizure must be from a person whose undisclosed income or property is going to be taxed. This section, therefore, is wholly inappropriate in the case of seizure of goods which have already been seized.

15. Learned counsel for the appellants relied upon the decision in *Ramjibhai Kalidas v. I. G. Desai*, Income Tax Officer [1971] 80 ITR 721 (Guj.) in support of his contention that the power of search and seizure u/s 132 is directed against all who are in possession of undisclosed income irrespective of the fact whether they are responsible for evading taxes on such income. In our view, that decision is not apposite to the facts and circumstances of the present case and it cannot be taken to be an authority for the proposition contended for by the appellants in this case. The next case cited before us is the decision in *Motilal v. Preventive Intelligence Officer, Central Excise and Customs, Agra* [1971] 80 I.T.R. 418 (All.). In that case the customs department seized some silver bars, pieces of silver, and currency notes belonging to the petitioner. Thereafter, the Commissioner of Income Tax, Agra issued a warrant of authorisation on the strength of which the authorised officer served an order u/s 132(3) upon the Assistant Collector, Customs and Central Excise, Agra, not to remove, part with, or otherwise deal

with the silver seized by the customs authorities. On an application under article 226 of the Constitution praying for a direction upon the customs authorities to return the silver to the petitioner, the Allahabad High Court held that the warrant of authorisation issued by the Commissioner of Income Tax could not in law include the authority to search for and seize goods already with the Assistant Collector of Customs and Central Excise. That case, therefore, does not help the appellants in any way. The next case relied upon by the appellants in support of the proposition that even if the documents are in possession of the Central Government the authority under a particular statute had a right to seize them under the appropriate provision of law, is the decision in the case of *The Barium Chemicals Ltd. and Another Vs. Sh. A.J. Rana and Others*, . We do not see how that case is of any assistance to the appellants. In the first place, there the document in respect of which an order u/s 19(2) of the Foreign Exchange Regulation Act, 1947, was passed was not in possession of the Government but these were lying with the Registrar of the Supreme Court under an order passed by that court. Secondly, the order u/s 19(2) of the Act was not directed to the Registrar of the Supreme Court but it was directed upon the appellants of that case. That case is, therefore, no authority in support of the contention raised by the appellants in the present case. The next case relied upon by the appellants is *Collector of Customs for the State of New South Wales v. Southern Shipping Co. Ltd.* 107 C.L.R. 279 In that case a manufacturer delivered a quantity of excisable tobacco to the defendant at a wharf in Sydney for shipment to Hobart. The goods were subject to the control of customs within the meaning of the Excise Act 1901-1952 (Cth). Pending being placed aboard the ship the goods were put in a store on the wharf. The store was broken into by thieves and 40 cartons of tobacco were stolen after the store had been locked and the keys had, in accordance with the usage, been lodged in the customs office and were not available to the defendant. The plaintiff, Collector, maintained that the defendant had been entrusted with the goods and at the time of theft they were in the defendant's possession, custody or control and claimed a certain sum pursuant to Section 60 of the Excise Act on the basis that the defendant had failed to keep the goods safely, and when requested by the Collector had not accounted (or the goods to the satisfaction of the Collector. The defendant disputed the plaintiff's claim. The High Court of Australia held that placing of the key in the customs office was for safe keeping and did not place the customs in possession of the goods in lieu of the defendant. The decision of that case, therefore, can have no application in the present case which is entirely different on facts.

16. In the next place learned counsel for the appellants relied upon a case in *State of Gujrat v. Memo Mohamad Haji Hasan* [1968] 18 C.A. 34 : AIR 1961 S.C. 1689. 1689, in support of his contention that there was a valid seizure u/s 132(1) of the income tax Act. The facts of that case were that three motor vehicles belonging to the respondent were confiscated in 1947 by the customs officer for the alleged violation of customs laws. The order of confiscation was ultimately set aside in 1952 and the vehicles were ordered to be returned to the

respondent. The vehicles were kept in an open space and left uncared for with the result that they had deteriorated. The vehicles were sold as unclaimed property by a Magistrate u/s 523(9) of the Code of Criminal Procedure for Rs. 2,213 and odd. After the order of confiscation of the vehicles had been set aside, the respondent applied for return of the vehicles but was told that those had been sold and the sale proceeds paid to a creditor of the respondent. Thereupon the respondent brought a suit against the State for the return of the said Vehicles or in the alternative for their value. The trial court passed a decree against the State for Rs. 26,797 and odd. On the authority of that case it was sought to be argued that after the seizure of goods is made under the provision of a particular statute the authority seizing the goods is the bailee in respect of those goods and, therefore, possession thereof remains with the bailor, i.e., the person from whom the goods have been seized. In other words, the contention is that after the seizure of the money the customs department was the bailee in respect of the same and, therefore, possession thereof remained with Choraria, who was the bailor, and hence there could be a valid seizure by the Income Tax department u/s 132. The Supreme Court in that case accepted the findings of the court below that the vehicles were seized by the customs authority and that between 1947 and October, 1951, when they were disposed of they were lying uncared for in an open space, that they were disposed of at the instance of the police as unclaimed property, that when they were sold most of the valuable parts were missing and, lastly, they were sold while the appeal against the order of seizure and confiscation was still pending. It is in this context that the Supreme Court upheld the contention on behalf of the respondent that though the seizure might be lawful and under the authority of the statute, the State Government was from the time the said goods were seized, until the decision of the appeal, in the position of a bailee and was, therefore, bound to take reasonable care of the said vehicles. The Supreme Court further found that no such reasonable care was taken and the vehicles remained totally uncared for. In the background of these facts, the Supreme Court held:

" There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. This was precisely the cause of action on which the respondent's suit was grounded. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it. The order of disposal in any event was obtained on a false representation that the property was an unclaimed property.

Even if the Government cannot be said to be in the position of a bailee, it was in any case bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself "from returning it either by its own act or by any act of its agents or servants, In these circumstances it is difficult to appreciate how the contention that the State Government is not liable for any tortious act of its servants can possibly arise."

17. On the basis of the aforesaid decision we are unable to accept the broad proposition as contended for by learned counsel on behalf of the appellants that, as soon as there is a seizure of goods by a department of the Government in pursuance of some statutory provision the Government became the bailee in respect of those goods and, therefore, possession of those goods remains with the persons from whom the goods were seized. This view, of ours finds support from the observations made by the Supreme Court in *Durga Prasad v. Superintendent (Prevention), Central Excise, Nagpur* AIR 1966 S.C. 1209. At paragraph 7 of the report their Lordships have observed as follows:

" But we do not accept the argument of the appellant that the power of seizure must necessarily involve, in every case, the act of physical possession of the person who had a right to seize the articles. It is true that the documents had been sent to Delhi by respondent No. 2 for a limited purpose and for a limited period. But though the documents were sent to Delhi, respondent No. 2 was still in legal possession of the documents, for he had the right to control the use of the documents and to exclude persons who should or should not have access to the documents. The legal position is that at Delhi the documents were in possession of a bailee for the limited purpose of examination and translation of the documents but the legal possession was still with respondent No. 2."

18. The last case relied upon by counsel for the appellants is *Chiranjilal Shrilal Goenka Vs. R. Prasad and Others*, . In that case the Income Tax authorities conducted searches at the appellant's residence and office at Bombay on November 24, 1965, and, thereafter, searches of the petitioner's premises at Ramgarh in Rajasthan were made by the Income Tax Officers between the 1st and 13th of December, 1965, in the course of which some quantities of gold, jewellery, ornaments, silver articles and cash, and also some documents were seized. The gold and other valuable articles were deposited with the State Bank of India at Jaipur. Later on, the Income Tax authorities handed over the custody of the primary gold that was recovered from the appellant to the excise authorities. Thereafter, the Income Tax Officer issued notice to the appellant under Rule 112A of the Income Tax Rules to attend his office to explain or to produce evidence as to the nature of possession and source of acquisition of the seized assets. The appellants not having acted in pursuance of that notice the Income Tax Officer determined the total value of the seized goods u/s 132(5) of the income tax Act and passed an order that no portion of the seized assets which were retained by him could be released. This order of the Income- tax Officer was challenged on various grounds, one of which was that the income tax

Officers were not authorised to transfer the primary gold recovered by them to the excise department. It was contended in that case that once this transfer was effected by the Income Tax authorities the seizure made by the Income Tax authorities had lost its efficacy, with the result that the subsequent proceedings taken by them were without jurisdiction. On the basis of the contention raised on behalf of the appellant the questions which came up for consideration before the Rajasthan High Court were whether the Income Tax Officer was authorised to transfer the primary gold recovered by him to the Superintendent of Central Excise, Jaipur, and whether as a result of this transfer the seizure made by the Income Tax Officer would lose its efficacy, with the result that the subsequent proceedings taken by him were rendered without jurisdiction. So far as the first question is concerned it was held that there was nothing in Section 132 of the Income Tax Act to prevent the Income Tax Officer to hand over the seized goods to any other competent officer if that officer in exercise of his lawful power under any other law wants to take the goods. It is upon this view that the Rajasthan High Court held that if the Superintendent of Central Excise at Jaipur was competent to take possession of the gold that had been recovered by the Income Tax Officer in exercise of his power under the Defence of India Rules then the Income Tax Officer cannot be taken to be debarred from taking further proceedings under the Income Tax Act. But that is a point which does not arise for our consideration in this appeal. Moreover, it is to be noticed that the excise authorities seized the gold under the powers conferred upon them by the Defence of India Act. Section 48 of the Defence of India Act gives overriding effect to any order made under that Act or any rule made thereunder, and, therefore, the Rajasthan High Court was not called upon to decide whether the excise authorities could seize the gold which had already been seized by the Income Tax authorities. The other contention that was raised in that case was that, in view of Rule 126-W of the Defence of India Rules, the gold having already come under the control of the Government as a result of the seizure made by the Income Tax authorities, was exempt from the operation of the provisions of the Defence of India Rules relating to gold control. Rule 126-W of the Defence of India Rules is as follows:

" 126-W. Part not to apply to Government.--Nothing in this Part shall apply to or in relation to-

(a) any gold belonging to, or in the possession or under the control of, the Government,

(b) any refinery owned or occupied, or any business of a dealer carried on by the Government."

19. So the question which arose for consideration in that case was whether the gold which was seized by the Income Tax department was in the possession or under the control of the Government within the meaning of Rule 126-W of the Defence of India Rules. It is in that connection that it was observed by their Lordships that " the custody of the Income Tax Officer was in the nature of

custodia legis as he was holding it for the purposes underlying the Act as a statutory functionary." Their Lordships, accordingly, came to the conclusion that Rule 126-W was not applicable in the facts and circumstances of that case. The appellant in that case challenged the power of the excise department to take proceedings under the Defence of India Rules and challenged the validity of seizure on a different ground. The Rajasthan High Court, therefore, had no occasion to consider the case from the point of view from which the present appeal has been argued before us. The said case is, therefore, not of much assistance in deciding the present appeal.

20. For the reasons mentioned above, this appeal fails and it is accordingly dismissed, but there will be no order as to costs.

B.C. Mitra, J.

21. I agree.