
(1970) 11 CAL CK 0004
In the Calcutta High Court
Case No : Matter No. 473 of 1967

Laxmipat Choraria

APPELLANT

Vs

K.K. Ganguli and Others

RESPONDENT

Date of Decision : 20-11-1970

Acts Referred:

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

Citation : (1971) 82 ITR 306

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Ginwalla, S. Sen and B. Sen, for the Appellant;

Judgement

Sabyasachi Mukharji, J.—One Laxmipat Choraria was apprehended by the customs officials at the Palam Airport at Delhi, coming by an internal flight on the 13th January, 1967, with Rs. 3,60,000. Thereafter, the residence and the office premises of the Chorarias were searched by the Bombay customs authorities the same evening. As result of the search Indian currency notes amounting to Rs. 8,700 were recovered from the residence of Laxmipat Choraria and currency notes amounting to Rs. 34,074 were recovered from the office premises at Bombay. The searches were in pursuance of Section 105 of the Customs Act, 1962. The said search was conducted by the customs authorities under the reasonable belief that the moneys in the hands of the Chorarias represented the sales proceeds of smuggled goods. During the search it appears that the officers of the Income Tax department were also present. On the 14th February, 1967, the Income Tax authorities in Bombay served a warrant of authorisation u/s 132 of the Income Tax Act, 1961, issued, by the Commissioner of Income Tax, Calcutta. As a result of the said authorisation issued by the Commissioner of Income Tax, Calcutta, the said sum, of Rs. 42,774 was taken away by the Income Tax authorities from the customs authorities. Thereafter, on the 22nd February, 1967, a notice was issued, asking Laxmipat Choraria to submit an explanation in writing as to the nature of possession and the sources of

acquisition of the money recovered from the customs authorities in Bombay, by the Income Tax authorities. This notice, was issued u/s 132(5) of the Income Tax Act, 1961 Laxmipat Choraria by a letter written by his authorised representative stated that the said section had no application. Thereupon, on the 12th May, 1967, an order was passed u/s 132(5) of the Income Tax Act, 1961, whereby 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 which previous year or years the income belonged it was assessed at the rate prevalent in the relevant assessment year, namely, 1966-67. The notice dated 22nd February, 1967, which is annexure "C" to the petition, and the order dated 12th May, 1967, which is annexure "D" to the petition, are the subject-matters of this rule in the application under Article 226 of the Constitution made by Laxmipat Choraria, the petitioner herein.

2. In support of this application Mr. Ginwala, learned counsel for the petitioner, mainly urged two points before me. He contended, firstly, that Section 132 of the Income Tax Act, 1961, cannot have any application in the facts and circumstances of this case because in order to be a proper search and seizure as contemplated by Section 132 of the Income Tax Act, 1961, the documents or the moneys must be in possession of the person from whom seizure is directed. In this case when the authorisation u/s 132 of the Income Tax Act, 1961, was issued the documents and/or the moneys and/or the goods were in the possession of the customs authorities. In those circumstances it was contended by Mr. Ginwala that there could not have been any valid authorisation or proper authorisation u/s 132 of the Income Tax Act, 1961. It was, secondly, contended that the time for disclosure of income for the assessment year 1966-67 had not yet come when the purported seizure took place. Therefore, it was incorrect and improper and without jurisdiction to say that the amount of moneys recovered from the customs authorities represented the undisclosed income of the assessment year 1966-67. It could not be disclosed because time for disclosure had not yet come. On that ground Mr. Ginwala contended that the order passed u/s 132(5) by the Income Tax Officer was wholly without jurisdiction. Inasmuch as six months had already elapsed after the search by the customs authorities, the customs authorities were not entitled to retain the goods and the books and/or the moneys seized and they would not have been able to retain them but for the illegal seizure by the Income Tax authorities, according to Mr. Ginwala.

3. The first point therefore that has to be considered in this case is whether there could have been an order u/s 132 for seizing the goods of the petitioner from the custody of the customs. It is therefore 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 (11 of 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 (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 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 sub-section

(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 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 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"

4. The question is at the relevant time, that is to say when the authorisation was issued, namely, 10th February, 1967, in whose possession were the moneys, goods or books in question. The expression "possession" has not been defined in the Act. Possession is a word of ambiguous meaning and its legal sense does not always coincide with the popular sense. Reference may be made to Halsbury's Laws of England, volume 29, 3rd edition, Articles 1720-1735, pages 369 to 371. Possession again may not always be synonymous with manual detention or physical retention of the goods or moneys. Law dictionaries and text books are

unanimous that the expression is incapable of an exact definition. Without however entering into the complexities either of language or of jurisprudence and having regard to the nature of the- Act, it appears to me that in this case, when physical custody of the moneys and the goods were with the customs authorities, and that by a legal sanction and authority to have that custody, it would be improper to contend that possession as used in the context of Section 132, was still with the petitioner. It is not necessary for me to decide whether in law the petitioner had some possession or title or not. In this case and in the context of the section it appears to me that the petitioner at the relevant time did not have either physical control or physical power or authority over the said goods or the moneys. In those circumstances it cannot be said, in the context again of Section 132, that possession was with the petitioner. Mr. Sen, learned counsel for the department, contended that the immediate possession was with the customs, but the legal possession, according to him, was with the petitioner. He obviously drew his inspiration from Sub-section (3) of Section 132 of the Income Tax Act, 1961, where the expression "immediate possession" has been used; but I do not think that the expression "immediate possession" in any way detracts from the meaning of possession in the popular sense as I have construed in the context of the section. I am not also unmindful of the fact that in some of the Sub-sections of Section 132 the expressions "retention" and "custody" have been used; but reading these expressions in the context they have been used I do not think that where an authority or a person has retention and custody with the legal sanction behind it, it was not the intention of the legislature to say that he was not in possession as contemplated in Section 132 of the Income Tax Act, 1961. On the meaning of the expression "possession" reference may be made to Burrows Words & Phrases Judicial Dictionary, 4th edition, page 306. But there is another aspect which compels me to hold that in this case it could not be said that possession was with the petitioner. The expression used here for the recovery of the possession is "seizure". Seizure is again an expression which implies a forcible exaction or taking possession from either the owner or one who has the possession and who is unwilling to part with possession. Now in this case the custody was with the customs authority. It would be inappropriate in my opinion to accept the position that the Income Tax department which is another department of the Union of India had to be armed with authority to take forcible custody from another department of the same Government or had to be armed with authority to gain custody from an unwilling person. It would be wholly inappropriate, in my opinion, in the context were one department of the Government takes the goods or the documents or the moneys from another department of the same Government to use the expression "seizure". Having regard to the context in which the expressions "possession" and "seizure" have been used I have come to the conclusion that there cannot be an order u/s 132 in respect of goods or moneys or papers which are in the custody of one department of Government under a legal authority. In the premises the warrant of authorisation issued in this case on the 10th February, 1967, was without jurisdiction and invalid.

5. I have now to notice the decisions relied on at the Bar. The first decision upon which Mr. Ginwala relied is the decision in the case of Gian Chand and Others Vs. The State Of Punjab, There the Supreme Court had occasion to construe the expression "seized" in the context of Section 178A of the Sea Customs Act, 1878. The Supreme Court observed that the expression "seized" in the context in which it had been used in the Act meant taking possession contrary to the wishes of the owner of the property.

6. Here seizure must be contrary to the wishes of the person from whose custody possession is being effected. In the said case the Supreme Court observed at page 499 of the report :

"What the goods were seized by the police the ceased to be in the possession of the accused and passed into the possession of the police and when they were with the Magistrate it is unnecessary to consider whether the Magistrate had possession or merely custody of the goods. 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."

7. In my opinion the aforesaid observations of the Supreme Court are apposite to the facts and circumstances of this case. In this case when the customs authority seized the goods the petition not only lost custody but possession and it cannot thereafter be contended that they were in possession of the goods and moneys as I have mentioned before. Mr. Sen, learned counsel for the respondent, contended that this is a case under the Customs Act and should not be relied on in deciding a question under the income tax Act. I am, however, unable to accept this contention of Mr. Sen. The next case on which reliance was placed was the case of Durga Prasad H.R. Gomes, Superintendent (Prevention), Central Excise, Nagpur A.I.R, 1966 S.C. 1209 There what had happened was that after certain orders of authorisation when the documents were in the custody of the Government, there were subsequent orders of authorisation. Mr. Ginwala contended that in the instant case before me it has not been contended by the Government that the first seizure by the customs was invalid, as seems to have been the position in the aforesaid decision. Secondly, the question whether there could be a subsequent order of seizure when the goods were in the custody of the Government was not canvassed in the said case before the Supreme Court. Mr. Sen, learned counsel for the respondent, drew my attention to certain observations in the cases of Mamchand & Co. v. Commissioner of Income Tax ITR 1968 (Cal.) 631 Hindustan Metal Works v. Commissioner of Income Tax I.T.R.1968 (All.) 798. and Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc., ., I am, however, of the opinion that in view of the controversy raised in this case the aforesaid decisions are not relevant. Therefore, in my opinion, the first point taken by Mr. Ginwala succeeds

and it must be held that the authorisation issued in this case was beyond the scope of Section 132 and, as such, illegal and void.

8. The next contention raised by Mr. Ginwala was that there could not have been an order u/s 132(5) of the Income Tax Act, 1961, because the time to disclose the income for the relevant assessment year had not come when the seizure was made. I am, however, unable to accept this contention of Mr. Ginwala. The proviso to Sub-section (5) in my opinion provides for a contingency like this. The proviso provides for a calculation of taxes on a fictional basis--it does not make the income the undisclosed income of a particular year. In that view of the matter I am unable to accept the second contention of Mr. Ginwala.

9. It was contended by Mr. Sen that the application should be rejected because the application has been made in the original side of this court, while according to Mr. Sen, in accordance with the rules of this court, the application should have been made in the appellate side of this court. It, however, appears that originally there was no prayer for a writ in the nature of certiorari ; by a subsequent order of amendment that prayer has been allowed and the rule has been directed to be amended. Rule nisi, however, it appears, has not yet been amended. In view of the order for amendment I do not think that there is any merit in this objection of Mr. Sen.

10. Mr. Dipak Sen, learned counsel for the customs authority, contended that this court has in any event no jurisdiction to entertain this application against the customs authority. Mr. Sen contended that the officers of the customs were outside the jurisdiction of this court. Furthermore, the impugned order passed by the customs authorities and the search and seizure by the customs authorities took place outside this State. Mr. Sen, therefore, contended that this application, so far as the customs were concerned, was not maintainable in this High Court. I am, however unable to accept this contention of Mr. Sen. What is being challenged is the improper authorisation of the Income Tax department u/s 132 of the Income Tax Act ; that order was passed within the jurisdiction of this court. Furthermore, the records of the Income Tax department are within the jurisdiction of this court. But for this authorisation the moneys could not have been retained by the customs. Therefore, the customs authorities were necessary parties to this application and the cause of action which is the subject-matter of the grievance of the petitioner arose within the jurisdiction of this court. In that view of the matter it must be held that this court has jurisdiction.

11. As mentioned hereinbefore I have held that the original order of authorisation u/s 132 was improper and invalid. The order passed by the Income Tax Officer u/s 132(5) though valid has also to be struck down because it was in pursuance of the search and seizure and an order under Sub-section (5) can only be passed where moneys have been seized under Sub-section (1). In view of the facts that there has been no seizure under Sub-section (1), the order under Sub-section (5) must also be struck down. In that view of the matter this application succeeds and the rule nisi is, accordingly, made absolute. Let a writ in the nature

of prohibition issue prohibiting the third respondent from retaining the said currency notes and from enforcing or taking any steps to enforce or from giving effect to the notice dated the 22nd February, 1967, and the order dated the 12th May, 1967. There will also be a writ in the nature of mandamus commanding the respondents to restore and return to the petitioner the currency notes mentioned hereinbefore.

12. In the facts and circumstances of this case, there will be no order as to costs. There will be a stay of operation of this order for seven weeks, as prayed for.