(2000) 02 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Writ Petition No. 29 of 2000 25 February 2000

MARUTI MILLS (P) LTD. APPELLANT

Vs

UNION OF INDIA and Others RESPONDENT

Date of Decision : 25-02-2000

Acts Referred:
Income Tax Act, 1961 — Section 1, 131, 133A

Citation : (2000) 159 CTR 142 : (2000) 2 RLW 896

Hon'ble Judges : B. S. Chauhan, J

Bench : Division Bench

Advocate : Anjay Kothari, for the Assessee and Sandeep Bhandawat, for the Revenue, for the Appellant;

Judgement

S. Chauhan, J.

The instant writ petition has been filed for quashing the impugned order dated 22-12-1999 (Annexure 2), impounding the books of accounts and other documents; for quashing the summons u/s 131, dated 21-12-1999 (Annexure 1); and for issuing directions to the respondents to release the entire books of accounts and other documents impounded by them.

2. The facts and circumstances giving rise to this case are that a survey was conducted u/s 133A of the Income Tax Act, 1961 (hereianfter referred to as "the Act"), at the business premises of the petitioner on 21-12-1999, and a list of documents as prepared. On the same date, i.e., on 21-12-1999, summons u/s 1 of the Act was issued to the director of the petitioner-company to produce the books of accounts and other documents for verification of the entries on 22-12-1999. In pursuance of the summons issued u/s 131(1) of the Act, the director of the petitioner-company appeared along with the books of accounts and other documents on 22-12-1999, and the same had been impounded by the authority on the said date. Hence this petition.

3. Heard Mr. Anjay Kothari, learned counsel for the petitioner, and Mr. Sandeep

Bhandawat, for the respondents.

4. It has been submitted by Mr. Kothari that the law does not permit impounding the books of accounts and documents in survey proceedings conducted u/s 133A of the Act and the authorities have acted illegally and in contravention of the statutory provisions and the said impugned orders are liable to be quashed.

5. On the other hand, it has been submitted on behalf of the respondents that a survey was conducted on 21-12-1999 by the authorities concerned and from the record seen therein, it was felt necessary that the summons be issued u/s 131(1) of the Act as large number of documents were there and the directors of the petitioner company had been evading any explanation for the entries made therein. The notice was issued for verification on 22-12-1999 and as during the course of survey, there had been marking for identification of the documents putting exhibit numbers thereon, the documents so exhibited if were directed to be produced for verification on the next date and it is vehemently denied that books of accounts and other documents have been impounded during the survey, rather the same had been impounded while hearing the petitioner in pursuance of the summons issued u/s 131(1) of the Act as their representatives did not furnish any explanation for the entries made therein and the impugned orders are justified and have been passed in strict compliance with law.

6. I have considered the rival submissions made by the learned counsel for the parties.

7. Section 133A of the Act empowers the authority to conduct the survey. Sub-section (4) said section provides that the Income Tax authority acting under the provisions the said section "shall, on no occasion, remove or cause to be removed from place wherein he has entered, any books of accounts or other documents or any cash, stock or other valuable articles and things." Thus, the said sub-section (4) of the said section puts an embargo on the powers of the authority to remove or caused to be removed from the place where he has entered, the books of accounts and other documents, etc.

Sub section (6) of section 133A reads as under :

"If a person under this section is required to afford facility to the Income Tax authority inspect books of accounts or other documents or to check or verify any cash, stock or other valuable article or thing, or to furnish any information or to have his statement recorded, either refuses or evades to do so, the Income Tax authority shall have all the powers under sub-section (1) of section 131 for enforcing compliance with the requirement made."

The aforesaid provision empowers the authority to exercise the powers conferred upon it u/s 131(1) of the Act in case the person concerned refuses or evades to furnish any information or to have his statement recorded.

Section 131(1) empowers the assessing officer or other authority under the statute, for the purpose of the Act, to exercise the powers vested in the court under the Criminal Procedure Code, 1908, while trying a suit in respect of the matters including discovery and inspection and compelling the production of books of accounts and other documents.

Sub-section (3) of section 131 reads as under :

"Subject to any rules made in this behalf, any authority referred to in sub-section (1) or sub-section (1A), may impound and retain in its custody for such period as it thinks fit any books of accounts or other documents produced before it in any proceeding under the Act."

The proviso attached to the said provision empowers impounding the books of accounts and other documents only after recording the reasons and the said impounded books of accounts or other documents cannot be retained for a period of more than fifteen days unless there is prior sanction by the authority mentioned therein.

In view of the above, it is quite clear that the Income Tax authority cannot impound the books of accounts or other documents in the proceedings of conducting the survey and the impounding is permissible only under sub-section (3) of section 131. Thus, the instant case is to be examined in the light of the aforesaid statutory provisions.

8. Mr. Kothari has placed reliance upon a large number of judgments of various High Courts urging that what is not permissible to be done directly, cannot be done indirectly and under the garb of the powers conferred under, section 131(3), the authorities have mala fidely exercised its powers u/s 133A of the Act, which is not permissible.

9. In Dr. Vijay Pahwa v. Sameer Mukhopadhyay, Dy CIT (1995) 129 CTR (Cal) 64, the Calcutta High Court considered the case where the survey was conducted on 17-4-1995, the summons u/s 131(l) were served upon him on the spot and the same were executed within thirty minutes or so. The books and other documents, when produced before the authority in the Income Tax Officer were impounded immediately. In the peculiar facts and circumstances of the case, the court held that the authority had exceeded its powers and the procedure adopted by the authority was illegal and amounted to high-handed. action.

10. In N.K. Mohnot Vs. Deputy Commissioner of Income Tax and others, : the Madras High Court held as under :

"Sub-section (6) of section 133A does not authorise the Income Tax authority to impound any of the documents found in the course of survey. That sub-section incorporates within itself the provisions of section 131(1) for the limited purpose of enforcing compliance with the requirements made by the authority with regard to the matters enumerated at (i), (ii) & (iii) of section 133A(1). It is for this limited purpose that the powers conferred on the officers, referred to in section 131(l), namely, the same powers as are vested in the Court under the Criminal Pocedure Code while trying a suit in respect of (a) inspection and discovery-, (b) enforcing the attendance of any person and examining him on oath; and (c) compelling the production of books of accounts and other documents are also conferred on the Income Tax authority while carrying out a survey, if the persons connected with the business or profession, present at the time of survey, refuse or evade complying with the requisitions made in respect of the matters referred to in section 133A(1). The contents of section 131(1) are incorporated into section 133A(6) by reference. By such incorporation the other sub sections of section 131 are not engrafted into section 133A(6). Parliament has taken particular care to avoid any reference to section 131(3) which empowers the authority before whom books of accounts are produced to impound the same, in view of the express emphatic bar imposed by section 133A(4) against removal by the authority of the books of accounts, documents, cash or other valuable article thing found during the course of survey.

What is expressly prohibted by section 133A(4) cannot be circumvented and the prohibition nulifying by resorting to sub section (2) of section 131 ...... the prohibited contained in sub section (4) of section 133A is absolute and unqualified."

11. In Gheru Lal Bal Chand Vs. Income Tax Officer, ''A'' Ward, the Punjab & Haryana High Court held that the Income Tax authorities have no jurisdiction to resort to the powers under sub-sections (1) and (2) of section 131 while surveying the accounts of the assessee u/s 133A when the assessee neither refused nor evaded to cooperate with the competent authority. The court held as under :

"Under these circumstances, the Income Tax Officer had no jurisdiction to resort to the powers under sub-ss. (1) and (2) of section 131 of the Act while surveying the accounts of the petitioner u/s 133A on 11-4-1978. It is obvious that the Income Tax Officer issued notices (Annexure P/1 to Annexure P/4) u/s 131 of the Act to the petitioner in excess of the jurisdiction vested in him. These notices are consequently liable to be quashed.

12. In United Chemical Agency Vs. R.K. Singh, Income Tax Officer, Ward II and Others, the Allahabad High Court has held that "in absence of any specific reasons, sub-section (3) of section 131 in section 133A, the officer exercising the power u/s 133A was not empowered to impound documents during the course of survey."

13. In Sri Venkateshwara Tourist Home (P.) Ltd. Vs. Assistant Director of Income Tax (Investigation), the Karnataka High Court, after considering a large number of judgments, held as under :

"The contention raised by the petitioner appears to be correct that without following the procedure provided u/s 133A, the respondent was in a mood to impound the documents and for that purpose, list was prepared at the spot and the formalities u/s 131 were just shown to have been done. The action of the authorities cannot be considered as justified in accordance with the provisions of law."

A Similar view has been taken by a Division Bench of Punjab & Haryana High Court in Ram Saroop Pawan Kumar Vs. Income Tax Officer,

14. Thus, in view of the aforesaid judgments, it can be formulated that the Income Tax authorities cannot impound the books of accounts and other documents during the course of survey. In the instant case, undoubtedly the orders of impounding are purported to have been made u/s 131(3) of the Act, but the circumstances in which the said books of accounts and other documents have been seized/impounded explicitly reveal that the provisions of section 131(3) have been resorted to only to impound the documents found by the statutory authority during survey, which is not permissible under the scheme of the statute.

It is settled proposition of law that what cannot be done "per directum is not permissible to be done per obliquum", meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. "

15. In Jagir Singh Vs. Ranbir Singh and Another, the Apex Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance.," While deciding the said case the Hon''ble Suprme Court placed reliance on the judgment in Fox v. Bishop of Chester 2(1824) BC 635, wherein it has been observed as under :

"To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing in an indirect or circuitous manner that which it has prohibited or enjoined."

Law prohibits to do something indirectly which is prohibited to be done directly.

16. Moreso, the powers even u/s 131(1) can be resorted to in all cases where the assessee refuses or evades the answer of the queries or recording of his statement and does not cooperate with the survey. The impugned order dated 22-12-1999 (Annexure 2) does not disclose anywhere that the petitioner-assessee or any of its employee, legal representative or director has either refused or evaded to furnish an information, therefore, the question of resorting to the provisions of section 131(1) was unwarranted and uncalled for. The reasons recorded therein clearly provide that the documents are required for the purpose of proper assessment of the assessee. Therefore, there can be no hesitation to the court to declare the said order illegal and de hors the statutory rules. The provisions of section 131(3) are not meant to be resorted to in connection with survey as the legislature has consciously not made any reference to the said provision in the provisions of section 133A and the impugned order dated 22-12-1999 (Anneure 2) is invalid and amounts to abuse of power of the statutory authority and the same is liable to be quashed.

17. There is further no force in the contention raised by M. Bhandawat that if the original accounts books and documents are returned to the petitioner-assessee, the petitioner would have an opportunity to tamper with the books of accounts and the said documents and would succeedin concealing his income, for the reason that such a course can be prevented by retaining the photo-copies of all the required documents by the Revenue department and get the same authenticated by the petitioner and in that circumstances, there will be no apprehension of tampering with the books of accounts and documents by the petitioner-assessee. Thus, the apprehension entertained by the statutory authority is unfounded and not worth considering.

In view of the above, the petition suceeds and is allowed. The orer dated 22-12-1999 (Annexure 2) is hereby quashed and the respondents are directed to return the books of accounts and other documents are at liberty to retain the photocopies of the relevant documents and get them authenticated by the petitioner and use the same in future to contradict any entry made by the petitioner in future in case petitoiner tampers with the said books of accounts or the documents. There shall be no order as to costs.