

(1970) 10 AHC CK 0007

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4137 of 1969

Motilal and Others

APPELLANT

Vs

Preventive Intelligence Officer and Others

RESPONDENT

Date of Decision : 14-10-1970

Acts Referred:

Income Tax Act, 1961 — Section 132(1), 132(3), 69, 69A, 69B

Citation : (1971) 80 ITR 418

Hon'ble Judges : R.S. Pathak, J; R.L. Gulati, J

Bench : Division Bench

Advocate : S.C. Khare and R.C. Srivastava, for the Appellant; S.N. Kacker and Ashok Moheley, for the Respondent

Final Decision : Allowed

Judgement

Pathak, J.—The petitioners apply for relief under Article 226 of the Constitution against an order u/s 132(3), Income Tax Act, 1961.

2. The petitioners, who are brothers, carry on business as brokers in silver under the name Messrs. Moti Lal Panna Lal. On June 5, 1969, the Preventive Intelligence Officer and other officers of the Customs and Central Excise Department searched the residential and business premises of the petitioners and carried away some silver bars, pieces of silver and currency notes. It appears that the customs officers also arrested the petitioners, but subsequently, upon a habeas corpus application, this court directed their release by its order dated June 25, 1969.

3. On July 24, 1969, the petitioners applied to the customs authorities for return of the silver but despite repeated requests in that behalf the silver was not returned to them. On September 4, 1969, the petitioners filed a petition (Writ Petition No. 3073 of 1969) under Article 226 of the Constitution praying for a direction to the customs authorities to return their silver. Notice of the writ petition was served on the customs authorities on September 22, 1969.

4. On September 27, 1969, a report was submitted by Shri S. S. Hitkari, Inspecting Assistant Commissioner of Income Tax, Agra, to the Commissioner of Income Tax, Kanpur, requesting that certain Income Tax Officers be authorised u/s 132(1), Income Tax Act, 1961, to search and seize account books, money, bullion, jewellery and other valuable Articles or things discovered during the search. On September 28, 1969, the Commissioner of Income Tax made an order according the requisite authorisation in respect of the residential and business premises of the petitioners and also of the Assistant Collector, Customs and Central Excise, Agra, and the Directorate of Revenue (Intelligence), New Delhi. On September 29, 1969, the Income Tax Officer, Agra, one of the Income Tax Officers authorised u/s 132(1), made an order, purporting to be u/s 132(3), directing the Assistant Collector, Customs and Central Excise Agra, not to remove, part with or otherwise deal with the silver seized by the customs authorities from the business and residential premises of the petitioners on June 5, 1969. Then, an application, supported by affidavit, was filed by the Preventive intelligence Officer, Customs and Central Excise, Agra, in the aforesaid writ petition pending in this court stating that the Income Tax Officer, Agra, had visited the office of the Assistant Collector, Customs and Central Excise, and wanted to search the premises in connection with the bullion belonging to the petitioners, that the Preventive Intelligence Officer disclosed details of the said bullion to the Income Tax Officer and informed him that the matter of the return of the silver to the petitioners was pending adjudication in the writ petition in this court, that the Income Tax Officer then made the aforesaid order u/s 132(3) and served it on the Assistant Collector, that the customs authorities were thus bound in law to place the silver in the custody of the Income Tax Officer and that, therefore, the writ petition pending in this court had become infructuous.

5. On November 13, 1969, the present writ petition was filed challenging the validity of the order made u/s 132(3).

6. Shri S. C. Khare, learned counsel for the petitioners, has raised two contentions before us. He urged that the impugned order did not fall within the scope of Section 132(3) inasmuch as the silver was already known to the Income Tax department to be in the custody of the customs authorities and no question arose of invoking the jurisdiction u/s 132. The other submission is that the proceedings taken by the Income Tax department constitute a colourable exercise of the powers conferred under Sub-sections (1) and (3) of Section 132 with a view to obstruct and defeat the writ petition pending in this court and prevent the return of the silver to the petitioners.

7. During the pendency of the present petition, we considered it appropriate to send for certain documents constituting the original record concerning the "search and seizure" proceedings initiated u/s 132(1).

8. We have, accordingly, before us the following document:

(1) The report dated September 27, 1969, of Shri S. S. Hitkari, Inspecting

Assistant Commissioner of Income Tax, Agra, submitted to the Commissioner of Income Tax, Kanpur.

(2) The order dated September 28, 1969, of the Commissioner of Income Tax, Kanpur, according authorisation to certain designated Income Tax Officers u/s 132.

(3) Warrants of authorisation issued pursuant to the aforesaid order of the Commissioner of Income Tax, Kanpur.

9. To appreciate the first contention raised on behalf of the petitioners it will be appropriate, I think, to set out the relevant provisions of Section 130 :

"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 (XI 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 (XI 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 (XI 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."

10. To put it more concisely, the authority to search and seize u/s 132(1) is contemplated in those cases where is reason to believe that a person has omitted or failed to produce or cause to be produced account books or documents in spite of a summons or notice issued under the Indian Income Tax Act, 1922, or the Income Tax Act, 1961, or a person who would not, in spite of such summons or notice, produce or cause to be produced the account books or documents or a person is in possession of money, bullion, jewellery or other valuable article or thing representing either wholly or partly income or property which has not been disclosed for the purposes of either Income Tax Act. Where the authorised officer finds that it is not practicable to seize such account book, documents, money, bullion, jewellery or other valuable article or thing he is empowered by Sub-section (3) of Section 132 to serve an order on the owner or the person in immediate possession or control thereof prohibiting him from removing, parting with or otherwise dealing with it without the previous permission of such officer.

11. It is clear that the articles or things referred to in Sub-section (3) of Section 132 are those which the authorised officer was empowered to search for and seize and no other. That is plain from the language of subsection (3), which refers to "such books of account, other document, money, bullion, jewellery...", that is, those articles or things which are the subject of authorisation u/s 132(1) (c). They must be articles or things which may be necessary to search for before they can be seized. That is clear from the nature of the powers conferred upon the authorised officer under Clauses (i) to (v) contained in Section 132(1). Clause (i) empowers him to enter and search a building or place where he has reason to suspect that the article or thing is kept. Obviously, that would not include a case where it is already known that the article or thing is kept in a certain building or place and will ordinarily be yielded up by the person holding custody of such article or thing. That conclusion is reinforced when we refer to the further power conferred by Clause (ii) which enables the authorised officer to break open the lock of any door, box, locker, safe, almirah or other receptacle

when the keys thereof are not available. The power to seize, it is clear from Clause (iii), is contemplated in the case of those articles or things found as a result of such search. In my opinion, the power conferred u/s 132(1) is contemplated in relation to those cases where the precise location of the article or thing is not known to the Income Tax department and, therefore, a search must be made for it, and where it will not be ordinarily yielded over by the person having possession of it and, therefore, it is necessary to seize it. If it is only such article or thing which is contemplated by Section 132(1), then it is such article or thing alone which can be the subject of an order u/s 132(3), I am unable to accept the contention on behalf of the Income Tax department that Section 132(3) will include a case where the location of the article or thing is known and where ordinarily the person holding custody of it will readily deliver it up to the Income Tax department. Such article or thing, I think, requires neither search nor seizure.

12. Upon the material before us I am satisfied that the silver in the custody of the Assistant Collector of Customs and Central Excise was not an article or thing which could be the subject of an order u/s 132(3). The report of Shri S. S. Hitkari, the Inspecting Assistant Commissioner of Income Tax, dated September 27, 1969, refers to the search made by the customs authorities on June 5, 1969, and the seizure of the petitioners' account books and 136.935 kilograms of silver and states that the account books were lying with the Assistant Director of Revenue (Intelligence), New Delhi, and the silver was in the custody of the Assistant Collector, Central Excise, Agra. Clearly, the location of the silver was known to the Income Tax department, and it cannot be disputed that as it was in the custody of a public officer it would have been readily handed over to the Income Tax department upon proper requisition made in that behalf. There is no material whatever on the record to suggest that the customs authorities would refuse to co-operate with the Income Tax department and decline to comply with any , reasonable request made to them. On the contrary, it would appear that the two departments were acting in co-operation. On June 5, 1969, when the customs officers effected the search and seizure of the petitioners' premises they were accompanied by an Income Tax Officer, H. G. Seymore. Could it within reason be supposed that the customs authorities would conceal the silver from the Income Tax department, rendering a search necessary, and upon a reasonable request made in that behalf refuse to deliver it up ? That is a question to which an affirmative answer does not seem possible.

13. I am firmly of opinion that the warrants of authorisation issued by the Commissioner of Income Tax could not in law include the authority to search for and seize the silver already with the Assistant Collector, Customs and Central Excise. And if, as is pointed out on behalf of the Income Tax department, the Income Tax Officers proceeded, pursuant to the warrants of authorisation, to search for and seize that silver in the officer of the Assistant Collector, it was a meaningless gesture. The impression gained by me is that the Income Tax department considered it necessary to comply with the form of law in order to be

able to make an order u/s 132(3). The form of the law was satisfied, its substance was not. I hold that the order u/s 132(3) was an order without the authority of law.

14. It is urged on behalf of the Income Tax department that the power exercised by the Commissioner of Income Tax u/s 132(1) is administrative or executive in nature and It is not open to the court, especially in writ jurisdiction, to sit in judgment over the reasonableness of the belief of the Commissioner contemplated under that provision. We are referred to Income Tax OFFICER, AWARD, AGRA, AND OTHERS Vs. FIRM MADAN MOHAN DAMMA MAL AND ANOTHER., and Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc., .. It seems to me clear that this court has jurisdiction to consider whether on the material before the Commissioner of Income Tax it was at all reasonably possible to entertain the belief as to the existence of the circumstances mentioned in Section 132(1) justifying a search and seizure. If upon that material it is not possible in any view of the matter to hold such belief the matter falls clearly within the jurisdiction of this court. But if upon the material present before the Commissioner it is possible to believe that the considerations mentioned in Section 132(1) exist and justify a search and seizure it is then not open to the court to weigh that material and arrive at a different opinion from that come to by the Commissioner of Income Tax.

15. In the view which has found favour with me, I find it unnecessary to examine the other contention raised by the petitioners that the action taken by the Income Tax department amounts to a colourable exercise of the powers conferred by Section 132.

16. The petition is allowed. The order dated Septemeber 29, 1969, made by the Income Tax Officer, Agra, is quashed. The petitioners are entitled to their costs.

R.L. Gulati, J.

17. I agree with my learned brother, Pathak J., that the impugned order dated September 29, 1969, passed under Sub-section (3) of Section 132 of the Income Tax Act, 1961, should be quashed. I, however, would like to add the following by way of elucidation.

18. In order to determine the scope of Sub-section (3) of Section 132 of the income tax Act, 1961, it is necessary to examine the scheme underlying the provisions relating to search and seizure as contained in Section 132. Section 132 confers upon certain Income Tax authorities the power of search and seizure of books of accounts and other documents as also money, bullion, jewellery and other articles (hereinafter referred to as the assets). When an action under this Section is taken with regard to assets the scheme appears to be to empower the authorised officer to seize the assets recovered as a result of the search and under Sub-section (5) to retain such assets sufficient to meet the tax liability of an assessee which the Income Tax Officer is entitled to determine summarily and to add to it the other outstanding tax liability of the assessee not only under the

two Income Tax Acts of 1961 and 1922, but also under the allied Acts like the Excess Profits Tax Act, the Business Profits Tax Act, the Wealth-tax Act, the Expenditure-tax Act and the Gift-tax Act as mentioned in Section 230A. Thereafter, the Income Tax Officer proceeds to make regular assessments and by Section 132A he is empowered to appropriate the sale proceeds of the assets towards the aggregate tax liability of the assessee, in case the assessee is in default or is deemed to be in default.

19. Then we have another set of provisions in the Act which may also be noticed. Sections 69, 69A and 69B provide for the manner of assessment of unexplained and unaccounted for assets. These provisions are applicable in relation to assessment of such assets whether discovered as a result of search or otherwise. The other relevant provision is Sub-section (5) of Section 226, which provides :

"The Income Tax Officer may, if so authorised by the Commissioner by general or special order recover any arrears of tax due from an assessee by distant and sale of his movable property in the manner laid down in the Third Schedule."

20. Thus, apart from the provisions contained in Section 132, the Income Tax Officer is empowered under Sub-section (5) of Section 226 also to attach and sell movable property of the assessee. But that provision can be pressed into aid only after a regular assessment has been made and the assessee is in default or is deemed to be in default in respect of the tax liability due from him. Under sub-section (5) of Section 132, the assets can be put under distant even before the final assessments are made and even before the assessee can be said to be in default. In other words, an action under Sub-section (5) of Section 132 really amounts to attachment before judgment. This is the vital difference between an action u/s 132(5) and the one under Sub-section (5) of Section 226. The consequences that ensue upon an action u/s 132 are, indeed, drastic and extraordinary and, therefore, it becomes necessary to determine the exact scope of Section 132, so that, if a case does not squarely fall under that Section the Income Tax department should not be permitted to take recourse to it. There is one more distinction which may be pointed out here. When one closely looks at Sub-section (5) of Section 132, one finds that it is confined to the assets which are seized as a result of search under Sub-section (1) of Section 132. Sub-section (3) of Section 132 finds no mention in that provision. According to the literal interpretation of that provision, therefore, it can be said that the provisions of Sub-section (5) of Section 132, and, consequently, of Section 132A, which deal with the application of assets retained under Sub-section (5) of Section 132 do not apply to the assets in respect of which merely an order under Sub-section (3) of Section 132 has been made. Under sub-section (3) of Section 132 the authorised officer may, where it is not practicable to seize any assets, serve an order on the owner or the person, who is in immediate possession or control of the assets, not to remove, part with or otherwise deal with them except with the previous permission of such officer. The logical conclusion of such an interpretation would be that the assets which have been attached as it were,

under Sub-section (3) of Section 132, cannot be retained or appropriated towards the tax liability of the assessee in the manner provided in Section 132A of the Act. Even subsection (5) of Section 226 also cannot be pressed into aid by the Income Tax Officer in such a case because that provision applies only if the regular assessment has been made and the assessee is in default. There is no power in the Income Tax Officer to attach assets before the assessment. It follows therefore, that in a case where the Income Tax Officer wishes to proceed u/s 226(5) he cannot pass an order by way of attachment of the movable property before the final assessment is made and before the assessee is held to be in default, that is possible only under Sub-section (3) of Section 132. Sub-section (3) of Section 132 is a part of Section 132. An order under that provision can only be made where the case is otherwise covered by Section 132. In other words, an order of "attachment before judgment" contemplated by Sub-section (3) of Section 132 can only be passed where Section 132(1) itself is applicable and the assets are liable to be seized as a result of a search. That is plain from the use of the word "such" before "money, bullion, jewellery or other valuable article or thing" used in Sub-section (3) of Section 132. The word "such" refers, back to Sub-clause (iii) of Clause (c) of Sub-section (1) of Section 132 which provides that "the authorised officer may seize any such money, bullion, jewellery or other valuable article found as a result of such search." In other words, u/s 132, the power to search and seize go together. If no search is called for, no seizure can be made, whether the seizure is actual under Sub-clause (iii) of Clause (c) of Sub-section (1) of Section 132 or by way of attachment as contemplated by Sub-section (3) of that Section. An order of attachment under Sub-section (3) of Section 132 cannot, therefore, be passed without taking recourse to" Section 132(1). It follows, therefore, that a search must be carried out u/s 132(1) before an order under Sub-section (3) can be passed. This explains the reason why the department issued a warrant of search of the premises of the Assistant Collector, Central Excise, Agra, in respect of the silver which had been recovered by the excise department from the assessee's possession and which was lying in the custody of the Assistant Collector, Agra. The department's anxiety obviously was to seize the silver and to utilize it towards the payment of the tax liability of the assessee and not merely to permit the excise department to retain the silver in its custody as has been alleged by the petitioner.

21. A question then arises as to whether such a search was permissible u/s 132. From a reading of that Section it is obvious that Section 132 is applied only to unearth hidden books of accounts and assets.

22. So far as the silver seized by the excise authorities was concerned, it had already come to surface. Its exact quantity and location was within the knowledge of the Income Tax department as is obvious from the letter of Sri S. S. Hitkari, the Inspecting Assistant Commissioner of Income Tax, and on the basis of which the search was carried out. In that letter Sri S. S. Hitkari had clearly stated that silver weighing 136.936 kg. had been recovered from the

business and residential premises of the petitioner-firm and its partners and was lying in the custody of the Assistant Collector, Central Excise, Agra. There was, therefore, no occasion for any search being organised in respect of that silver. In his letter to the Commissioner, Sri Hitkari had also stated that the assessee was not a dealer in Silver and the same had not been disclosed in its closing stock, profit and loss account or the balance-sheet filed by the assessee during the last three years. In these circumstances, it was a case which could clearly be dealt with by the Income Tax Officer under Sections 69, 69A and, 69B. The assessee could have been called upon to furnish an explanation with regard to the source and nature of the investment made in silver and on his failure to give a satisfactory explanation, the Income Tax department could have brought to tax the concealed income represented by the silver. Had that course been followed, the department could have proceeded for the recovery of the tax in the normal manner by serving a notice of demand upon the assessee and on his failure to comply with it, to initiate recovery proceedings u/s 222 or under Sub-section (5) of Section 226. But an order under Sub-section (3) of Section 132 freezing the silver, as it were, at that stage was clearly unauthorised.

BY THE COURT

23. For the reasons set out in our respective judgments, the petition is allowed. The order dated September 29, 1969, made by the Income Tax Officer, Agra, is quashed. The petitioners are entitled to their costs.