
(1993) 09 CAL CK 0038
In the Calcutta High Court
Case No : Matter No. 1666 of 1985

Rajendra Prasad Agarwalla

APPELLANT

Vs

Inspecting Assistant Commissioner of Income Tax and Others

RESPONDENT

Date of Decision : 14-09-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114
Income Tax Act, 1961 — Section 132, 132(10), 132(5)

Citation : (1994) 209 ITR 784 : (1994) 77 TAXMAN 334

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : R.K. Murarka, for the Appellant; Shome, for the Respondent

Judgement

Ruma Pal, J.—On December 23, 1981, there was a search and seizure at the petitioner's premises. Various documents, share scrips and Rs. 90,000 in cash were seized. This writ application has been filed for return of the documents and share scrips.

2. The only point argued by the petitioner is that he is entitled to the return of the documents and share scrips because the respondent authorities have no authority to retain them under the provisions of Section 132(8) of the Income Tax Act, 1961 (referred to as "the Act" hereafter).

3. Section 132(8) reads :

"(8) The books of account or other documents seized under Subsection (1) or Sub-section (1A) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Chief Commissioner or Commissioner for such retention is obtained :

Provided that the Chief Commissioner or Commissioner shall not authorise the retention of the books of account and other documents for a period exceeding

thirty days after all the proceedings under the Indian Income Tax Act, 1922 (11 of 1922), or this Act in respect of the years for which the books of account or other documents are relevant are completed."

4. A series of judicial decisions have held that books and documents seized in a search conducted u/s 132 of the Act may be retained by the Assessing Officer under Sub-section (8) of that section only : when (i) reasons are recorded in writing by the Assessing Officer seeking the Commissioner's approval ; (ii) the Commissioner in fact approves the retention ; (iii) both the recorded reasons of the Assessing Officer as well as the Commissioner's approval are communicated to the assessee concerned ; and (iv) the communication is made as expeditiously as possible, (See Commissioner of Income Tax, West Bengal III and Others Vs. Oriental Rubber Works, ; Thanthi Trust Vs. Commissioner of Income Tax and others, and Jorawar Singh Baid Vs. Assistant Commissioner of Income Tax and Others, .

5 According to the petitioner, the last two preconditions to the retention of the petitioner's books, share scrips and documents were missing at least after June 30, 1983.

6. According to the respondents, after the seizure u/s 132(1) on December 23, 1981, by letter dated June 4/7, 1982, the Assessing Officer (then known as the Income Tax Officer), had applied for approval to the Commissioner for retention of the documents seized recording his reasons in the letter for such request. The Commissioner approved the retention by an order dated June 15, 1982. Retention was permitted till June 30, 1983. The Commissioner's order dated June 15, 1982, was served on the petitioner on June 18, 1982.

7. It is said by the respondents that by subsequent orders dated June 23, 1983, June 21, 1984, and June 18, 1985, the Commissioner had extended the period for the retention of the documents u/s 132(8) of the Act till March 31, 1987, and on all occasions the orders had been communicated to the petitioner. The writ petition had been filed on December 10, 1985. It is, therefore, submitted that the retention of the books, documents, etc., was lawful.

8. The submission of the respondents even on the admitted facts is . unacceptable. As has been already noted, it was incumbent on the respondents not only to serve the petitioner the orders of the Commissioner but also the reasons recorded by the Assessing Officer. Nowhere in the affidavit of the respondents has it been said that this had been done. Even assuming that the Commissioner's approval alone had to be served, the averment of service of the Commissioner's orders dated June 23, 1983, and June 21, 1984, are absolutely vague. Nothing has been said as to how the service was effected or when such service was made. This may be contrasted with the averment relating to service of the Commissioner's order dated August 18, 1985, (sic) where the date of service has been specifically mentioned.

9. Besides, the averments of service have been affirmed by respondent No. 1 as

based on information received from the records. I have scrutinised the records. The records certainly do not support the case of service of the orders dated June 23, 1983, or June 21, 1984, on the petitioner. There is no receipt as there is in the case of the orders dated June 15, 1982, and June 18, 1985. There is no reference in the order sheet to these orders of the Commissioner let alone to their service. However, I did not let the matter rest there. I directed the respondents to produce the despatch register relevant to the period in question to show service. The respondents said that the despatch register was not traceable.

10. In this state of evidence of service, the respondents contended that this court should not decide the question of service. It was said that respondent No. 1 had pledged his oath to the service. Therefore, the question was a disputed one.

11. Secondly, it was said that the petitioner should be relegated to the remedy available to him u/s 132(10) of the Act.

12. Thirdly, it was contended that the respondents were entitled to the benefit of the presumption u/s 114(e) of the Evidence Act particularly when the first and second orders of the Commissioner had been admittedly served and the last order referred to the earlier order of approval. It is urged that the silence of the petitioner for several years after receipt of the first order of the Commissioner was in keeping with the respondents' case that the orders had in fact been communicated to him.

13. Finally it is contended that the writ petitioner was not entitled to any relief as he had deliberately suppressed the receipt of the last order of the Commissioner dated June 18, 1985, which had been received by him prior to the filing of the writ petition.

14. None of the aforesaid contentions of the respondents is acceptable. The officer who has affirmed the affidavit on behalf of the respondents was not the officer who served the orders. The deponent has not stated that he had anything to do with the service of the orders of the Commissioner except for the last order. As far as the orders dated June 23, 1983, and June 21, 1984, are concerned, the Officer has affirmed the affidavit on the basis of the records. The absence of the affidavit of the Officer claiming that in fact he effected service on the petitioner coupled with the fact that the records do not support the averments made in the affidavit, the court can certainly come to a finding that the two orders in question, namely, of June 23, 1983, and June 21, 1984, had not been served on the petitioner at all. The question cannot be said to be a disputed one.

15. The second contention of the respondent is unacceptable because Section 132(10) envisages an application to the Board from the approval of the Chief Commissioner or Commissioner under Sub-section (8). This pre-supposes that the approval had been received by the petitioner. The grievance of the petitioner in this writ petition is that the approval was not received at all. This is not a

matter in respect of which an application could have been made to the Board, and the remedy u/s 132(10) cannot be considered to be an alternative remedy at all.

16. As far as the third contention of the respondents is concerned, the presumption u/s 114(e) of the Evidence Act, namely, that judicial and official acts have been regularly performed does not extend to a situation where the performance of the act itself is in question and not the regularity of the act (see *Rasiklal Amritlal Doshi Vs. A. Nundy*, Additional Income Tax Officer, Section III (Central), Bombay and Others, . Even assuming that a presumption could be raised u/s 114(e) of the Evidence Act, it is well-established that such a presumption is a rebuttable one. There is sufficient positive evidence on record to rebut the presumption, if any, in this case.

17. In any event, this presumption is not available as far as the requirement of service of the recorded reasons of the Income Tax Officer is concerned.

18. As far as the last contention of the respondents on this aspect is concerned, suppression of a fact would be sufficient to disentitle a writ petitioner from any relief, provided the suppression is such as to make a material difference to the outcome of the case. In the case before me irrespective of the service of the Commissioner's order dated June 18, 1985, in view of the finding of the court regarding the non-service of the recorded reasons of the Income Tax Officer on the petitioner, the petitioner would have succeeded in any case.

19. For the reasons stated, the retention of the books and documents by the respondents cannot be sustained. It may be mentioned here that after the writ application was moved, an order was passed on February 6, 1986, by Khastgir J., appointing a special officer for taking charge of the seized share scrips and for holding the same until further order of this court. If the share scrips are treated as documents, they would be covered by the reasoning in this judgment and must be returned. If they are not treated as documents, they must be returned by virtue of the fact that the order u/s 132(5) which was passed in 1982 after the search and seizure only permits retention of Rs. 90,000 seized and nothing else.

20. The application is accordingly allowed and the respondents are directed to return the seized documents, books, etc., to the petitioner within one week from the date of service of the operative portion of this judgment upon them. The Special Officer will stand discharged after handing over the share scrips in his custody to the petitioner also within such period. There will be no order as to costs.

21. All parties concerned are to act on a signed copy of the operative part of this judgment on the usual undertaking.

September 14, 1993 :

22. It appears that subsequent to the order dated February 6, 1986, an order

was passed on February 20, 1986, by Khastgir J., as His Lordship then was, correcting the order dated February 6, 1986, by directing the special officer to take possession not only of the share scrips but also of the books of account and documents set out in annexure-A to the petition.

23. Accordingly, in addition to the return of the share scrips the special officer will also return the books of account and documents taken possession of by him.

23. The petitioner shall pay the special officer a further 100 G. Ms. in full and final settlement of his dues.

24. Let this order be incorporated in the judgment and order passed by this court on September 13, 1993.

25. All parties concerned including the special officer and the Department are to act on a signed copy of the minutes of this order on the usual undertaking.

26. Let xerox copies of the judgment dated September 13, 1993, duly signed by the Assistant Registrar of this court be given to the parties upon their undertaking to apply for the certified copy of the judgment and on payment of usual charges.