
(1989) 10 AHC CK 0025

In the Allahabad High Court

Case No : Writ Petition No's. 6218 of 1987 and 22 of 1988

Shyam Jewellers and Another

APPELLANT

Vs

Chief Commissioner (Administration) and Others

RESPONDENT

Date of Decision : 06-10-1989

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226

Income Tax Act, 1961 — Section 132, 132(1), 132(11), 132(4), 132(5)

Citation : (1992) 196 ITR 243

Hon'ble Judges : U.C. Srivastava, J; S.H.A. Raza, J

Bench : Division Bench

Advocate : Mahesh Chandra and W. Chandra, for the Appellant; S.C. Misra, for the Respondent

Judgement

S.H.A. Raza J.

1. M/s. Shyam Jewellers and its proprietor have filed these writ petitions claiming various reliefs against the Income Tax Department and the action taken by it which, according to the petitioner, is against propriety and legality and which has caused huge loss and is the result of mala fide and calculated action.

2. The first writ petition (Writ Petition No. 6218 of 1987) is against the action to seal off the petitioner's shop and the notice which has been pasted over the shop. The petitioners have prayed for issue of a writ, order or direction for quashing the order contained in annexure No. 2 to the writ petition and have further prayed for issue of a writ in the nature of certiorari for quashing the first information report (annexure No. 1). In the second Writ Petition No. 22 of 1988, the original relief was for the issue of a writ of mandamus, directing the opposite parties to restore the articles, etc., to the petitioners, which were seized and to declare the sealing of the shop as illegal and without jurisdiction. The petitioners have also prayed for a direction to the effect that the ornamental articles seized by the opposite parties were not liable to be seized ; and further for issue of a writ in the nature of certiorari for quashing the authorisation to the Income Tax

Officer u/s 132 of the Income Tax Act, 1961.

3. Subsequently, an order u/s 132, Sub-section (5), of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), was passed as a result of which the writ petition was amended and relief for quashing annexure No. 3 dated January 5, 1988, passed by opposite party No. 3 was also made.

4. It has been stated that the petitioner-firm has been carrying on business in gold and silver and has been obeying the provisions of the Excise Act and have been submitting the details of receipt or purchase of gold articles quarterly and have been maintaining all the details and have furnished them to the Excise Department. The details up to July, 1987, have already been furnished to the Excise Department and they have also complied with the provisions of the Sales Tax Act and the authorities of these Departments used to regularly visit the shop and have been carrying on their duty of screening and the petitioners have been submitting their Income Tax returns regularly and have been properly maintaining their accounts. It has been stated that, even after the search, not only the return of the previous years, but of the subsequent years were filed and the account books have been accepted and the Income Tax Department people have been making survey of the shop in the past and they have found nothing incriminating. It has been stated that the officers of the Income Tax department used to identify themselves to the person who happened to be the owner or the partner of the firm at the time of their visit. In the past, these surveys used to be maintained regularly as most of the firms/shops are subject to the payment of Income Tax notwithstanding the small business. It has further been asserted that the legal position has changed and income to the extent of Rs. 2 lacs per year has been exempted from the payment of Income Tax and as such, such cases were then not subject to survey or verification by the Income Tax Department. The petitioners have also made reference to the woes of the shopkeepers who have been harassed by the Income Tax inspectors and officers and have stated that these officials have been unlawfully and illegally earning money by harassing the shopkeepers by paying visits, but by the amendment of the said provision, the earning of such persons has been badly affected as the amended provision has shortened their right to visit shops. It has been stated that, in order to harass the petitioners and other shopkeepers unusual and unidentified visits were made by persons claiming to be officers/employees of the Income Tax Department, and, as such, a situation has arisen whereby the shops of the petitioners and others have been forcibly closed and their business has been badly affected.

5. Reference to the happenings on August 31, 1987, has been made by the petitioners. It has been stated that, on that date, six persons rushed to the shop of the petitioners without disclosing their identity and they started threatening the petitioners. The petitioners, however, did not stop such persons from carrying on survey of the shop but required them to disclose their identity and enquired from them as to which Department they belonged and asked them as to why

they were using abusive language when the petitioners have always been complying with the provisions of the Income Tax Act. It has further been stated by the petitioners that, in the meantime, many persons, including owners of a few shops, collected at the spot and they requested the visiting team to disclose their identity but they, instead of disclosing their identity, threatened the petitioners to close down the firm and the business at Aminabad. It has been stated that, when the aforesaid persons did not find anything illegal in the shops, they, without disclosing their identity, left the shop. The petitioner, after closing down the shop at 7.30 p.m. on August 31, 1987, left for his residence. It has further been stated that in the midnight of August 31, 1987, the petitioner No. 2 and his employees and a number of persons of the vicinity received information that a number of shops have been closed down by putting seal over the locks and this was done by the officers of the Income Tax Department with the help of the police of the police station, Aminabad. The petitioners tried to know the reason on account of which the shops were sealed off but could not get any clear answer, but, ultimately, the petitioners received a copy of a first information report containing certain allegations against a number of persons as a result of which their shops were sealed off. The first information report was lodged at 10.30 p.m. in the night of August 31, 1987, in which it has been stated that, while making survey, the petitioners and other persons badly dealt with the officers and officials and thus the petitioners committed breach of Section 133A of the Income Tax Act. Even in the first information report, it was not stated that petitioner No. 2, the proprietor of petitioner No. 1, in any way opposed the survey. It has been alleged that objections were made by petitioner No. 2 to the effect that as there was an apprehension of terrorists entering the shop and taking away goods and articles and money, the persons entering the shop must disclose their identity. It has been stated that although the so-called survey was made at 11 a.m., the first information report was lodged at 1.30 p.m. which, according to the petitioner, was lodged after ten hours. On September 1, 1987, on the shutter of the shop an order was found pasted which was alleged to have been passed by the Commissioner of Income Tax purporting to have been passed, in exercise of the powers conferred on him under Sub-section (3) of Section 132 of the Act. But even after the expiry of one week, the shop continued to remain sealed off with the result that the petitioner had to incur heavy losses. Ultimately, the petitioners were compelled to file a writ petition before this court on September 7, 1987. Notice of the writ petition was given to the departmental counsel who placed the notice dated September 7, 1987, before the court which reads as under :

"Messrs. Shyam Jewellers, Aminabad, Lucknow. As you are aware that an operation u/s 132 of the Income Tax Act, 1961, is continuing in your case, your premises were sealed on August 31, 1987, as due to law and order problem the search operations could not be carried out.

Now you are required to see the undersigned either today or tomorrow along with the keys of the sealed premises so that action for opening the seals and

completing the work u/s 132 of the Income Tax Act, 1961, may be taken up earliest.

(Sd.) Authorised Officer u/s 132(1) of the Income Tax Act, 1961, September 7, 1987."

6. In view of this notice which was produced before the court, the court was not inclined to grant an interim order at that stage as the opposite parties expressed readiness to open the seal, and, as such, it was provided :

"This action, i.e., opening of the seals or removal of the locks and the action contemplated u/s 132 of the Income Tax Act shall be done in the presence of the petitioners or any of their authorised representatives . . ."

7. On behalf of the petitioners, it was stated before the court that the seals and locks may be removed from the business premises at 10 a.m. and this was in response to the request made by the Department that since both the parties are present in court, the date and time on which the seals and locks may be removed may be indicated. Since indication was given before the court, as such, orders in this behalf were passed. It appears that the locks and and seals were removed in pursuance of this order.

8. In Writ Petition No. 22 of 1988, it has been stated that the shop was reopened on September 9, 1987, by the Income Tax authorities and the Income Tax authorities on that date carried out a search and took away the entire gold ornaments and jewellery, etc., valued at Rs. 20 lacs. It has been stated that although the petitioners had disclosed Rs. 3 lacs by way of voluntary disclosure, the entire articles were not liable to be seized. It has been stated that, on that day, survey of five shops in different parts of the city were made and all the surveys were converted u/s 133 of the Act to raids., i.e., search and seizure u/s 132 of the Act and, in two cases, seizure was done while in the other three cases, seizure could not be done.

9. It has been pleaded by the petitioners that authorisation, if any, given by the Chief Commissioner (Administration) U. P./The Commissioner of Income Tax, Lucknow, to opposite parties Nos. 2 and 3 u/s 132 of the Act and the basis for forming reasonable belief was not given to the petitioners although a request for the same was made. Aggrieved against the survey and seizure, the petitioners preferred the other Writ Petition No. 22 of 1988, a reference to which has already been made earlier. This writ petition was filed before this court on January 4, 1988, and it appears that counsel for the Income Tax Department prayed for time to obtain instructions. The case came up on January 6, 1988. On the date when the petition was filed, viz., January 4, 1988, final orders u/s 132(5) of the Act had not been passed. As would be evident from the order sheet dated January 6, 1988, it appears that learned counsel for the Department made a statement that final orders have been passed on January 5, 1988, which had been issued on the same day by registered post to the petitioners. On behalf of the petitioners, it was stated that the writ petition would have to be amended

and as such, the case was directed to be taken up on January 11, 1988. On January 11, 1988, the case was directed to come up before another Bench on January 15, 1988. It was also directed that a counter-affidavit to the amendment application might be filed within the said period. Counter-affidavit to the amendment application was filed and the application was opposed.

10. On behalf of the petitioner, it was stated that the record of the case was produced and the court was requested to look into the letter sent by the petitioners to the Department on January 4, 1988, under the orders of the court which was not sent to the Income Tax Officer who passed the order as he was not a party to the proceedings.

11. In the counter-affidavit, it was stated that there was a typographical mistake in the date of the order. In fact, the order was passed on January 5, 1988, but wrongly it was typed as January 4, 1988, and the Income Tax Officer passed the order on January 5, 1988, and signed every page of it. On behalf of the petitioner, it was contended that hurriedly because of the writ petition, orders were passed behind their back on January 4, 1988, and the date admittedly was changed to 5th by hand and the cuttings were not initialled by anyone and the things were suspicious. Amendment application was allowed on January 20, 1988.

12. In the counter-affidavit, it was stated that the final orders had been passed and the petitioner had got an alternative remedy of filing an appeal u/s 132(11) of the Act. As the petitioners had already filed an appeal, as such, the writ petition ought to be dismissed on the ground of alternative remedy.

13. A perusal of Section 132 of the Act reveals that there is no provision for appeal and only objections can be filed before the Commissioner of Income Tax u/s 132(11) and which the petitioners have filed, through the authorisation which has been challenged by the petitioners and which has been justified by the opposite parties has been given by an officer superior in rank to the Income Tax Officer, i.e., by the Commissioner of Income Tax. Learned counsel for the opposite parties contended that, u/s 132(11), the Income Tax Commissioner has got wide powers and can pass any order which he deems fit and as the petitioner has already filed such an objection subsequently, the court cannot enter into the merits of the case including sealing of the shop, search and seizure and the writ petition deserves to be dismissed.

14. Both the writ petitions have been admitted and counter and rejoinder affidavits have been exchanged between the parties. Learned counsel appearing on behalf of the opposite parties vehemently challenged the maintainability of the writ petition on the ground of availability of an alternative remedy.

15. In the case reported in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , which was a case arising out of an order u/s 35 of the Act, no appeal lay, but the order was revisable. Instead of filing a revision application, the petitioner filed a writ petition in the High Court at Allahabad and the court heard the said writ petition on merits. The petition had been entertained by the High Court. It was

observed (at page 31 of 78 ITR) :

"If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved, the period prescribed by Section 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition which was entertained and was heard on merits."

16. Non-entertainability of the writ petition on the ground of alternative remedy is a self-imposed restriction and the remedy under Article 226 of the Constitution being discretionary, the High Court may refuse to entertain the writ petition where there exists an equally adequate and efficacious alternative remedy. There being no absolute bar in certain circumstances and in certain cases, like that the statute itself is ultra vires or that fundamental rights have been violated or that there is gross violation of the principles of natural justice or that the order complained of is void on the face of it or there is palpable defect, the writ petition can be entertained but that depends on the nature and facts of the case.

17. On behalf of the petitioner, it was contended that, in the instant case, there has been encroachment upon his fundamental rights and, without any authority of law, his business was forcibly closed till the High Court intervened and the powers of search and seizure have been exercised in gross violation of the provisions of law and the powers have been so exercised for malicious and collateral purposes and further by keeping the High Court in the dark while the writ petition was pending. The order u/s 132(5) of the Act was hurriedly passed in order to defeat the process of law and even otherwise, the objection u/s 132(11) of the Act was not an equally efficacious remedy. It was contended on behalf of the petitioner that, in an objection, the reliefs claimed by the petitioners against sealing off, search and seizure, cannot be granted. The filing of the objection which was done by the petitioners subsequently by way of caution, can also not stand in the way.

18. On behalf of the opposite parties, in support of the plea raised with regard to dismissal of the writ petition on the ground of alternative remedy, reference to certain cases was also made.

19. Reference was made to the case in Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others, in which it was observed (headnote) :

"Where an assessee gives no explanation in his writ petition against an order of the Commissioner u/s 33B of the Indian Income Tax Act, 1922, for not preferring an appeal under the Act against the Commissioner's order and justifying his recourse to the special jurisdiction of the High Court under Article 226 of the Constitution, the High Court would be justified in dismissing the writ petition in limine."

20. In *Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, , which was a case u/s 33B of the Act, it was observed (headnote) :

"The High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority which is, *ex facie*, with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises a question of jurisdiction or of infringement of fundamental rights of the petitioner."

21. In *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , it was observed (headnote) :

"Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as, for instance, where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters."

22. In *Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta*, , which was a case under the Sales Tax Act, the very same principle was laid down. In *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , which was also a case under the Sales Tax Act, it was observed (at page 672) :

"... the Act provides for an adequate safeguard against an arbitrary or unjust assessment. The petitioners have a right to prefer an appeal under Sub-section (1) of Section 23 of the Act subject to the payment of the admitted amount of tax as enjoined by the proviso thereto. As regards the disputed amount of tax, the petitioners have the remedy of applying for stay of recovery to the Commissioner of Sales Tax under Clause (a) of the second proviso to Sub-section (1) of Section 13 of the Act."

23. Reference was also made to certain High Court decisions and particularly to the case of *Karnataka Industrial Areas Development Board Vs. Commissioner of Income Tax and Another*, in which it was observed that the impugned orders of assessment can be challenged only by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. Reference was also made to an unreported decision of this court in Writ Petition No. 105 of 1988, *Smt. Punam Tandon Vs. Director of Inspection and Others*, , which was filed challenging the order u/s 132(5) of the Act. The court dismissed the said writ petition in limine vide order dated January 11, 1988, on the ground that the assessee had a statutory remedy available against the order purported to have been passed u/s 132(5) of the Act by filing objection u/s 132(11) of the Act. Copy of the said

decision has not been filed along with a counter-affidavit and it is not known under what circumstances the said writ petition was filed.

24. On behalf of the petitioners, reference to certain cases in respect of the plea of availability of alternative remedy which, according to the petitioner, is not an alternative remedy in respect of all the reliefs claimed and which will not stand even as a bar to the reliefs which the petitioner can get u/s 132(11) of the Act, has been made.

25. In *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, it was held that where a person aggrieved has availed of a statutory remedy, such as an appeal or revision, the original order merges in that of the superior authority so that thereafter his remedy, if any, lies only against the decision of the appellate authority and not the original order. If there is an erroneous interpretation of the statute, alternative remedy will not be a bar.

26. In *Beharilal Shyamsunder Vs. Sales Tax Officer, Cui Circle, Cuttack and Another*, it was held that if a decision is without authority of law or ultra vires or without any material to support the conclusion that the statutory conditions precedent for the assumption of jurisdiction did exist, but not where the determination of the jurisdictional fact itself involves a long and elaborate inquiry on taking evidence and cannot be made on affidavit, it will not be a bar under Article 226 of the Constitution.

27. In *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, which was a case under the Sales Tax Act, it was held that, where fundamental rights have been infringed by the impugned order, i.e., by the demand of a tax which offends against Article 14 or 19 of the Constitution, the petitioner can get relief under Article 226 of the Constitution before the High Court. Similarly, in *Union of India (UOI) and Others Vs. Haji Mastan Mirza*, which was a case under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short "SAFEMA"), it was held that pendency of appeal would not bar the maintainability of a petition under Article 226 of the Constitution of India. The facts of the said case were distinguishable as it was found that the appellant could not move a court against his detention and he was released after the emergency was lifted and it is only thereafter that he could pursue the matter.

28. In *Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc.*, which was a case u/s 132 of the Act, the Hon"ble Supreme Court, after reversing the decision of the Allahabad High Court, allowing the writ petition, sent back the matter again to the High Court. It was observed (headnote of *Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc.*, :

"In appropriate cases, a writ petition may lie challenging the validity of the action u/s 132, Income Tax Act, 1961, on the ground of absence of power or on a plea that proceedings were taken maliciously or for a collateral purpose. But normally

the High Court in such a case does not proceed to determine merely on affidavits important issues of fact especially where serious allegations of improper conduct are made against public servants. If the High Court is of the view that the question is in respect of which an investigation should be made in a petition for the issue of a writ , it should direct evidence to be taken viva voce."

29. In *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, , which was also a case u/s 132 of the Income Tax Act, regarding limitation prescribed u/s 132(5) of the Act, no observations were made. The first writ petition filed against search and seizure was disposed of with the consent of the parties and the court quashed the impugned order and directed that opportunity be given to the petitioner in respect of the contentions raised by him. No observation in this behalf was made in the second writ petition except that the writ petition was maintainable.

30. Reference was also made to the case of *Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others*, , which was not a case under any of the taxation Acts. It was held that a writ petition challenging a null and void order is maintainable notwithstanding the existence of an alternative remedy under the statute. Lastly, reference was made to a Division Bench decision of this court in *Writ Petition No. 410 of 1987 Dr. Nand Lal Tahiliani Vs. Commissioner of Income Tax and Others*, , decided on December 22, 1987. The writ petition was allowed by the High Court and the SLP against the same was dismissed by the Hon"ble Supreme Court. The said writ petition was directed against an authorisation warrant issued by the Assistant Director u/s 132 and the restraint order issued u/s 132(3) of the Act. The writ petition was entertained and both the orders were quashed.

31. The position, thus, is that where a statutory alternative remedy is provided, particularly in matters of revenue, a writ petition is not to be entertained squarely, but the same is entertainable. A petition under Article 226 of the Constitution normally is not to be entertained in case a statutory alternative equally efficacious remedy is open. This self-imposed restriction and rule of convenience and desirability applies in matters of revenue also. But there is no absolute bar to the entertainability of a writ petition in suitable cases even if an alternative remedy is available. When the statute itself is ultra vires, there is encroachment on the fundamental rights ; question of jurisdiction is seriously involved ; the proceedings were taken maliciously and for collateral purposes or where the private or public wrongs are so inextricably mixed up and the vindication of public justice requires or when the order on the face of it is erroneous, the bar of availability of alternative remedy may not stand in the way of entertainability of a petition under Article 226 of the Constitution of India.

32. In the instant case, the proceedings started with survey followed by sealing of the premises and then in search and seizure and ended by passing of an order u/s 132(5) of the Income Tax Act ; obviously, on the date on which the request was made that the case may be taken up on the third day. The provisions

regarding survey are contained in Section 133A of the Act, which, in so far as it is relevant, reads as under :

"133A.(1) Notwithstanding anything contained in any other provision of this Act, an Income Tax authority may enter-

(a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction,

at which a business or profession is carried on, whether such place be the principal place or not of such business or profession, and require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession-

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place,

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

Explanation.--For the purposes of this sub-section, a place where a business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept.

(2) An Income Tax authority may enter any place of business or profession referred to in Sub-section (1) only during the hours at which such place is open for the conduct of business or profession and, in the case of any other place, only after sunrise and before sunset.

(3) An Income Tax authority acting under this section may,--

(i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom,

(ii) make an inventory of any cash, stock or other valuable article or thing checked or verified by him,

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

(4) An Income Tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered, any

books of account or other documents or any cash, stock or other valuable article or thing . . .

Explanation.--. . . "

33. The said section nowhere provides for sealing of the business premises before or subsequent to the survey or even if there is difficulty in making a survey.

34. Section 132 which provides for search and seizure, as it stood at the relevant point of time, reads as follows :

"132. Search and seizure,--(1) Where the Director of Inspection or the Commissioner or any such Deputy Director of Inspection or Inspecting Assistant Commissioner as may be empowered in this behalf by the Board 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, or would not be 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), then,--

(A) the Director of Inspection or the Commissioner, as the case may be, may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income Tax Officer, or

(B) such Deputy Director of Inspection or Inspecting Assistant Commissioner, as the case may be, may authorise any Assistant Director of Inspection or Income Tax Officer,

(the officer so authorised in all cases being hereinafter referred to as the authorised Officer) to-

(i) enter and search any building, place, vessel, vehicle or aircraft 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 ;

(iia) search any person who has got out of or is about to get into or is in the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing ;

(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 :

Provided that where any building, place, vessel, vehicle or aircraft referred to in Clause (i) is within the area of jurisdiction of any Commissioner, but such Commissioner has no jurisdiction over the person referred to in Clause (a) or Clause (b) or Clause (c) then, notwithstanding anything contained in Section 121, it shall be competent for him to exercise the powers under this sub-section, in all cases where he has reason to believe that any delay in getting the authorisation from the Commissioner having jurisdiction over such person may be prejudicial to the interests of the Revenue . . .

(5) Where any money, bullion, jewellery or other valuable article or thing (hereinafter in this section and in Sections 132A and 132B referred to as the assets) is seized under Sub-section (1) or Sub-section (1A), the Income Tax Officer, after affording a reasonable opportunity to the person concerned of 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 Inspecting Assistant 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 ;

(iia) determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Indian Income Tax Act, 1922, (11 of 1922) or this Act, as if the order had been the order of regular assessment ;

(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), (ia) 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 and may also determine the interest or penalty, if any, payable or imposable accordingly :

Provided further that where a person has paid or made satisfactory arrangement for payment of all the amounts referred to in Clauses (ii), (ia) 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 . . .

(11) If any person objects for any reason to an order made under Sub-section (5), he may, within thirty days of the date of such order, make an application to such authority, as may be notified in this behalf by the Central Government in the Official Gazette (hereinafter in this section referred to as the notified authority), stating therein the reasons for such objection and requesting for appropriate relief in the matter.

(12) On receipt of the application under Sub-section (10) the Board, or on receipt of the application under Sub-section (11) the notified authority, may, after giving the applicant an opportunity of being heard, pass such orders as it thinks fit."

35. It is, thus, to be noticed that there is no provision for sealing of the business premises either u/s 133A or Section 132 or any other section of the Income Tax Act. The business premises of the petitioner was sealed off, obviously after the lodging of the F.I.R. in which complaint of forcible stoppage of the work by various persons and tearing of the papers and taking out of money from their pockets was made by the Income Tax authorities with the help of the police stationed at Aminabad, Lucknow. The order of sealing which was affixed on the shutter of the shop was purported to have been passed in exercise of powers under Sub-section (3) of Section 132 of the Act. Sub-section (3) of Section 132 of the Act also nowhere provides for sealing of a shop and the stage of Section 132(3) arises when an authorisation is given and only thereafter the authorised officer can, where it is not practicable to seize any such books of account, other

documents, 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. It is to be noted that no other shop was sealed off and no seizure of articles was made from it although a similar incident is said to have taken place in another shop which is quite near the shop of the petitioner. No explanation for the singling out of one premises or shop for action has been given.

36. The act of sealing of a particular business premises purported to be in exercise of powers u/s 132 of the Act is a deliberate act in gross violation of the specific provisions of law which the Income Tax Officer or a higher officer is supposed to know and the said action was not only an abuse of the power or misuse of the power but was a malicious act with a collateral object. The sealing of the business premises for which there was no provision in law was in violation of the fundamental rights guaranteed to a citizen under Article 19(1)(g) of the Constitution of India which guarantees the right to practice any profession, or to carry on any occupation, trade or business and also under Article 300A of the Constitution of India inasmuch as the same amounted to temporary deprivation of property without authority of law.

37. As directed, the file of the Department was produced before us, but it was taken back stating that whenever it will be required, it will be shown. After closure of arguments, photostat copies of four documents were given. The documents so given created certain doubts. During the course of dictation of judgment, August 28, 1989 was fixed and learned counsel for the Department was directed to produce the file. Learned counsel prayed for three days' time ; as such, the third day, viz., August 31, 1989, was fixed. On that date, two files were produced, one containing five documents and the other containing other papers, though initially whatever papers were produced were contained in one file.

38. The report on the back of which the order of authorisation was passed indicates that the survey u/s 133A was under progress at four shops, two in Aminabad and two elsewhere and the partners and owners of the shops had forcibly stopped the survey operation with the help of a number of persons and also had harassed the officials who had gone there for survey. It is further mentioned that reports of four officers were placed on the file. This sentence apparently is in different ink and in a different hand. It further mentions that it is suspected that a huge amount of income is concealed at those places and, therefore, they have resisted the survey operation. It also mentions that warrants u/s 132(1) may be issued in the following names for the above premises. It also indicated that the notice if issued u/s 131 shall not be complied with. This sentence again seems to have been inserted between two lines subsequently in another ink and in another handwriting. These two insertions are

not initialled by anyone. Therefore, in the order sheet, the names of four shop keepers and their partners including the petitioner have been given and in the bottom it has been mentioned "search warrants are placed below for signature please". The same bears the signature of the Deputy Director of Inspection. The Chief Commissioner of Income Tax, on the back of it, seems to have passed the following order :

"Discussed with Deputy Director of Inspection. The case is covered u/s 132(1)(c) and (b). I am satisfied that it is a fit case for action u/s 132(1) in the shop premises. Authorisation issued."

39. No description of these documents finds a place either in the counter-affidavit which was filed for opposing the amendment application or in the counter-affidavit filed to the writ petition itself or even in the four reports which finds place in the same.

40. In the first file produced, apart from the documents mentioned above, four reports said to have been given by the members of the survey party also find place. It is not possible for us to say whether the three reports were earlier on the record or not nor do our notes taken when the case was argued indicate any such thing. The report which was shown earlier was by one "Srivastava", Income Tax Officer, addressed to I-A, I. C. On the margin, the time of its receipt is shown to be 3.15 p. m. To our surprise, we have found that in the other three reports which are on plain papers, the time of its receipt is shown to be 3.15 p. m. and in the other two it is 3.45 p. m. All were received by the same person and his signatures were on the margin in all the four documents and they appear to be in four different pens and ink. We will not say anything further in this behalf as we cannot act as experts nor are we called upon to give findings on it. Strangely enough, in one of the reports given by the same Mahesh Chandra on a plain piece of paper, the value of goods said to have been concealed is said to be of the value of about Rs. 35,000, though, according to the first investigation report on which authorisation order was passed, the stage for such an enquiry did not reach because of the alleged vandalism committed by the shop-keepers, yet the note on the back of which the Chief Commissioner passed his order does not indicate anything at all regarding concealed articles and their value. If there was such a report till then, normally, it should have found a place in the note which was before the Chief Commissioner of Income Tax. The passing of a general authorisation order in respect of all four shops could be said to negative the existence of any statement or report at that time before the Chief Commissioner of Income Tax when he passed the authorisation order.

41. In the report of the Income Tax Officer which is said to have been received on March 31, 1987, at 3.15 p. m. it has been mentioned, "as per your directions, survey was being carried out in the business premises of Messrs. Shyam Jewellers, Aminabad, Lucknow. Some loose papers were found in the premises which disclosed heavy sales. Stock of gold jewellery was being weighed. During the course of survey, Sri Banwari Lal Kanchal, Secretary of the Vyapar Mandal,

entered the premises and asked for my identity card. I showed the same to him. Then he asked for authorisation of survey. I told him that I am an Income Tax Officer and I do not need any authorisation. On this, he flared up and used filthy language. By this time, a mob of about more than hundred persons had collected. They all created hindrance to the survey and Sri Kanchhal took me out of the shop and prohibited me from carrying out the survey. The proprietor of the shop, Sri Shyam Kartik, tore off the statement given by him and also the papers which were found in his shop. The stocks of gold and silver ornaments in the shop are expected to be of about Rs. 25 to 30 lacs. No proper books of account were found in the shop which give rise to a suspicion that the entire stock is unaccounted. Now, the shutters of the shop have been closed by the mob and the shop keepers and it is not possible to carry out survey. Kindly issue further instructions. I am sending this information to you through Sri Devi Dayal, Inspector, who will narrate to you the entire story in detail."

42. In the counter-affidavit, it has not been stated anywhere that the report of the Income Tax Officer, which was given to the Income Tax Assistant Commissioner on August 31, 1987, was before the Commissioner of Income Tax or it was placed before him. The Commissioner of Income Tax has also not referred to any such report and, from his order, it appears that the authorisation order was passed after orally discussing the matter with the Deputy Director (Investigation), in respect of all the shops and not any particular shop which is evident from the word "premises".

43. Section 132 of the Income Tax Act empowers the Chief Commissioner of Income Tax or the Commissioner of Income Tax to pass an order for search and issue a warrant authorising a particular officer when he has reason to believe that any of the three conditions mentioned in Sub-clauses (a), (b) and (c) of Sub-section (1) of Section 132 of the Income Tax Act exists. Clause (b) of Sub-section (1) of Section 132 applies to any person to whom a summons or notice has been or might be issued and who 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 Income Tax Act, 1961. This clause does not apply to the petitioners' case as no notice was issued to the petitioner nor was under contemplation till then and the case was not for documents, but for undisclosed bullion, jewellery, etc. Clause (c) of the said section applies when the person is in possession of undisclosed bullion, jewellery, etc., and the income from it had not or would not be disclosed for the purposes of the Income Tax Act.

44. If either of these conditions is not satisfied or have not been adhered to, then the authority is precluded from invoking the powers under this section. It is the information which is the foundation of action by the authority concerned. The information being the foundation, it has not only to be authentic but capable of giving rise to the inference that the person was in possession of undisclosed income which was not or would not be disclosed (See Ganga Prasad Maheshwari and Others Vs. Commissioner of Income Tax, .

45. When there is sufficient reason to believe that any person was in possession of any money, bullion or jewellery or other valuable article which has not been or would not be disclosed for the purpose of Income Tax only then the order of search and seizure could be passed. The words "reason to believe" postulate application of mind and assigning of reasons. The words used are "reason to believe" and, as such, it has a rational nexus between "reason" and "belief" as has been observed by the Hon'ble Supreme Court in Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, , while interpreting a similar provision in Section 147 of the Income Tax Act.

46. Similarly, in S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore, , it has been held (headnote) :

"The expression "reason to believe" in Section 34 does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The belief must be held in good faith ; it cannot be merely a pretence. It is open to the court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section."

47. In Gulab and Company and Another Vs. Superintendent of Central Excise (Preventive) and Others, , it has been observed (headnote) :

"The words "reason to believe" in Section 132(1)(c) of the Income Tax Act, 1961, refer to a belief that the money or other asset belongs to a particular individual and such money or other asset represents undisclosed income of that individual. If these two conditions are satisfied, a warrant would issue. If the Commissioner has reason to believe that the money or other asset is the undisclosed income of a particular individual, he could authorise the Income Tax Officer to seize such money or other asset as that of that individual wherever it may be found and whoever may be in actual physical control or possession of the same. The action is against the person who is believed to have not disclosed that money or other asset as his income and against such undisclosed money or asset."

48. In Ganga Prasad Maheshwari and Others Vs. Commissioner of Income Tax, , it has been observed by a Division Bench of this court (headnote) :

" "Reason to believe" has been considered to be the most salutary safeguard on the exercise of power by the officer concerned. It is made up of two words "reason" and "to believe". The word "reason" means cause or justification and the word "believe" means to accept as true or have faith in it. Before the officer has faith or accepts a fact to exist there must be a justification for it. The belief may not be open to scrutiny as it is the final conclusion arrived at by the officer concerned as a result of mental exercise made by him on the information received. But the reason due to which the decision is reached can always be examined. When it is said that the reason to believe is not open to scrutiny, what is meant is that the satisfaction arrived at by the officer concerned is immune

from challenge, but, where the satisfaction is not based on any material or it cannot withstand the test of reason, which is an integral part of it, then it falls through and the court is empowered to strike it down."

49. Earlier, Rule 112(2) of the Income Tax Rules specifically required the authorising officer to record his satisfaction, but the said rule has been deleted (sic) by the amendment of 1976. But this deletion of the rule will not change the position in view of the words "reason to believe" in Section 132(1) of the Act. This phrase postulates recording of reasons. In the absence of reasons, the order could not be said to be reasonable and cannot be upheld as held in the case, Ganga Prasad Maheshwari and Others Vs. Commissioner of Income Tax, .

50. The authorisation order in this case, reference to which has been made earlier, reads as under :

"Discussed with Deputy Director of Investigation. The cases are covered u/s 132(1)(c) and (b). I am satisfied that it is a fit case for action u/s 132(1) in the shop premises. Authorisation issued."

51. This order has been passed on the back of the report in which reference to all the four shops in which survey was not allowed to be made on that date has been made. The word used is "cases" meaning thereby that the said order was passed in respect of all the cases. The order which is vague and in the nature of a general authorisation in respect of all the four shops nowhere indicates that, in respect of any particular shop, there was any definite and separate information received by him on the basis of which he could have harboured such a reasonable belief that taking of action u/s 132(1)(c) and (b) of the Income Tax Act was necessary. There is no specific or separate order in respect of the petitioner's shop. The order, as it is, clearly indicates that the four reports were not before the Chief Commissioner of Income Tax, or even if they could be said to be in existence, they were not brought to his notice, for, otherwise, there would have been a separate order in respect of the petitioner's shop. The general order indicates that the Chief Commissioner of Income Tax did not apply his mind to the individual cases and has passed his order in a mechanical manner on the basis of the talks which he had with the Deputy Director of Investigation on that date.

52. The petitioner's case, obviously, was not covered u/s 132(1)(c) and, at best it could be covered u/s 132(1)(b). There being no information before the Chief Commissioner of Income Tax when he passed the authorisation order that the petitioner was in possession of undisclosed money, bullion, jewellery or other valuable article or thing and there being no application of mind by the Chief Commissioner of Income Tax, the vague and general order was not an authorisation order in the eyes of law and no proceedings on the basis of such an order could have taken place.

53. If the note of the Income Tax Officer which has been placed before us in which one guessed that the stock of ornaments was expected to be of about Rs.

25 to 30 lacs and at one place it was mentioned that there was undisclosed jewellery worth a particular amount, all of which was not mentioned in the much belated first information report which was lodged in the night was before the Chief Commissioner of Income Tax, the authorisation order would have contained some reference to it or the file would have contained any material from which it could be said that there was any required information before the Chief Commissioner of Income Tax or that he had reason to believe that the exigencies mentioned in Section 132 of the Income Tax Act were in existence, and, as such, an authorisation order was necessary. The authorisation order, thus, is patently illegal and was passed in gross violation of the provisions of Section 132(1) of the Income Tax Act.

54. On the basis of the above-mentioned authorisation order, search and seizure started and even before starting the search, a statement of the petitioner's proprietor was taken and also a reference was made to what happened on that day when the survey was conducted and questions were put to him, but he denied certain allegations. Section 132(4) of the Act provides that the authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, but not before starting search and seizure and in case any such statement was recorded, it will not purport to be one u/s 132(4) of the Act as it is only during the course of a search that a statement could be recorded.

55. As has been mentioned earlier, against the sealing off and seizure, a writ petition was filed and when the same came up for hearing, learned counsel for the Department took time to obtain instructions. In the notice it was stated that the information was sent to the Commissioner, but it could not reach the officer who passed the order dated January 4, 1989. The order, it appears, was passed on January 5, 1989. Anyhow, this fact was taken into consideration while allowing the amendment application.

56. It was in this background that the order u/s 132(5) of the Income Tax Act was passed and the proceedings for search and seizure themselves being illegal and void, the same could not have been made the foundation of any order u/s 132(5) of the Act. While passing the said order care was also not taken to adhere to the provisions of Section 132(4) of the Act. While passing the order u/s 132(5) of the Act, the available evidence, i.e., the petitioners' Income Tax returns and other accounts which were also available in the Income Tax Department could have been seen, but the same were also not looked into. The fact that the capital and assets necessarily would not be the same which they were when the business was started, was also not taken into consideration and for which the records available in the Income Tax Department were of much assistance.

57. The search and seizure, being without jurisdiction and against the specific provisions of law and the proceedings so taken, were tainted with illegalities and the private and public wrongs were inextricably mixed up in the instant case and

the impugned order was passed during the pendency of the writ petition hurriedly bearing two dates and that too after the passing of the interim order by this court throwing the same into the realm of suspicion, the so-called availability of an alternative remedy u/s 132(11), not being wide enough to cover all the pleas or points raised or involved in the case particularly the sealing of the premises, cannot be an equally efficacious remedy and the writ petition is entertainable and the objection regarding its entertainability fails.

58. However, as the authorities under the Income Tax Act are the custodians of public money and they have to perform their duties in good faith in accordance with law and the procedure prescribed which rules out any vindictive or malicious action or misuse of authority, no one has a right to interfere in their performance of duty or create hurdles or humiliate or manhandle them. Any such action cannot be appreciated and is to be deprecated and persons taking the law into their hands or committing guilt deserve the prescribed punishment But at the same time, it is the duty of the officers to see that they act in accordance with law, shorn of all feeling of vindictiveness or ego and in good faith which protects them and grants them full immunity even from any legal action.

59. In view of the above, Writ Petition No. 6218 of 1987 is dismissed as infructuous as some of the reliefs are common to the second writ petition, viz., Writ Petition No. 22 of 1988. Writ Petition No. 22 of 1988 is hereby allowed and the order u/s 132(5) of the Income Tax Act, passed in respect of the petitioner's shop, is quashed. However, it will be open for the Income Tax authorities to proceed in accordance with law.

60. There will be no order as to costs.