
(2004) 04 CAL CK 0035

In the Calcutta High Court

Case No : T. No's. 140, 141, 143 and 144 of 2004

Windson Electronics Pvt. Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-04-2004

Acts Referred:

Income Tax Act, 1961 — Section 132, 132(1), 132(3), 132(8A)

Citation : (2004) 191 CTR 542 : (2004) 2 ILR (Cal) 20 : (2004) 269 ITR 481 : (2004) 141 TAXMAN 419

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Bhaskar Sen, Pratap Chatterjee and Debal Banerjee, for the Appellant; S.K. Kapoor and P.K. Mullick, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—This batch of petitions raises common question of fact and law with an insignificant variation. In all these cases the petitioners herein have prayed for a writ of mandamus commanding respondents Nos. 1 to 6 to restrain from appropriating and/or withdrawing any amount lying in favour of the petitioners from respondent No. 7 and further in particular appropriating and/or withdrawing any amount in respect of the several managers' cheques all dated February 19, 2004. Further direction has been sought for commanding respondents Nos. 7 and 8 to honour the managers' cheques issued by City Bank drawn in favour of the petitioners as and when presented.

2. The common grievance of the petitioners is that despite presentation of the managers' cheques, the bank authorities are not honouring because of the preventive and obstructive action being taken by the Revenue authorities. The petitioners and each of them at an earlier point of time came to this court for identical grievance challenging a prohibitory order dated February 20, 2004, issued u/s 132(3) of the Income Tax Act, 1961 (hereinafter referred to as the said Act). These first writ petitions were moved on April 19, 2004 and on April 20, 2004, the aforesaid writ petitions were disposed of as the said prohibitory

order u/s 132(3) had lost its force because of efflux of statutory period. As such the challenges were not maintainable as being infructuous.

3. In these present writ petitions because of the bank's refusal to honour the said managers' cheques on account of issuance of fresh prohibitory order u/s 132, Sub-section (3) of the said Act and for wrongful and forcible demand for encashment of the said cheques and making over proceeds thereof to them.

4. Mr. Pratap Chatterjee, the learned senior advocate appearing with Mr. Debal Banerjee, the learned senior advocate, contends that under the scheme of the newly inserted Section 132(3) read with Sub-section (8A) of the said Act no fresh prohibitory order can be issued in relation to the same action of search and seizure. Mr. Chatterjee says that this Sub-section (8A) has been inserted with effect from June 1, 2002, by the Finance Act, 2002. Prior thereto there was a provision for extension beyond the period of 60 days subject to strict regulatory measure and guidance, meaning thereby extension could not be made automatic. The object behind the deletion of the provision for extension has been stated in the proposal, when the Bill of the aforesaid Finance Act, 2002, was presented before Parliament. From this proposal it will be apparent and the court should take note of the same, that the object was to eliminate unnecessary harassment and prolongation resulting in the search and seizure action, u/s 132(3) of the said Act, by fixing an inflexible time limit of sixty days.

5. According to them, this fresh prohibitory order u/s 132(3) of the said Act is nothing but an automatic order of extension in disguise. Such action on the part of the Revenue in the real sense is frustrating the very object of deletion of the earlier provision, which they cannot do. In essence, this issuance of the fresh order is a fraud upon the statute.

6. Mr. Chatterjee submits that his client is not challenging the jurisdiction of the authority of the officer concerned in the matter of issuance of summons or taking action for search and seizure, but these are to be done within the four corners of the statute. He urges that upon a fair and careful reading of Section 132 it will appear to this court that the Revenue official cannot seize anything or any substance other than mentioned in the said section. The money lying in the bank or in the custody of the bank meant for honouring the managers' cheques and/or pay order cannot be said to belong to the petitioners under banking law. The bank is not a custodian of the money of the petitioners rather it is debtor to the petitioners in terms of the contract of banking transaction. At the highest the amount which is sought to be withdrawn by the Revenue officials is "a debt" payable on demand or maturity of any "term deposit" to the petitioners.

7. Under the provisions of the said section, the Revenue officials cannot force the bank to pay the money to it or to withdraw the same forcibly. Therefore, this action on part of the respondents in the name of search and seizure aiming to obstruct and/or prevent the petitioners from encashment, as well as the bank from honouring the managers' cheques is unauthorised and not permitted under

the provisions of the said Act, They cannot seize the money, at the highest the Revenue official can attach by issuing prohibitory orders u/s 132(3) of the said Act. He has relied on the following decisions, in support of his submission as above.

8. Raj Kumar and Others Vs. Union of India and Others, ; Dheer Singh and Another Vs. Asst. Director of Income Tax and Others, ; I. Devarajan and Others Vs. Tamil Nadu Farmers Service Co-operative Federation and Others, and Income Tax Officer and Another Vs. M. Shajahan and Another, .

9. Mr. S. K. Kapoor, learned Additional Solicitor-General, appearing with Mr. P. K. Mullick, the learned senior advocate, while opposing all the writ petitions contends that the writ petitions are liable to be dismissed in limine and the interim order already passed shall be vacated forthwith. He submits that these so-called companies are the group companies of Ruia Cortex Ltd. which according to the Revenue information has floated a fictitious company in order to divert large undisclosed income and money to evade and/or dodge lawful revenue. This network of diverting system of the aforesaid company has been spread all over the country through its various banks. Actually when the Delhi office of the Ruia Cortex Ltd. was raided surreptitiously large amounts from the various banks in the city of Delhi were withdrawn to divert to other banks and/or branches of the same bank to get away with the money so that the Revenue can be evaded effectively.

10. The Revenue official having got positive information and in consequence thereof, has reason to believe that these amounts are undisclosed income. Therefore, in exercise of the power u/s 131 of the said Act necessary summons were issued asking all the writ petitioners and/or their directors to produce documents or books of account In spite of summons-since they failed to do so action for search and seizure u/s 132 of the said Act has been conducted and in furtherance thereof on February 20, 2004, a restraint order u/s 132(3) was issued. According to the Revenue officials so authorised, the money lying in the said bank and/or kept is representing the undisclosed income. Therefore, he submits that the Revenue officials or the raiding officials are absolutely within their rights under the aforesaid section to seize the money lying or kept by the bank.

11. He contends that it is true that by virtue of newly inserted Sub-section (8A) of Section 132 of the said Act the life of the prohibitory order u/s 132(3) extinguishes on the expiry of 60 days from the date of issuance, but the authorities concerned are not debarred from issuing fresh order, as the power of extension is no longer in the statute book.

12. He contends that the court has to look into the prime object of making provision for search and seizure ignoring subtle technical difficulties.

13. He contends that in the event the period of search and seizure is not prolonged beyond 60 days, in a case where investigation cannot be completed

within a short time then the undisclosed income cannot be unearthed and recovery of the tax on this income would be impossible, for the person concerned will go away with the money.

14. He contends citing the principle laid down by a number of Supreme Court decisions that the courts do not interfere with the action nor stall any cause of issuance of show cause notice being operated under the Revenue statute or action of this nature, if taken lawfully. He submits that if it is held that the money kept at the bank is not the money of the petitioners then certainly it is "a debt" payable by the bank to the petitioners as a creditor and this debt can very well be attached and/or be subjected to the order of seizure. In support of his contention, he has placed reliance on the following judgments :

The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, ; Lan Eseda Steels Ltd. and Another Vs. Assistant Commissioner of Income Tax and Others, ; Deputy Director of Inspection (Intelligence) and Others Vs. Vinod Kumar Didwania and Another, and Afzalunnissa Begum Vs. Union of India (UOI) and Others, .

15. Mr. Bhasker Sen, the learned senior advocate appearing for the bank, submits that the bank will abide by the decision of this court. He supplies information to the court that in all the cases the requisite amount covering the amount of managers' cheques have been transmitted by debiting in the account of the writ petitioners maintained in other branches and these amounts are lying in the suspense account to facilitate the Calcutta branch to honour the managers' cheques if presented. He contends in view of the prohibitory order issued u/s 132(3) of the said Act to the bank the managers' cheques could not be honoured. He further submits that Income Tax officials are insisting on the bank official making over the amounts. He informs further that in the event the managers' cheques are not presented within the validity period, the amount will be kept as unclaimed money.

16. I have heard the respective contentions of learned counsel appearing for the parties. I have examined the records of one of the writ petitions, which have been produced relating to and/or in connection with all the search and seizure action. From the records, I find undisputedly the Revenue officials have issued summons upon the writ petitioners and I am told upon each of them, u/s 131 of the said Act and the writ petitioners have failed to comply with the requisition of the summons. So this search and seizure was necessitated. It is contended by Mr. Additional Solicitor-General this search and seizure was conducted for non-disclosure of income. There is no challenge against the jurisdiction of the authority concerned in the matter of conducting search and seizure. In this case, this court has to come to a conclusion prima facie for considering the grant of interim relief whether (i) fresh restraint order u/s 132, Sub-section (3), is permissible in relation to the same action of search and seizure, (ii) whether the money lying at the bank for honouring the manager's cheques can be treated to be of the petitioners for seizing the same, or the money lying and/or kept under

the bank custody can be seized under any circumstances as per the provisions of the said section or not.

17. Firstly, I shall deal with prima facie whether fresh restraint order dated April 20, 2004, can be issued on the facts and circumstances of this case. Admittedly, the prohibitory order u/s 132(3) of the said Act dated April 20, 2004, has been issued afresh in relation to the same summons against the same persons. No new and further development took place. In my view as rightly submitted by Mr. Chatterjee this fresh order is not permissible under law in view of the insertion of Sub-section (8A) of the said Section 132. Previously, before the insertion of the Finance Act, 2002, there was a provision for extension beyond the period of 60 days. I have seen carefully the Finance Bill of 2002 (reported in [2002] 254 ITR 153), it appears to me to obviate the difficulties then being faced by the affected person a rigid time limit of 60 days has been fixed and the earlier provision of extension has been deleted with the idea that whatever is required to be done to maintain the restraint order is to be completed within the period of 60 days in relation to one set of action. This has been done keeping in view that the Revenue officials taking advantage of the provision for extension used to prolong the investigation, search and seizure which resulted in undue harassment of the taxpayers.

18. I am unable to accept the submission of Mr. Additional Solicitor-General that in the absence of a contrary provision it is open for the Revenue officials to pass order u/s 132(3) of the said Act afresh in relation to the same search and seizure action. In my opinion if this argument is accepted then it amounts to unconditional and unguided extension of time in effect, which was not even permissible under the previous provisions and further the object of the Legislature, if not practising "fraud" upon the statute. The fresh restraint order can be issued in relation to fresh and different action and not in relation to the same action previously taken. It is the settled position of law an individual body can act whatever he/she likes unless prohibited by the law, while a statutory body and/or its official cannot act what is not expressly permitted by the law. The power of the statutory body cannot be inferred.

19. When the section itself provides that a restraint order in relation to one set of search and seizure action, will lose its force upon the expiry of 60 days the same cannot be brought back to life in any manner whatsoever. The law never permits an action should be taken in a circuitous way, meaning thereby what cannot be possible directly, should not be allowed to be possible indirectly. Accordingly, I prima facie hold that the fresh restraint order in connection with this search and seizure action is ultra vires the provision of Section 132 and it is without jurisdiction. The decision of the Supreme Court rendered in the case of Special The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, , is wholly misplaced here. The issue involved here does not relate to stalling search and seizure. The issue is whether action taken and order passed are within the limit of law or not. Here I am satisfied prima facie that the fresh order of

attachment is absolutely want of authority.

20. The next contention of Mr. Additional Solicitor-General is that the money lying at the hand of the bank can be treated to be money of the petitioners to seize it. Before I address this question and issue, I think it is necessary for me to quote the relevant portion of the provision of Section 132(1) of the said Act.

"132. (1) Where the Director-General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint 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 General or Director or the Chief Commissioner or Commissioner, as the case may be, may authorise any Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer, or

(B) such Joint Director or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner 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 ;

(ia) 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 Chief Commissioner or Commissioner, but such Chief Commissioner or Commissioner has no jurisdiction over the person referred to in Clause (a) or Clause (b) or Clause (c), then notwithstanding anything contained in Section 120 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 Chief Commissioner or Commissioner having jurisdiction over such person may be prejudicial to the interests of the Revenue :

Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may 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 authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under Clause (iii).

(1A) Where any Chief Commissioner or Commissioner, in consequence of information in his possession, has reason to suspect that any books of account, other documents, money, bullion, jewellery or other valuable article or thing in respect of which an officer has been authorised by the Director General or Director or any other Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board to take action under Clauses (i) to (v) of Sub-section (1) are or is kept in any building, place, vessel, vehicle or aircraft not mentioned in the authorisation under Sub-section (1), such Chief Commissioner or Commissioner may, notwithstanding anything contained in Section 120, authorise the said officer to

take action under any of the clauses aforesaid in respect of such building, place, vessel, vehicle or aircraft".

21. Upon a careful and fair reading of the said section it appears to me in order to seize amongst others any money the following pre-conditions are to be fulfilled, (i) the summons as mentioned in Clauses (a) and (b) of Sub-section (1) of Section 132 of the said Act having been issued and failure and/or omission to carry out direction of summons, or any person (including a third person) is in possession of any money representing either wholly or partly income which has not been or would not be disclosed under this Act, and (ii) the authorised officer has reason to suspect such money is kept.

22. Therefore, in my view irrespective of ownership, control or dominion of the money, search and seizure can validly be conducted, if the aforesaid conditions are satisfied.

23. Mr. Chatterjee has cited a number of decisions to persuade me to hold that the money lying at the disposal of the bank is not the money belonging to the petitioner at the present moment. The bank is a "debtor" to the petitioner in respect of the money lying within it and/or payable by it on presentation of managers' cheques.

24. Mr. Sen, appearing for the bank, submitted that the amount has been lying and/or kept in the suspense account and the same will be made over to the petitioners the moment the managers' cheques are allowed to be encashed. He further informed this court that in the event the aforesaid encashment is not made within the stipulated time then this money covering the amounts of managers' cheques is liable to be kept as "unclaimed amount" and in that case the holder of the managers' cheques will be debarred from recovering this amount.

25. I accept the argument of Mr. Chatterjee following the decisions rendered by several High Courts on this question cited by him, that the money lying at the bank at the present moment does not belong to the petitioners, rather the bank is a debtor to the petitioners. The moment the managers' cheques are produced for encashment, this amount will be made over to pay off the debt.

26. In the Madras High Court Division Bench judgment in I. Devarajan and Others Vs. Tamil Nadu Farmers Service Co-operative Federation and Others, and of the Division Bench of the Kerala High Court in Income Tax Officer and Another Vs. M. Shajahan and Another, , it has been observed amongst others that it will not be the money of the petitioners but the same can be treated to be "a debt" and it is liable to be attached u/s 132(3) of the said Act. Neither the cheque nor the pay order, nor the managers' cheques for that matter, are money themselves, these are merely valuable documents. These documents may be seized by the Revenue officials but the money itself is in connection with these documents. I find considerable force in the argument of Mr. Chatterjee that the Revenue official cannot compel the bank to encash fixed deposit and make over

the proceeds to him under search and seizure and this will be without jurisdiction. The observation of the Division Bench of the Allahabad High Court in Dheer Singh and Another Vs. Asst. Director of Income Tax and Others, in this context is apposite. Section 132 does not confer any authority on the Income Tax Officer to realise the assets and convert them into cash. This principle has also been reiterated in the judgment of the Andhra Pradesh High Court in Lan Eseda Steels Ltd. and Another Vs. Assistant Commissioner of Income Tax and Others, . The Supreme Court decision reported in Afzalunnissa Begum Vs. Union of India (UOI) and Others, cited by Mr. Additional Solicitor General is distinguishable on the facts. In that case the money was kept with the bank in the vault as custodian not qua banker. The ownership of the depositor/assessee did not cease, therefore it was seizable. Reliance of Mr. Additional Solicitor General on the decision of the Supreme Court in Deputy Director of Inspection (Intelligence) and Others Vs. Vinod Kumar Didwania and Another, is of no assistance in this case, as it was held in that case amongst others, that the litigant having abused the process of the court, should not be allowed to take advantage.

27. Considering the aforesaid facts and circumstances, I think these matters are to be heard on affidavit. But then what should be the interim order is the question. It would be open for each of the writ petitioners to present the managers' cheques if they are advised for encashment, the bank shall allow encashment and the proceeds thereof shall be invested in short-term fixed deposits not exceeding ninety days from the date of issuance, in the name of the respective first writ petitioners. This encashment shall be done upon prior notice to the authorised raiding officials. The original fixed deposit receipt shall be made over by the bank official to the raiding Income Tax officials who in their turn shall supply xerox copies of the same to each of the writ petitioners and/or their learned advocates-on-record. These officials shall hold the same as an officer of the court and shall not encash the same without leave of this court. If this presentation or encashment is not done by the writ petitioners or any of them within a period of a fortnight from date the bank official shall invest the aforesaid amount(s) lying in suspense account in a short-term fixed deposit not exceeding ninety days. These fixed deposits or deposit as the case may be shall be issued in the name of the concerned Commissioner or Joint Commissioner of Income Tax and these fixed deposit receipts shall be handed over to the aforesaid officials. They or the holder of the receipts shall not encash the same without leave of the court.

28. This order is passed keeping in view the possibility that in the event any absolute order of injunction is passed in favour of the petitioners consequently the money is allowed to be withdrawn and the writ petition is dismissed ultimately, then it will be impossible to recover the probable tax dues that might be assessed, whereas, if the writ petition succeeds then the amount that will be invested in the short-term fixed deposits and the interest to be fetched thereon will enure to the benefit of all the petitioners.

29. Affidavits in opposition are to be filed within three weeks from date. Reply within two weeks thereof. Matter to appear in the monthly list of July, 2004, for hearing. This order is passed without prejudice to the rights and contentions of the parties. The Revenue officials shall proceed pursuant to the search and seizure in accordance with law as expeditiously as possible and it would be open for them to pass any order as they may think fit and proper in accordance with law. Any finding in this judgment shall be treated to be tentative and prima facie and will not have any binding effect at the time of hearing of this matter. Records submitted are returned.