Dr. Partap Singh and Another

Vs

Director of Enforcement, Foreign Exchange Regulation Act and Others

Civil Appeal No. 1138 of 1981

(D. A. Desai, V. B. Eradi JJ)

26.04.1985

JUDGMENT

D. A. DESAI J.

1. Appellants who are husband and wife respectively moved Civil Writ Petition No. 2163 of 1980 in the High Court of Punjab & Haryana praying for quashing of a search warrant issued by respondent 2 - Assistant Director, Enforcement on August 24, 1979, as also the warrant of authorisation issued by respondent 5 - Commissioner of Income-tax, Jullundur on April 9, 1980, and for a direction to return articles seized during the search of his house on August 24, 1979, and for relief incidental and ancillary thereto.

2. Briefly stated, the allegations were that respondent - 6 Shri J. S. Ahuluwalia, Assistant Commissioner of Income-tax at Jullundur bore personal malice towards the appellants, amongst others, attributable to an incident concerning the servant of the appellants and an application for transfer of appeals pending before him made to the Chairman, Central of Direct Taxes, by the first appellant. Actuated by this personal malice, respondent 6 first instigated respondent 2 issue a search warrant under the authority of which a raid was carried out at the residence of the appellants on August 24, 1979, which led to the seizure of certain documents including some foreign currency. Thereafter, when the appellants made various representations for return of documents, again instigated by respondent 6, respondent 5 issued a warrant of authorisation under Section 132-A of the Income Tax Act on April 9, 1984, by which respondent 2 was directed to deliver such books of account and other documents and goods seized during the search to the requisitioning officer. As the documents and material seized during the search had not been returned, the writ petition as aforementioned was filed for the reliefs hereinabove set out.

3. When the writ petition came up before a Division Bench of the Punjab and Haryana High Court, Mr. Kuldip Singh, learned counsel who appeared on behalf of the Directorate of Enforcement Department made a statement that the Directorate has closed the proceedings and does not want to take any action against the appellants on account of the search. The High Court observed that in view of this statement, the Directorate of Enforcement would normally be required to return the seized material to the appellants but it was noticed that as the same was sealed under a warrant of authorisation issued under Section 132-A of the Income Tax Act, an order for return of the same cannot be made. The High Court also took note of the statement made by Mr. D. N. Avathy that the Income Tax Department was still scrutinising the seized documents. The High Court was of the opinion that there was nothing illegal in the issuance of search warrant, the consequent search, the seizure during the search and taking over of the documents by the Income Tax Department under Section 132-A. The High Court accordingly dismissed the petition. Hence this appeal by special

leave.

Dr. Partap Singh, the first appellant who appeared in person, submitted that respondent 2 acted in a manner contrary to law in issuing a search warrant when there was no material before him on which he could entertain a reasonable belief that any documents which in his opinion will be useful for, or relevant to, in investigation or proceedings under the Foreign Exchange Regulation Act, 1973 (Act for short), are secreted in any place, whereupon alone he may authorise any officer of Enforcement to search for and seize or may himself search for and seize such documents. It was also contended that as the second respondent did not record his reasons in writing on which reasonable belief was entertained, the search warrant issued by him was illegal.

5. Section 37 of the Act confers power on any officer of Enforcement not below the rank of Assistant Director of Enforcement to search premises. This power can be exercised if the officer has reason to believe that any documents which in his opinion will be useful for, or relevant to, any investigation or proceedings under the Act, are secreted in any place. The appellant contended that no material was placed on record which may permit an inference that the second respondent had reason to believe that any documents which in his opinion would be useful for or relevant to any investigation or proceeding under the Act were secreted in the house of the appellants. It was urged that respondent 6 was actuated by personal malice towards the appellants and who being a friend of respondent 2 instigated and provoked him to exercise his power of search and seizure and not to effectuate any purpose for which power of search but with a view to humiliating and harassing the appellants.

6. A little while later, we will examine the allegation of personal malice. Suffice it to say that there is no substance in the allegation.

7. Respondent 2 is a responsible officer being the Assistant Director, Enforcement, Foreign Exchange Regulation Act, stationed at Jullundur. He issued the impugned search warrant which led to the seizure. In the affidavit in reply on behalf of the respondents 1 to 4, it was clearly stated that the search was authorised by the second respondent after he was fully satisfied on the basis on the information available in the official record and also on the basis of the information collected by the officers of the Enforcement Directorate after making enquiries. It was repeated in para 14 of the affidavit-in-reply, that on the basis of the official record and reliable information in possession of respondent 2, he entertained a reasonable belief for issuing the search warrant against the appellants. Respondent 2, it was said, on the basis of the information available on the file had reasons to believe that incriminating documents were secreted in the residential premises of the first appellant and the documents which were seized by Enforcement Directorate were useful for the investigation undertaken by the office. He undertook to produce the relevant records for the inspection of the Court at the time of the hearing of the petition. Relying on this statement in the affidavit in reply, the appellant contended that no record was shown to the Court as promised therein. We therefore, adjourned the matter to a later date and directed the learned counsel for respondents 1 to 4 to produce the file. Original papers were shown to us and typed copies were furnished to the court. We have minutely gone through the file and we are fully satisfied that there was material before the second respondent which would furnish him grounds for entertaining a reasonable belief that some documents which would be useful in the investigation or proceedings under the Act were secreted in the house of the appellants. He was, therefore, fully justified in issuing the search warrant.

8. The appellant contended that in order to justify that the power of search was exercised in a fair and just manner and to effectuate the purpose for which it is conferred as is evident from the

language employed in Section 37, the officer issuing the search warrant must disclose that material was before him on which he entertained a reasonable belief to move in the matter. Proceedings alone it was submitted that neither in the search warrant nor in the affidavit in opposition in the High Court, the material on which reasonable belief was entertained was disclosed. It was submitted that the affidavit merely recites in a mechanical manner the language of the section which cannot be held sufficient for discharging the burden on the party which has exercised this power of search and seizure. In this connection, lastly, it was submitted that if the Court is going to look into the file produced on behalf of the second respondent, the same must be disclosed to the appellants so that they can controvert any false or wholly unsustainable material set out in the file.

9. When the officer of the Enforcement Department process to act under Section 37, undoubtedly, he must have reason to believe that the documents useful for investigation or proceeding under the Act are secreted. The material on which the belief is grounded may be secret, may be obtained through Intelligence or occasionally may be conveyed orally by informants. It is no obligatory upon the officer to disclose his material on the mere allegation that there was no material before him on which his reason to believe can be grounded. The expression 'reason to believe' is to be found in various statutes. We may take note of one such. Section 34 of the Indian Income Tax Act, 1922, inter alia, provides that if the Income Tax Officer must have 'reason to believe' that the income, profits or gains chargeable to income-tax have been under-assessed, then alone he can take action under Section 34. In S. Narayanappa v. CIT ((1967) 1 SCR 590 : AIR 1967 SC 523 : 63 ITR 219), the assessee challenged the action taken under Section 34 and amongst others it was contended on his behalf that the reason which induced the Income-tax Officer to initiate proceeding under Section 34 were justiciable, and, therefor, these reasons should have been communicated by the Income Tax Officer to the assessee before the assessment can be reopened. It was also submitted that the reasons must be sufficient for a prudent man to come to the conclusion that income has escaped assessment and that the Court can examine the sufficiency or adequacy of the reasons on which the Income Tax Officer has acted. Negativing all the limbs of the contention, this court held that

if there are in fact some reasonable grounds for the Income Tax Officer to believe that there had been any non-disclosure as regard any fact, which could have a material bearing on the question of under-assessment, that would be sufficient to give jurisdiction to the Income Tax Officer to issue notice under Section 34.

The court in terms held that whether these grounds are adequate or not is not a matter for the court to investigate.

10. The expression 'reason to believe' is no synonymous with the subjective satisfaction of the Officer. The belief must be held in good faith; it cannot merely be a pretense. In the same case, it was held that it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief on and are no extraneous or irrelevant to the purpose of the section. To limited extent, the action of the Income Tax Officer in starting proceedings under Section 34 is open to challenge in a court of law. (See Calcutta Discount Co. Ltd. v. ITO (41 ITR 191 : (1961) 2 SCR 241 : AIR 1961 SC 372).) In R. S. Seth Gopikrishnan Agarwal v. R. N. Sen, Assistant Collector of Customs ((1967) 2 SCR 340 : AIR 1967 SC 1298 : 1967 Cri LJ 1194), this Court repelled the challenge to the validity of the search of premises of the appellant and the seizure of the documents found therein. The search was carried out under the authority of an authorisation issued under Rule 126(L)(2) of the Defence of India (Amendment) Rules, 1963 (Gold Control Rules) for search of the premises of the appellant. The validity of the authorisation was challenged on the ground of mala files as also on the ground that the authorisation

did not expressly employ the phrase 'reason to believe' occurring in Section 105 of the Customs Act. Negativing both the contentions, Subba Rao, C.J. speaking for the Court, observed that the object underlying Section 105 of the Customs Act which confers power for issuing authorisation for search of the premises and seizing of incriminating article was to search for goods liable to be confiscated or documents secreted in any place, which are relevant to any proceedings under the Act. The legislative policy reflected in the section is that the search must be in regard to the two categories mentioned in the section. The Court further observed that though under the section, the officer concerned need not give reasons if the existence of belief is questioned in any collateral proceedings, he has to produce relevant evidence to sustain his belief. A shield against the abuse of power was found in the provision that the officer authorised to search has to send forthwith to the Collector of Customs a copy of any record made by him. Sub-section (2) of Section 37 of the Act takes care for this position inasmuch as that where an officer the rank of the Director of Enforcement carried out the search, he must send a report to the Director of Enforcement. The last part of the submission does not commend to us because the file was produced before us and as stated earlier, the Officer issuing the search warrant had material which he rightly claimed to be adequate for forming a reasonable belief to issue the search warrant.

11. It was, however, contended that when sub-section (2) of Section 37 is read in juxtaposition with sub-section (1), the legislative mandate clearly manifests itself that before issuing a search warrant in exercise of the power conferred by Section 37(1), it is obligatory upon the officer issuing the search warrant to record in writing the grounds of the his belief and specifying in such writing, so far as possible, the thing for which search warrant is to be made because Section 37(2) provides that the provisions of the Code of Criminal Procedure, 1898 (now 1973) relating to searches, shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of Section 165 of the said Code shall have effect as if for the word 'Magistrate', wherever it occurs, the words "Director of Enforcement or other officer exercising his power" is substituted. It was submitted that if the power to search premises is conferred on the officer therein mentioned, it is hedged in with a condition that in exercise of the power, he is bound by the requirements of Section 165 of the Code. In the other words, it was said that by sub-section (2) of Section 37, Section 165 of the Code is incorporated in pen and link in Section 37. It was urged that the section should be re-read as Section 37(1) as it is and Section 165(1) of the Code be read as Section 37(2). Continuing along this line, it was submitted that, read thus, the necessary intendment of the Legislature becomes revealed in that such drastic power of search and seizure without notice to the person affected, can be exercised, if the officer has reason to believe which must have its foundation on some material or grounds which must be stated in the search warrant itself or in a record anterior to the issuance of the search warrant so that when questioned, the contemporaneous record would be available to the court to examine the contention whether there was material for taking such a drastic action or that the action was taken for extraneous and irrelevant reasons. In support of this submission, reliance was placed on a decision of the Punjab and Haryana High Court in H. L. Sibal v. CIT ((1975) 101 ITR 112 (P&H HC)). The Court was examining the expression 'in consequence of information in his possession, has reason to believe' in Section 132 of the Income Tax Act, 1961. The Court after referring to the decision of this Court in Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver ((1967) 66 ITR 664 : (1968) 1 SCR 148 : AIR 1968 SC 59), held that 'the obligation to record in writing, the grounds of the belief as enjoined by Section 165(1), if not complied with would vitiate the issuance of a search warrant and the seizure of the articles". It was then submitted that if the search is illegal, anything seized during such an illegal search has to be returned as held by a learned Single Judge of the Calcutta High Court in New Central Jute Mills Co. Ltd. v. T. N. Kaul (AIR 1976 Cal 178).

12. Section 37(2) provides that 'the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under Section 37(1)'. Reading the two sub-sections together it merely means that the methodology prescribed for carrying out a search provided in Section 165 has to be generally followed. The expression 'so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible. The submission that Section 165(1) has been incorporated by pen and ink in Section 37(2) has to be negatived in view of the positive language employed in the section that the provisions relating to searches shall so far as may be apply to searches under Section 37(1). If Section 165(1) was to be incorporated by pen and ink as Section (2) of Section 37, the legislative draftsmanship will leave no room for doubt by providing that the provisions of the Code of Criminal Procedure relating to searches shall apply to the searches directed or ordered under Section 37(1) except that the power will be exercised by the Director of Enforcement of other officer exercising his power and he will be substituted in place of the Magistrate. The provisions of sub-section (2) of Section 37 has not been cast in any such language. It merely provides that the search may be carried out according to the method prescribed in Section 165(1). If the duty to record reasons which furnish grounds for entertaining a reasonable belief were to be recorded in advance, the same could have been incorporated in Section 37(1), otherwise a simple one-line section would have been sufficient that all searches as required for the purpose of his Act shall be carried out in the manner prescribed in Section 165 of the Code by the on officer to be set out in the section. In order to give full meaning to the expression 'so far as may be', sub-section (2) of Section 37 should be interpreted to mean that broadly the procedure relating to search as enacted in Section 165 shall be followed. But if a deviation becomes necessary to carry out the purpose of the Act in which Section 37(1) is incorporated, it would be permissible except that when challenged before a court of law, justification will have to be offered for the deviation. This view will give full play to the expression 'so far as may be'.

13. The view which we are taking is in accord with the view taken in Gopikrishan Agarwal case ((1967) 2 SCR 340 : AIR 1967 SC 1298 : 1967 Cri LJ 1194). The grounds which induced reasonable belief, therefore need not be stated in the search warrant.

14. Assuming that it was obligatory to record reasons in writing prior to directing the search, the file submitted to the court unmistakably shows that there was enough material before the officer to from a reasonable belief which prompted him to direct the search. That the documents seized during the search did not provide sufficient material to the officer for further action cannot be a ground for holding that the grounds which induced the reasonable belief were either imaginary or fictitious or mala fide conjured up.

15. Assuming that is obligatory upon the officer proceeding to take search or directing a search to record in writing the grounds of his belief and also to specify in such writing, so far as possible, the thing for which the search is to be made, it mandatory and that non-recording of his reasons would result in the search being condemned as illegal, what consequences it would have on the seizure of the documents during the such illegal search. The view taken by a learned Single Judge of the Calcutta High Court in New Central Jute Mills Co. Ltd. case (AIR 1976 Cal 178), that once the authorisation for carrying out the search is found to be illegal on account of the absence of recording of reasons in the formation of a reasonable belief, the officer who has seized documents during such search must return the documents seized as a result of the illegal search is against the weight of judicial opinion on the subject and does not commend to us. In fact this decision should not detain us at all because virtually for all practical purposes, it can be said to have been overruled by the decision of the Constitution Bench in Pooran Mal v. Director of Inspection ((1974) 2 SCR 704 : (1974) 1 SCC 345 : 1974 SCC (Tax) 114). This Court held that "courts in India and even in

England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure". If, therefore, the view of the learned Single Judge of Calcutta High Court were to be accepted, meaning thereby that if the search is shown to be illegal, anything seized during such illegal search will have to be returned to the person from whose premises the same was seized, it would be tantamount to saying that evidence collected during illegal search must be excluded on that ground alone. This was terms negatived by the Constitution Bench. It is has been often held that the illegality in the method, manner or initiation of a search does not necessarily mean that anything seized during the search has to be returned. After all, in the course of a search, things or documents are required to be seized and such things and documents when seized may furnish evidence. Illegality of the search does not vitiate the evidence seized during the search illegal search. The only requirement is that the court or the authority before which such material or evidence seized during the search shown to be illegal, is placed has to be cautious and circumspect in dealing with such evidence or material. This is too well-established to necessitate its substantiation by a precedent. However, one can profitably refer to Radhakishan v. State of U. P. (1963 Supp 1 SCR 408, 411; AIR 1963 SC 822 : (1963) 1 Cri LJ 809) wherein the court held that assuming that the search was illegal, the seizure of the articles is not vitiated. It may be that because of the illegality of the search, the court may be inclined to examine carefully the evidence regarding seizure, but no other consequence ensues. (See State of Maharashtra v. Natwarlal Damodardas Soni ((1980) 4 SCC 669 : 1981 SCC (Cri) 98).)

16. In this behalf, the appellant further contended that if the search was genuine or bona fide for carrying out the purposes of the Act, it is surprising that when the matter was before the High Court, the Enforcement Directorate submitted that it does not wish to take any further action in respect of the material seized during the search. There is no warrant for the assertion that every search must result in seizure of incriminating material. Such an approach would be a sad commentary on human ingenuity. There can be cases in which a search may fail or a reasonable explanation in respect of the documents may be forthcoming. In ITO v. M/s. Seth Brother (1970) 1 SCR 601 : (1969) 2 SCC 324), it was in terms held that "from amongst the documents seized during the search, if some are found not to be useful for or relevant to the proceeding, that by itself will not vitiate the search. Nor can an inference be made that the power was initially exercised mala fide". The Court can in Pooran Mla case ((1974) 2 SCR 704 : (1974) 1 SCC 345 : 1974 SCC (Tax) 114), held that if the books of account and other documents collected during the search were afterwards found to be not relevant, that by itself does not make the search and seizure illegal. In this case, however, as the documents and other materials have been sealed under the warrant of authorisation issued under Section 132-A of the Income Tax Act, the Enforcement Directorate may legitimately close the proceedings. We cannot move backward and conclude that if no farther proceedings are taken, at the inception the search was mala fide or for reasons irrelevant or extraneous to the exercise of power. The contention therefore, must be rejected. Having examined all the limbs of the submission, we find no merit in the contention that the issuance of a search warrant was illegal or that the search was illegal and invalid.

17. It was next urged that if there was no justification for issuing a search warrant, the search under the authority of such a warrant would be illegal and respondents Nos. 1 to 4 are bound to return the documents. If the officer who issued the search warrant had material for forming a reasonable belief to exercise the power, the search cannot be styled as illegal and, therefore, no case is made out or directing return of the documents on the supposition that the search and seizure were illegal.

18. The next submission was the respondent No. 6 was actuated by a personal malice and with a view to harassing and humiliating the appellants, instigated and provoked his friend, the second

respondent, to issue the search warrant and to carry out the search. In the petition filed in the High Court, the allegations of mala fides are so scanty that the High Court was justified in not examining of the contention on merits. In para 6 of the petition, it is stated "that the petitioners own house No. 531 in New Jawahar Nagar, Jullundur, while respondent 6 occupies the adjoining house. His attitude toward the petitioners was inimical and has ever been so". Some appeals filed by the appellants against their assessments under the Wealth Tax Act were pending before the sixth respondent and that "on May 29, 1979, the first appellant submitted a representation to the Chairman, Central Board of Direct Taxes complaining about the animosity of the sixth respondent toward the first appellant and requested that those appeals pending before the sixth respondent be transferred to another appellate court". These are all the relevant averments on the allegation of mala fides. When attention of the first appellant was drawn to this scanty material, he drew out attention to the averments in a para 6 of the petition for special leave wherein it is alleged "that when the petitioners were away from Jullundur leaving their servant, Gyan Chand, to look after their house, the servant of respondent 6 left his job whereupon respondent 6 nursed a feeling that his servant had left the job on being tutored by the petitioner's servant. Thereupon respondent 6 got Gyan Chand detained and maltreated by the police. When the petitioners learnt about it at Bombay, they requested a common friend to get Gyan Chand released and in fact Gyan Chand was released. It was then stated that the friend contacted the police officer who had detain Gyan Chand and before him, the police officer admitted that Gyan Chand was detained at the instance of the sixth respondent". Could there be more vague and completely misleading averments to support serious allegation of personal mala fides against the officer discharging his duties ? We are not inclined to dilate any more on this aspect save and except saying that the affidavit of Gyan Chand is not forthcoming, that the name of the friend is not mentioned and the police officer cannot be identified from the material disclosed in the petition. One can only say that a nefarious attempt has been made to cook up a wholly imaginary allegation for attributing personal mala fides to the sixth respondent. The contention must be negative without further examination.

19. It was lastly urged that there has been tampering with the documents by the officers of the Enforcement Directorate while the Income Tax Officer sealed and took possession of the documents or under the authority of warrant of authorisation issued by the fifth respondent under Section 132-A of the Income Tax Act. It was submitted that the documents with which the appellants were not concerned have been foisted upon him and some documents have been removed. Though the submission was made at some length, Mr. Desai, learned counsel appearing or some of the respondents dispelled whatever little doubt was generated in our mind by the submissions of the first appellant. He referred to Pass Book Account Nos. 132269 and 159431, both issued by the Bank of India, and urged that what was mentioned was not the account number but the Pass Book numbers and the Account Nos. SB 6731 and SB 7626 both tally and, therefore, the submissions in this behalf is misconceived. We accept the same. It was then urged that there were some erasures in some of the loss sheets. We found none. After referring to pages 148, 149 and 150 of the diary, an argument was attempted to be built up that there is some tinkering with the same. We found the submission wholly imaginary. Therefore, there is absolutely no merit in the contention that there has been some tampering with the documents which they were sealed under the authority of the warrant of authorisation issued by the Commissioner of Income Tax.

20. These were all the contention raised in this appeal and as there is no merit in any of them, the appeal fails and is dismissed but with no order as to costs.

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