

Commissioner of Income Tax, Haryana, Himachal Pradesh and Delhi and Others

Vs

Tarsem Kumar and Another

Civil Appeal No. 1666 (Nt) of 1974

(R. S. Pathak, Sabyasachi Mukhaji JJ)

17.07.1986

JUDGMENT

SABYASACHI MUKHAJI, J. –

1. This appeal is by special leave from a judgment and order of Punjab and Haryana High Court in an application under article 226 of the Constitution. The judgment in question is reported in Tarsem Kumar v. CIT ((1974) 94 ITR 567 (P&H)). By a petition under Articles 226 and 227 of the Constitution the order of the Income Tax Department dated May 10, 1972, was passed under Section 132 of the Income Tax Act, 1961 (hereinafter called the 'Act') and Rule 112(II) of the Income Tax Rules, 1962 (hereinafter called the 'Rules') was challenged. The Division Bench by the impugned judgment allowed the petition, quashed the search and seizure warrants and directed the Income Tax Department to return the moneys to the customs authorities and gave certain consequential directions. In order to appreciate the points involved, it is necessary to refer to certain facts as found by the High Court. On August 23, 1970 the petitioner before the High Court, who is the respondent here, was travelling by car, alleged to be belonging to his brother from Ambala to Batala. He was intercepted near the Beas river by the Customs Officer and was forcibly taken along with the driver, Gurnam Singh, to the Customs House at Amritsar. The said petitioner in that application was searched along with his driver and the customs authorities took into possession Rs 93,500 in Indian currency, 10 gold sovereigns and the car. On August 24, 1970, the petitioner was produced before a Duty Magistrate at Amritsar and was granted bail. In the meantime, the Customs Department took proceedings under Section 110(2) of the Customs Act, 1962 and extended the period of issuing of the show cause notice under section 124 of the Customs Act, 1962. These proceedings were challenged in the High Court by writ petition and the order of the customs authority under Section 110(2) was quashed by an order of the learned single Judge of the High Court on April 24, 1972. The appeal against that decision was dismissed by the Division Bench along with this petition by the High Court. After the said judgment of the learned single Judge, the respondent had approached the customs authorities for the return of the money and the car. The gold sovereigns were not demanded because according to the said petitioner, these did not belong to him. He had been directed to come on the following day to get back the currency notes and the car. In the meantime on May 12, 1972 the Income Tax Officer, had served the warrant of authorisation dated May 10, 1972 issued under Section 132 of the Act and Rule 112(II) of the Rules on the respondent as well as on the Customs Department, with the result that only the cash was taken possession of by the income tax authorities. Thereafter, the respondent filed the petition under Articles 226 and 227 of the Constitution before the High Court in respect of which the judgment impugned here was rendered.

2. It was submitted that the authorisation warrant was illegal, because the money was not in his

possession but was in the possession of the customs authorities. It was secondly urged that the action taken by the income tax authorities under Section 132 of the Act militated the provisions of Section 110(2) of the Customs Act. The High Court felt that so far as the first contention was concerned, it was concluded by the decision of the said High Court in CIT v. Ramesh Chander ((1974) 93 ITR 450 (P&H)). The High Court relied on the following observations at pages 478-479 of the report :

....I have come to the conclusion that the search and seizure warrants issued under sub-section (1) of Section 132 of the Income Tax Act were illegal, firstly because the search and seizure warrants were issued in the name of Ramesh Chander and he was in fact not in possession of either the currency notes or account books, and, secondly, the income tax authorities could not seize the currency notes and account books from the police officer who is duty bound to proceed with the case-property in accordance with the provisions of the Code of Criminal Procedure.

3. The High Court held that where the amount was seized by the customs authorities and the seizure was held illegal by the court, customs authorities were bound to return the money to the person entitled to it under the relevant provisions of Section 110 of the Customs Act, 1962. The income tax authorities could not seize such an amount from the customs authorities under Section 132 of the Act. Moreover, the authorisation was illegal if issued in the name of the person who did not have possession of the article, in respect of which it was issued. The High Court further held that in the facts and circumstances of the case the order under Section 132 of the Act was not justified. Therefore, the High Court held that the search and seizure warrants were liable to be quashed and the money returned to the Customs Department. The judgment of the High Court is reported in Tarsem Kumar v. CIT ((1974) 94 ITR 567 (P&H)). The validity to the judgment is impugned in this appeal.

4. It is necessary in order to appreciate the contentions urged in this case to refer to the relevant provisions of Section 132 of the Act. Sub-section (1) of Section 132 provides as follows :

"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;

(ii-a) 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 mark 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 :

5. The only other sub-section to which reference need be made is sub-section (3) which is as follows :

"The authorised officer may, where it is not practicable to seize any such book of account, other document, money, bullion, jewellery or other valuable article or thing, serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

6. It is not necessary to refer to the other provisions for the present purpose. But the procedure

indicated that if necessary, force may be used for search and seizure. Rule 112 of the said Rules provides the manner in which such search and seizure should be conducted.

7. On a construction of the section, and the context, in which the words "search", "possession" and "seizure" have been used in the said section and the rules indicate that there cannot be any order in respect of goods or moneys or papers which are in the custody of another department under legal authority. It is important to note that the expression "possession" has not been defined in the Act.

8. It may be noted that sub-section (3) of Section 132 of the Act uses the expression "who is in immediate possession or control thereof". "Possession" is a word of ambiguous meaning and its legal senses do not always coincide with the popular sense. Reference may be made to Halsbury's Laws of England, Vol. 35, 4th Edn. articles 1111-1126, pages 617-627. Possession again may not always be synonymous with manual detention or physical retention of the goods or moneys. It appears to us that when the physical custody of the money and goods were with the customs authorities, and that too by a legal sanction and authority to have that custody, it would be improper to contend that possession as used in Section 132 of the Act was still with the respondent. The use of the expression "immediate possession" in sub-section (3) of Section 132 does not detract from the meaning of possession in the popular sense. This construction is not unmindful of the fact that in some of the sub-sections of Section 132 the expressions "retention" and "custody" have been used, but reading these expressions in the context these have been used, it cannot be said that where an authority or a person has retention and custody with the legal sanction behind it, it was not the intention of the legislature to say that he was not in possession as contemplated in Section 132 of the Income Tax Act, 1961. In this connection, reference may be made to Burrows Words and Phrases Judicial Dictionary, 4th Edn., page 306. All these aspects were discussed by the Calcutta High Court (by one of us, Sabyasachi Mukharji, J. singly) in *Laxmipat Choraria v. K. K. Ganguli* ((1971) 82 ITR 306 (Cal)). This decision was affirmed on appeal and the Bench decision of the said court is reported in *K. B. Johnson v. Laxmipat Choraria* ((1974) 93 ITR 489 (Cal)). This aspect of the matter has been clearly dealt with by a judgment of the Division Bench of the Allahabad High Court in *Motilal v. Preventive Intelligence Officer, Central Excise and Customs, Agra* ((1971) 80 ITR 418 (All)), where the judgment was delivered by one of us (R. S. Pathak, J.). There the court held that the power conferred under Section 132(1) of the Act was contemplated in relation to those cases where the precise location of the article or thing was not known to the Income Tax Department and therefore, a search was necessary for it, and where it would not be ordinarily yielded over by the person having possession of it. The view that Section 132(3) of the Act would include case where the location of the article or thing was known and where ordinarily the person holding custody of it would readily deliver it up to the Income Tax Department was not correct, it was so held by the Division Bench of the Allahabad High Court.

9. It was further held that consequently goods in the custody of the Assistant Collector of Customs and Central Excise were not things which could be the subject of an order under Section 132(3) of the Act. Pathak, J. spoke for the Division Bench there at p. 422 of the report thus :

In my opinion, the power conferred under Section 132(1) is contemplated in relation to those cases where the precise location of the article or thing is not known to the Income Tax Department and, therefore, a search must be made for it, and where it will not be ordinarily yielded over by the person having possession of it and, therefore it is necessary to seize it. If it is only such article or thing which is contemplated by Section 132(1), then it is such article or thing alone which can be the subject of an order under Section 132(3). I am unable to accept the contention on

behalf of the Income Tax Department that Section 132(3) will include a case where the location of the article or thing is known and where ordinarily the person holding custody of it will readily deliver it up to the Income Tax Department. Such article or thing, I think, requires neither search nor seizure.

10. Mr S. C. Manchanda, learned advocate for the revenue, drew our attention to several decisions including the decision in *Noor Mohd. Rahimatulla Gillani v. CIT* (1976 Tax LR 688 (Bom)).

11. In that case, after referring to the views expressed by the Division Bench of Allahabad High Court and Division Bench of Punjab and Haryana High Court in the judgment under appeal and the Calcutta High Court, as indicated before, Chandurkar, J. of the Bombay High Court observed as follows :

"We are not inclined to accept the submission that no valid authorisation to seize the amount lying with the Collector of Central Excise and Customs, Nagpur could have been issued under Section 132(1). The relevant provision in the instant case is to be found in Section 131(1)(c) of the Act and all that is required in order to issue an authorisation under Section 132(1) is that either the Director of Inspection or the Commissioner must have reason to believe that any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purposes of the Act or the Income Tax Act of 1922. It is the character of money or assets as undisclosed income or property and their possession that gives jurisdiction to issue the authorisation. Merely because some authority has seized that money or property, its character which is believed to be that of undisclosed income or property does not change. The seizure of the cash amount of Rs 3,05,530 by the Central Excise authorities in the instant case no doubt transferred physical possession of that amount from the petitioner to the Central Excise Department, but the legal ownership of that money still continued to be with the petitioner. As long as that amount was not confiscated or did not become the property of the Central Excise Department by virtue of an order passed under the relevant provision of law if at all any order could be so passed the property or the money did not cease to be that of the petitioner. Though the Collector of Central Excise and Customs was in possession of the money, since its alleged character of being undisclosed income or property remained unattended the Collector satisfied the description of "any person" being in possession of undisclosed income or property though the property represented the undisclosed income or property of the petitioner himself. The words used in Section 132(1)(c) are "any person". Such a person may be person who is in possession of his own undisclosed income or property or a person who is in possession of somebody else's undisclosed income or property. The fact that the Collector of Central Excise and Customs happened to be an officer of the Government of India was not relevant because the Income-tax authorities and the Central Excise authorities were functioning under two separate enactments which created two different liabilities the enforcement of which was entrusted to independent authorities under the law. Disagreeing, therefore, with the authorities relied upon by the petitioner, we must hold that the authorisation issued even against the Collector of Central Excise and Customs enabling the Income Tax Officer to seize that amount was a valid authorisation. In any case, in the instant case, a subsequent order under Section 132(3) was already made and even by the order

under Section 132(5) that amount was directed to be released.

12. It is true that the title was not transferred to the customs authorities by seizure under the Customs Act. But in the context, in which the expressions "possession" and "seizure" have been used it cannot be considered to mean that the possession was where the legal title was; physical possession was with the customs authorities, title was with the respondent herein. In this context, the physical possession having regard to the language used is relevant and material. Physical possession was with the customs authorities when the seizure authorisation was passed. Therefore, where the exact location of the property was known and there was no need to seize the money, the Income Tax Department could direct handing over the money to the income tax authorities or take steps for such direction through appropriate authorities. In that view of the matter we are unable to sustain the view of Chandurkar, J. as the learned Chief Justice then was of the Bombay High Court.

13. Mr Manchanda also drew our attention to the case of Pannalal v. ITO ((1974) 93 ITR 480 (MP)), where the Division Bench of the Madhya Pradesh High Court was of the view that an order under Section 132(3) could only be passed after an authorisation for search and seizure had been made under Section 132(1) of the Act. The thing in respect of which the order is made must be one regarding which the conditions mentioned in clauses (a), (b) and (c) of Section 132(1) are satisfied. But there was nothing in the requirements of Section 132 to support the view that if the Commissioner has definite knowledge that the books of account, documents, money, bullion, etc., sought to be searched and seized are in the possession of a particular person he cannot issue an authorisation for search and seizure of the same. In our opinion, it may be mentioned that if the location was certain, then there was nothing to search or look for. Madhya Pradesh High Court, however, observed that the expression "has reason to believe" signified that the Commissioner has reason to be satisfied that the things to be searched are in the possession of a particular person. The object of Section 132 was according to the High Court, not merely to get information of the undisclosed income but also to seize the money, bullion, etc. representing the undisclosed income and to retain them for purposes mentioned in Section 132(5). Section 132(1)(c) of the Act did not contain a condition either expressly or impliedly that the thing to be seized should not be in the possession of a person who may willingly part with his possession. There is no obligation on any one, not even on government officers of other departments, to deliver anything to the income tax authorities excepts when the law requires them to do so. The person authorised by the Commissioner could enter and search any building, break open the lock of any door etc. But that did not mean that in every case the person authorised by the warrant would have to exercise all those powers in making the search and seizing the thing, according to the High Court. It was not necessary that an actual search must precede an order under Section 132(3) directing a person not to part with articles in his possession. Section 132(1)(c) did not contemplate that the person who has not disclosed his income or property for the purposes of the Income Tax Act should himself be in possession of money, bullion, etc. representing such income. Clause (c) spoke of "any person who is in possession" and it did not specifically refer to possession by the person who had not disclosed his income. All that the clause required was that the money, bullion, etc. should be such which represents either wholly or partly income or property which had not been disclosed for purposes of the Income Tax Act and such money, bullion, etc. should be in the possession of a person. This construction was supported by the use of words "immediate possession" in Section 132(3) of the Act. This was the view of the High Court.

14. There an order under Section 132(3) was passed by the Commissioner of Income Tax on the Collector of Customs and Central Excise in respect of currency notes of the value of Rs 2,02,500 belonging to a firm, which the Collector was holding under the Gold Control Act and which, as no

offence was committed under that Act, the Collector had ordered to be released. It was also held by the High Court that the Collector was under a legal obligation to return the currency notes to the firm after the proceedings under the Gold Control Act had been finalised. The power of the Collector was only to retain the currency notes for a limited period. It could be held that the currency notes were held by the Collector for and on behalf of the firm and the order passed under Section 132 was valid.

15. For the reasons mentioned hereinbefore, we are unable to sustain that view of the High Court. As mentioned before though legal title might have been with the person whose income was sought to be taxed the physical possession was with the Customs authorities. Our attention was drawn to a Bench decision of the Madras High Court where similar view was taken in *Gulab and Co. v. Superintendent of Central Excise (Preventive)* ((1975) 98 ITR 581 (Mad)). For the reasons we have indicated hereinbefore, we are also unable to sustain this view. The Kerala High Court in the case of *Assainar v. ITO* ((1975) 101 ITR 854 (Ker)), also accepted this view. We are, for the aforesaid reasons, unable to sustain this view with respect. The High Court observed that the word "search" has varied meanings and it should be given the general meaning "to look for" or "seek" which are also well known. But in the context the expression "seizure" and in the context the expression "search" where the location of the property was known to the government, we are of the opinion that it could not be said that one government department could search any other government department, and seize those documents.

16. Relying on the decision of the Allahabad High Court in *Motilal case* ((1971) 80 ITR 418 (All)) as well as the decision of the Calcutta High Court in *Laxmipat case* ((1971) 82 ITR 306 (Cal)), the learned single Judge of the Punjab and Haryana High Court in *Ramesh Chander v. CIT* ((1974) 93 ITR 244 (P&H)) held that the word "seizure" implied forcibly taking from the owner or who has the possession and who was unwilling to part with the possession. In that case custody was with the police and it would be inappropriate to accept the position that the Income Tax Department which was another department of the Union of India had to be armed with authority to seize from the unwilling persons. We are in agreement with these views of the learned single Judge. This view of the learned single Judge has been confirmed in the judgment of the Division Bench, already referred to hereinbefore in *CIT v. Ramesh Chander* ((1974) 93 ITR 450 (P&H)). The lacuna in law has subsequently been filled in by Section 132-A of the Act with effect from October 1, 1975.

17. In the view of the law as it stood at the relevant time, we are unable to sustain the challenge to the order, impugned in this appeal. The appeal, therefore, fails and is accordingly dismissed with the observations that it will be open to the income tax authorities to approach the appropriate authorities to realise any amount of money or to recover any books of account or documents in accordance with law. In the facts and the circumstances of the case, parties will pay and bear their respective costs.

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