

Ram Mohan Rastogi Vs. Union of India (Uoi) and ors.

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Court : Allahabad

Decided On : Apr-20-1984

Reported in : (1984)42CTR(All)112; [1987]163ITR17(All)

Judge : H.N. Seth and ;A. Banerji, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 132, 132(5), 132(7) and 132(11);
[Constitution of India](#) - Article 226

Appeal No. : Civil Misc. Writ Petition No. 790 of 1982

Appellant : Ram Mohan Rastogi

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : M. Katju, Adv.

Advocate for Pet/Ap. : I.C. Agarwal and ;R.G. Padia, Advs.

Judgement :

A. Banerji, J.

1. An interesting question arises in this writ petition. The petitioner claims that certain silver bullions which were seized from a trader in bullions belonged to the petitioner and the same had not been released in his favour and that his representations had been rejected illegally. He has prayed in this petition for the

issue of a writ of mandamus directing respondents Nos. 2, 3 and 4 to release and return the seized silver weighing 7.660 kg. and for the quashing of the order dated January 29, 1981, in respect of seizure of the silver of the petitioner.

2. First the relevant facts : an income-tax raid was conducted against a bullion dealer, Chetmani Enterprises, Varanasi, on November 1, 1980, by the Income-tax Officer (B Ward), Varanasi. The seized articles included 7.660 kg. of silver in the form of ornaments, rods, etc. The petitioner's case was that he had given the silver to the bullion dealer the same day at about 11 in the morning for testing its purity with the intention to sell. The petitioner's case further was that he was asked by the bullion dealer to leave the silver at his place and come a little later so that the testing may be done and the price determined. When the petitioner went to the place of the bullion dealer after some time as required, he noticed that there was an income-tax raid and he could not get back the silver given by him to the bullion dealer, for it had also been seized. He made an application for the release of the silver to the Commissioner of Income-tax, Allahabad, on December 28, 1980, and to the Income-tax Officer (B Ward), Varanasi, on April 25, 1981. Subsequently, he made an application to the Income-tax Assistant Commissioner (Assessment), Varanasi, on July 3, 1982. His stand further was that the order passed under Section 132 of the Income-tax Act, 1961, dated January 29, 1981, by the Income-tax Officer (B Ward), Varanasi, was bad in law as the silver weighing 7.660 kg. belonged to him and not to the bullion dealer.

3. On behalf of the Income-tax Department, a counter-affidavit was filed by the Income- tax Assistant Commissioner (Assessment). It was stated there that a raid was conducted and several items including silver weighing 7.660 kgs. were seized, but the ownership of the petitioner in regard to the said silver was neither admitted nor established. In the order passed under Section 132(5) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), the seized silver had been held to belong to Chetmani Enterprises. That order was passed after taking into consideration all facts and circumstances. It was also stated that after the passing of the order under Section 132(5) of the Act, it was not possible for the Income-tax Officer to pass any further order. Before the order under Section 132(5) of the Act was passed on January 29, 1981, the petitioner had given his statement on oath

on December 15, 1980, and he had been heard. The petitioner had a right to make a representation under Section 132(11) of the Act and, in this view of the matter, the writ petition filed by him was not maintainable.

4. A rejoinder affidavit was filed reasserting the contents of the writ petition and denying the assertions to the contrary made in the counter-affidavit. It was also urged that an application under Section 132(7) of the Act had been made on April 25, 1981, and the denial of the receipt of the same was incorrect, as a receipt had also been furnished to the petitioner. It was further urged that the order passed under Section 132(5) of the Act was bad in law, for it did not contemplate any finding on the issue of ownership of the article. It was reasserted that the seized silver belonged to the petitioner and the order passed under Section 132(5) of the Act did not relate to the petitioner and, as such, there was no question of his filing any representation under Section 132(11) of the Act.

5. We have heard Shri R. G. Padia, learned counsel for the petitioner and Shri M. Katju, learned counsel for the Department. Before we advert to the questions raised in this petition, it will be relevant to mention here that the impugned order was passed on January 29, 1981, and the present writ petition was filed in this court in October, 1982. There is no adequate explanation for this inordinate delay to approach this court. The writ petition is liable to be dismissed on this ground of laches alone. However, since we have heard the learned counsel for the petitioner on merits, we proceed to decide the case on merits.

6. The first question for consideration is as to the scope of Section 132(5) and (7) of the Act. The relevant provisions of Section 132(5) and (7) read as follows :

'(5) Where any money, bullion, jewellery or other valuable article or thing (hereafter 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,--.....

7. and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amount referred to in Clauses (ii) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized :.....

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

(7) If the Income-tax Officer is satisfied that the seized assets or any part thereof were held by such person for or on behalf of any other person, the Income-tax Officer may proceed under Sub-section (5) against such other person and all the provisions of this section shall apply accordingly.'

9. Section 132(1) of the Act provides for the search and seizure of any goods, bullion, ornaments, books of account and other documents when authorised by the CBDT and the officers mentioned in this section. Exercise of the power is limited where the case comes under Clauses (a), (b) and (c) of Section 132(1) of the Act. An authorised officer may enter and search any building, place, vessel 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. He is also authorised to seize such books of account, other documents, money, bullion, jewellery or other valuable article or thing as a result of such search. Under Sub-section (4) of Section 132, the authorised officer may during the course of search and seizure, examine on oath any person who is alleged to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable articles. Sub-section (5) of Section 132 provides that where any money, bullion, jewellery or other valuable articles are seized under Sub-section (1) or Sub-section (1A), the Income-tax Officer is to afford a reasonable opportunity to the person concerned of being heard and after making such enquiry as may be prescribed, shall within ninety days of the seizure make an order with the previous approval of the Income-tax Assistant Commissioner (i) estimating the undisclosed

income 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; (iia) determining the amount of interest payable; and (iii) specifying the amount that will be required to satisfy any existing liability under the Act or other Acts mentioned in Section 230A(1)(a) and retain in his custody such assets which in his opinion are sufficient to satisfy the aggregate of the amounts calculated under Clauses (ii) and (iia). The second proviso stipulates that where a person has paid or made satisfactory arrangements for the payment of the amount referred to in Clauses (ii), (iia) 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.

10. It is apparent from the above that after the search and seizure had been made in accordance with law, a duty is cast on the authorised officer to make an order within 90 days of the seizure after making an enquiry and affording an opportunity of being heard to the person from whom the offending goods were seized. The aforesaid order should comply with the requirements of Clauses (i) (ii), (iia) and (iii) of Sub-section (5) of Section 132 of the Act. Section 132(5) pertains to the seizure of goods of the person against whom the search was contemplated under Section 132(1) of the Act. It has nothing to do with the goods of a third party. As a matter of fact, the goods of a third party do not come within the ambit of Section 132(5) of the Act.

11. Sub-section (7) of Section 132 of the Act provides the procedure in case the goods of a third party are found there. That sub-section says that if the Income-tax Officer is satisfied that the seized assets or any part thereof were held by the person whose premises was raided for and on behalf of any other person, it would be open to the Income-tax Officer to proceed under Sub-section (5) against such other person. It is, therefore, clear that in case the seized goods contained any goods which were held by the person against whom the search and seizure under sub-Section 132(1) or (1A) was organised, then the Income-tax Officer may proceed under Sub-section (5) against that person also whose goods were held by the person whose premises was raided. In the present case, there is no proceeding under Section 132(5) against the petitioner. The Income-tax Officer in

the instant case, proceeded against the Chetmani Enterprises, Varanasi, from whose possession the goods were seized. As a matter of fact in his order under Sub-section (5) of Section 132 of the Act, the Income-tax Officer has held that these goods including the silver belonged to Chetmani Enterprises.

12. The petitioner's contention has been that the Income-tax Officer had no jurisdiction to seize the aforesaid goods, for they did not belong to Chetmani Enterprises and it belonged to him. In other words, his contention that since the seized silver did not belong to Chetmani Enterprises, no order under Section 132(5) could be passed in respect of the seized silver. The contention on behalf of the Revenue is that the finding by the Income-tax Officer under Section 132(5) is cogent and clear that the seized silver belonged to Chetmani Enterprises and not to the petitioner. This was a question of fact and it was not open to the petitioner to raise disputed questions of fact in a petition under Article 226 of the Constitution. Learned counsel further urged that the Income-tax Officer being satisfied that the seized silver belonged to Chetmani Enterprises did not initiate any proceeding under Section 132(5) of the Act against the petitioner. In other words, he submitted that the question whether the silver belonged to the petitioner or to Chetmani Enterprises was beyond the scope of enquiry or decision in a petition under Article 226 of the Constitution, and the finding arrived at by the Income-tax Officer will have to be accepted as correct.

13. We find force in the above contention raised by the learned counsel for the Revenue. In the case of *Dharangadhra Chemical Works Ltd. v. State of Saurashtra* : (1957)ILLJ477SC , the question was whether the relationship between the parties was one as between an employer and an employee or between master and servant. Their Lordships held that that was a pure question of fact. The decision of the Tribunal on a question of fact is not liable to be questioned in proceedings under Article 226 of the Constitution, unless it is shown that the finding is wholly unsupported by any evidence.

14. In the case of *Nagendra Nath Bora v. Commr. of Hills Division* , : [1958]1SCR1240 , their Lordships laid down that 'one of the grounds on which the jurisdiction of the High Court on certiorari may be invoked, is an error of law

apparent on the face of the record and not every error either of law or fact'. It was further laid down that a writ petition under Article 226 of the Constitution does not take the place of an appeal. Its purpose is only to determine on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. It was further observed that mere formal or technical errors, even though of law, will not be sufficient to attract the extraordinary jurisdiction. This view has been followed and approved in subsequent decisions.

15. In the case of *Express Newspapers (P.) Ltd. v. Presiding Officer, Labour Court* : AIR 1964 SC806 , their Lordships laid down that the High Court can interfere in exercise of its powers under Article 226 of the Constitution with a finding of fact provided that there existed an error apparent on the face of the record or on the ground that there was no evidence at all to support it. Similar view has been expressed in the case of *Natha Singh v. Finance Commissioner, Taxation, Punjab* : [1976]3SCR620 . Their Lordships further held that where the conclusion by a Labour Court was based on legal evidence, there was no justification for interference by the High Court in exercise of its powers under Article 226 of the Constitution. [See *Cox and Kings (Agents) Ltd, v. Their Workmen* : (1977)ILLJ471SC] Similar view was taken in the case of *Khazan Singh v. Hukam Singh* : [1977]1SCR636 , where it was laid down that the High Court should not interfere with a finding of fact as long as that finding is based upon relevant circumstances and is not shown to be perverse.

16. In the present case, learned counsel for the petitioner contended that the property in dispute, viz., bars of silver, belonged to the petitioner and not to M/s. Chetmani Enterprises, Varanasi. He further contended that it was necessary for the Income-tax Officer to decide the question as to whether the silver bars belonged to the petitioner. The non-consideration of this relevant fact has resulted in a patently erroneous order resulting in the seizure of the goods which belonged to the petitioner and not to M/s. Chetmani Enterprises. This argument is wholly unacceptable. In a proceeding under Section 132(1) of the Act against the firm, M/s. Chetmani Enterprises, the Income-tax Officer was not called upon to decide whether the bars of silver found in the premises of Chetmani Enterprises during

the raid belonged to the petitioner. All that he was called upon to decide was whether the bars of silver found at the premises of Chetmani Enterprises belonged to the said firm or to someone else. The Income-tax Officer found that the bars of silver belonged to M/s. Chetmani Enterprises. There was no finding that these bars of silver did not belong to M/s. Chetmani Enterprises but to someone else. The finding arrived at by the Income-tax Officer was based on a consideration of the relevant evidence on the record. In view of the above finding, the Income-tax Officer was not required to go into the question whether the seized goods belonged to the petitioner. That question would have arisen if on the basis of available evidence on the record, the Income-tax Officer came to the conclusion that the silver bars did not belong to M/s. Chetmani Enterprises but belonged to someone else, viz., the petitioner. In that event, the Income-tax Officer could proceed under Section 132(7) of the Act and follow the procedure laid down in Section 132(5) of the Act against the petitioner. If he was otherwise satisfied that the silver bars belonged to the petitioner, he could also have passed an order for its release but those considerations would only arise if there was a finding that the silver bars did not belong to M/s. Chetmani Enterprises. Since the finding in the case on the basis of the relevant evidence was that the silver bars belonged to M/s. Chetmani Enterprises, no occasion arose for proceedings under Section 132(7) of the Act or for releasing the silver bars in favour of the petitioner.

17. The finding arrived at by the Income-tax Officer is based on the relevant evidence on the record. Nothing could be shown that the finding is vitiated by any error of law apparent on the face of the record, it is well settled that a mere error of law is not liable to be corrected in exercise of the powers of this court under Article 226 of the Constitution. The error of law must be manifest. In our opinion, nothing could be shown that the finding arrived at by the Income-tax Officer was manifestly erroneous.

18. We are also satisfied that there has not taken place any error in the procedure followed by the Income-tax Officer. As indicated above, the Income-tax Officer was not called upon to proceed under Section 132(7) of the Act in the present case.

19. Reference may be made to Sub-section (11) of Section 132 of the Act It provides for the making of an application/objection to such authority as may be notified on behalf of the Central Government in the Official Gazette for filing of an objection and for appropriate relief. If the petitioner was aggrieved by the order made under Section 132(5) of the Act, he could have sought an alternative remedy by filing an application/objection under Sub-section (11) of Section 132 of the Act. This had to be filed within 30 days of the order. Admittedly, no such application had been filed.

20. Learned counsel for the petitioner, however, argued that since the order under Section 132(5) of the Act was passed against M/s. Chetmani Enterprises, Varanasi, and not against the petitioner, the question of his filing an application/objection did not arise. This contention is not acceptable. The expression used in Sub-section (11) is 'If any person objects for any reason to an order made under Sub-section (5)'. This provision is wide enough to give a right to a person who objects to such an order being passed and is not confined only to the person from whose premises the goods were seized. In other words, a person whose goods had been seized during the course of a raid from the premises of another person could make an application under subSection (11) of Section 132 of the Act. The expression 'any person' would also include in its ambit persons other than those from whose premises the goods were seized. The other expression 'objects for any reason to an order made under Sub-section (5)' shows that an order made under Sub-section (5) of Section 132 of the Act could be agitated for any reason by a person who felt aggrieved. It is, therefore, apparent that the petitioner had an alternative remedy by filing an objection before the appropriate appellate authority within the time provided by law. He had not availed of that opportunity and instead he had filed this writ petition in this court. On this ground, his writ petition is not maintainable. It is well settled that if there is an alternative remedy, the High Court may refuse the grant of relief. In the case of C. A. Abraham v. ITO : [1961]41ITR425(SC) , it was laid down- that the petitioner could not be permitted to invoke the writ jurisdiction of the High Court when he had adequate remedy open to him by an appeal under the Act.

21. The argument was that if there was a violation of the principles of natural justice, the existence of an alternative remedy was not a bar to the issue of a writ. It is well settled that the High Court in exercise of its powers under Article 226 of the Constitution may interfere and issue an appropriate writ even where an alternative remedy is available, but that would be in an exceptional case. The normal rule is to refuse to issue such writs where adequate alternative remedy is available under the statute. In appropriate or suitable or exceptional cases, the court may exercise its powers notwithstanding an alternative remedy. The contention that if there was violation of the principles of natural justice, a writ would issue invariably is, however, not acceptable to us. It would depend on the facts of each case. The rules of natural justice could be invoked by a person who had been deprived of such an opportunity to which he was entitled under the law. In the present case, proceedings under Section 132(1) were against M/s. Chetmani Enterprises and not against the petitioner. M/s. Chetmani Enterprises took the plea that silver bars which had been seized from its premises belonged to the petitioner and in support of their case they had examined the petitioner. The petitioner had raised the plea that the silver bars belonged to him. As indicated above, the Income-tax Officer had to decide whether the seized silver belonged to M/s. Chetmani Enterprises. Rejecting the evidence produced on behalf of Chetmani Enterprises that the silver did not belong to the petitioner, the Income-tax Officer held against the firm. That was a finding of fact which could be challenged by the firm in appeal. Sub-section (11) of Section 132 of the Act, as indicated above, also provided an adequate opportunity to the petitioner to question the decision before the appellate authority. The petitioner could raise all such points in the appeal which he was entitled to raise in law. If the proceedings were primarily against the firm, M/s. Chetmani Enterprises, the proceedings under Section 132(5) of the Act could also proceed against the petitioner provided there was an order under Section 132(7) of the Act. There was no such order. The question of violation of the rules of natural justice against the petitioner could arise only after proceedings under Section 132(7) of the Act had been taken.

22. Learned counsel for the petitioner raised another argument based on a decision of the Madras High Court in the case of *Gulab & Co v. Supdt. of Central Excise (Preventive)*, Tricky : [1975]98ITR581(Mad) . The contention was that the

words 'person concerned' in Section 132(5) can refer only to the person against whom a warrant is issued and not the person who was in actual possession. The person who was in physical possession of the asset and from whom the actual seizure was effected ought to have been given an opportunity of being heard under the principles of natural justice. This contention is not acceptable to us for the reason that in the present case, it was not established that the petitioner was in physical possession of the silver bars and the actual seizure was effected from him. The finding is that it was seized from the premises of Chetmani Enterprises and not from the petitioner. Consequently, the question of giving an opportunity to the petitioner did not arise.

23. Reference was also made to the case of *Gita Devi Dhurka v. ITO* [1977] Tax LR 722 by the learned counsel for the petitioner. It was held in that case that if the Income-tax Officer was prima facie of the view that when notice under Rule 112A was issued, the seized goods did not belong to the person from whom they were seized, it would be open to him to take proceedings under Section 132(5) against the third party who made the claim instead of the person from whom the goods were seized. The principle laid down in this case would be applicable where the Income-tax Officer was prima facie of the view that it did not belong to the person from whom the goods were seized. In that event, he should proceed under Section 132(7) against the person who claimed to be its owner, but, in the present case, the facts are otherwise. These decisions, therefore, are distinguishable.

24. Having taken into consideration the circumstances of the case, we are not satisfied that this is a fit case for interference in exercise of the powers of this court under Article 226 of the Constitution when the petitioner had adequate alternative remedy under the statute.

25. For the reasons indicated above, this petition must fail and is accordingly dismissed with costs.