**D.R. Benefit Fund Ltd. Vs. Assistant Director of Income Tax (inv.) and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/839228

**Court** : Chennai

**Decided On :** Mar-07-2006

**Reported in** : (2006)203CTR(Mad)453; [2008]297ITR346(Mad)

**Judge** : K. Mohan Ram, J.

**Acts** : Income Tax Act, 1961 - Sections 132, 132(1), 132(3), 142(1), 143(2) and 226

**Appeal No.** : Writ Petn. Nos. 38997 of 2005 and 932 of 2006 and WPMP Nos. 41774 and 41775 of 2005 and 1066 and 256

**Appellant** : D.R. Benefit Fund Ltd.

**Respondent** : Assistant Director of Income Tax (inv.) and ors.

**Advocate for Def.** : Pushya Sitaraman and ;E. Om Prakash, Advs. for Ramlingam Associates

**Advocate for Pet/Ap.** : V. Ramachandran, Adv.

**Judgement** :
ORDER

**K. Mohan Ram, J.**

1. Writ Petn. No. 38997 of 2005 has been filed by the petitioner for issuance of a writ of certiorari to quash the prohibitory order issued by the first respondent in SS-II, dt. 23rd Nov., 2005 under Section 132(3) of the IT Act, 1961. While admitting the said writ petition, the Hon'ble Mr. Justice A. Kulasekaran, has passed an order dt. 21st Dec., 2005 in WPMP Nos. 41774 and 41775 of 2005 which reads as follows :

Considering the facts and circumstances of the case, the respondents are directed to depute one of their officials, not below the rank of an Inspector to go to the petitioner-company on every working day at a fixed time and permit the customers to redeem the jewels, if they are genuine persons. In case, any suspicion that any customer is a Benami or a fictitious person, the deputed Inspector may not allow them to redeem. The redeemed amount from the genuine customers is ordered to be deposited in a separate interest-bearing account. If there is any inconvenience in following this proposal, liberty is given to the parties to approach this Court. Notice.

The main ground on which the impugned proceeding is challenged is that the conditions necessary for invoking Section 132 are not satisfied in the petitioner's case and consequently there cannot be a valid search in the petitioner's premises. The prohibitory order issued under Section 132 is totally without jurisdiction as necessary conditions for issue of the prohibitory order had not been satisfied.

2. A detailed counter-affidavit has been filed by the respondent. In para 17 of the counter-affidavit, it is stated as follows :

The warrant of authorisation was issued after taking utmost care by the highest authorities. The warrant of authorisation is being issued by the Director of IT (Inv.) after obtaining due concurrence from the Director General of IT (Inv.) who is the senior most official of the IT Department. Before issuing warrant of authorisation, the Director of IT has to satisfy himself that there is a prima facie case exists. When the Director has arrived a conclusion that the normal issue of notice under Sections 142(1), 143(2) will not serve the purpose and has arrived a conclusion that it is a fit case for search and seizure operation then only warrant of authorisation is being issued. In the instant case, the Director of IT has arrived

such conclusion and thereby issued warrant of authorisation under Section 132 of the Act.

The respondents have further stated in their counter-affidavit that while executing the warrant under Section 132 of the Act, it was found that it is not practically possible to verify all the documents and lockers at a given point of time and so prohibitory order under Section 132(3) was issued and the conditions have been satisfied.

3. Writ Petn. No. 932 of 2006 has been filed by the same petitioner for the issuance of a writ of mandamus directing respondents 1 to 3 to refund the petitioner a sum of Rs. 17,78,326 recovered by the first respondent from the fourth respondent out of the amounts standing to the petitioner's credit with the fourth respondent together with interest thereon.

4. In the affidavit filed in support of the writ petition, apart from reiterating the contentions raised in Writ Petn. No. 38997 of 2005, the petitioner in para No. 10 of the affidavit has stated as follows :

10. Under Section 132(1) the inspecting officers are authorized to seize books of accounts, other documents, money, bullion, jewellery or other valuable article or thing in the course of the search, if the same constitutes undisclosed income and are not duly accounted. The proviso to Clause (iii) of Sub-section (1) prohibits the seizure of any stock-in-trade of business and empowers the inspecting authorities to only make inventory thereof. The proviso to Sub-section (1) further provides 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 volume, weight or physical characteristics, the authorised officer is empowered to issue a distraint order. Such a distraint order cannot be issued in respect of stock-in-trade.

In para Nos. 15 and 16, it is stated as follows :

15. The petitioner has been maintaining regular books of account and filing returns of income regularly in respect of its income. There is no outstanding demand against the petitioner. There is no provision under the IT Act authorising the IT

authorities to attach the bank accounts of an assessee or to demand the payment of the amounts standing to the credit of the assessee in the bank, over to the Department, except in cases where taxes are due and payable by the said assessee, In the instant case, there is no tax outstanding payable by the petitioner and consequently it is not open to the authorities to either attach the petitioner's bank accounts or direct the banks to pay the amount to the Department. The stand taken by the respondents 1 to 3 is thus totally untenable on facts and in law.

16. On the above facts, the petitioner called upon the 1st and 4th respondents to inform the provision of law under which the 1st respondent has called upon the 4th respondent to pay to him the amount standing to the petitioner's credit in the 4th respondent bank and further put the 1st and 4th respondents to notice that the only provision under the IT Act which permits such recovery is Section 226 which applies only to a tax defaulter. The petitioner is not a tax defaulter and none of the respondents have alleged that any tax is due from the petitioner. Hence the provisions of Section 226 would not apply to the petitioner. There being no other provisions under the IT Act which authorises the Department to demand payment of amount standing to the credit of the assessee, the demand notice stated to have been issued by the 1st respondent to the 4th respondent is totally illegal. Notwithstanding the above legal position, the 4th respondent informed the petitioner by letter dt. 3rd Jan., 2006 that pursuant to the demand warrant issued by the IT authorities he has paid a sum of Rs. 11,0.9,326 to the IT Department. Even the said letter of the 4th respondent does not set out the provision of law under which the above demand is made by the 1st respondent or amount paid by the 4th respondent to the 1st respondent.

In this writ petition also the respondents have filed a counter-affidavit almost containing the same averments as in Writ Petn. No. 38997 of 2005, apart from setting out. the details of the result of the search made by the Department.

5. When the miscellaneous petitions and the above two writ petitions came up for hearing, Mr. V. Ramachandran, learned senior counsel appeared for the petitioner and Mrs. Pushya Sitaraman, learned standing counsel for the IT Department appeared for the respondents and after advancing lengthy arguments, they

ultimately submitted that, the writ petitions itself can be disposed of without going into the rival contentions and merits of the case, in terms of a joint memo to be filed by the petitioner and the respondents. Accordingly, a joint memo dt. 23rd Feb., 2006 signed by the respective learned Counsel for the petitioner and the respondents has been filed, which reads as follows :

Issues-agreed by both parties.

1. Strong room will be opened by the Department.

2. Amounts kept in a separate account as per High Court orders dt. 21st Dec., 2005 will be deposited in an FD for 2 years in the same bank in the petitioner's name which petitioner cannot foreclose.

3. Amounts taken by Department by closing FD will be re-deposited in FD for 2 years in the same bank in the petitioner's name which the petitioner cannot foreclose.

4. Gold and jewellery seized will remain with the Department.

5. Regarding cash seized and amounts withdrawn from current account. The petitioner prays that these may be refunded to him.

The respondent prays that these may also be kept in an FD for 2 years in the petitioner's name without right of foreclosure.

6. The petitioner shall not part with the deposits in the name of Rajappa and family members.

7. The Department may issue notice to petitioner as well as fictitious Benami depositors. On receipt of such notice, the petitioner shall not refund deposit amounts to those persons or anyone claiming through them.

In the joint memo in Clause 5, the petitioner has sought for refund of the cash seized and amounts withdrawn from the current account, whereas the respondents pray that the said amount may be kept in an FD for 2 years in the petitioner's name without right of foreclosure. Learned senior counsel for the

petitioner drew my attention to para No. 12 of the counter-affidavit filed in Writ Petn. No. 932 of 2006 wherein the respondents have stated as follows :

The deposits made by Sri D. Rajappa and his family members amounting to Rs. 1.2 crores was also not reflected in the books of account.

He further pointed out that in para No. 16 of the same counter-affidavit, it is stated as follows :

Sri Rajappa and his family members have availed loan for more than Rs, 3,5 crores from the benefit fund out of the total loan of Rs. 5 crores. This loan has been purely utilised for his and his family members' business concerns.

6. Referring to the abovesaid averments, the learned senior counsel submitted that the allegation of the respondents itself is that Rajappa and his family members have deposited Rs. 1.2 crores with the petitioner, but the same was not reflected in the books of account. Admittedly as stated in para No. 16 of the counter-affidavit Shri D. Rajappa and his family members have availed loan for more than Rs. 3.5 crores from the benefit fund out of the total loan of Rs. 5 crores. Hence, prima facie the amount which was available in the current account and seized by the Department could not be said to be that of Rajappa and his family members and on the other hand the amount which was available in the current account would only be that of the other genuine depositors. That being so, if the respondents withhold that amount, the petitioner will not be in a position to repay to the genuine depositors as and when they seek to withdraw the same. The abovesaid contention of the learned senior counsel for the petitioner could not be answered by the learned Counsel for the respondents. Therefore, prima facie the amount recovered by the respondents from the bank which was standing in the name of the petitioner seems to belong to the genuine depositors. If that amount is retained by the respondents, the petitioner will not be in a position to run its day-to-day affairs and the petitioner will not be in a position to make payments to the genuine depositors who seek to withdraw the amount and the running of the petitioner's benefit fund itself will be affected.

7. Further in the joint memo enough safeguards are there to protect the interest of the Revenue. Clause 6 of the joint memo stipulates that the petitioners shall not part with the deposits in the name of Rajappa and his family members. As per Clause 7 of the joint memo, the Department may issue notice to petitioner as well as fictitious/Benami depositors and on receipt of such notice, the petitioners shall not refund the deposit amounts to those persons or anyone claiming through them.

8. The above two clauses totally protect the interest of the Revenue. Therefore, I . am of the considered view that it is just and proper that the respondents should be directed to refund the cash seized and the amounts withdrawn from the current account of the petitioner held with the fourth respondent bank. Accordingly, the respondents are directed to refund the cash seized and the amounts withdrawn from the current account of the petitioner with the fourth respondent bank. Further the petitioner and the respondents are directed to abide by Sub-clauses 1, 2, 3, 4, 6 and 7 contained in the joint memo. The joint memo filed by the petitioner and the respondents will form part of the records.

9. Further, it is made clear that this Court has not expressed any opinion on the merits of the case. It is open to the respondents to proceed further in this matter strictly in accordance with law without being influenced in any way by anything said in this order.

10. With the above directions, the writ petitions are disposed of. No costs. Consequently, the/connected WPMPs are closed.