

Union of India (Uoi) Vs. Pradip Kumar Saraf and ors.

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Court : Kolkata

Decided On : Jun-15-1992

Reported in : [1994]207ITR679(Cal)

Judge : Bhagabati Prosad Banerjee and ;Abani Mohan Sinha, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 127, 130, 130(2), 132, 132(5), 132(11), 132(12), 143, 253, 254, 256, 263 and 264

Appeal No. : Appeal from Original Order No. 94 of 1992

Appellant : Union of India (Uoi)

Respondent : Pradip Kumar Saraf and ors.

Advocate for Def. : Sudhir Kumar Mehta, Adv.

Advocate for Pet/Ap. : Sunil Kumar Mitra and ;Ram Chandra Prosad, Adv.

Judgement :

ORDER

UNDER S. 132(12)--Validity--Pending application under s. 132(11) transfer of file under s. 127--CIT not lost jurisdiction to dispose of application--Order, even if void ab initio unless set aside by competent court, is valid.

HELD

When an order has been passed even assuming that the order is ultra vires and void, the same should remain operative unless and until declared to be so by a competent court or authority. When an order is passed by a CIT who had jurisdiction to entertain such applications passes an order subsequent to the transfer of file from the ITO, the CIT does not lose his jurisdiction to dispose of appeals and applications inasmuch as it is nowhere provided in the IT Act the transfer of IT file will operate automatic transfer of all appeals and revisions filed against the ITO before whom file was there before the transfer of file. Even if in a case where it is found that the jurisdiction was defective, in that case also it is not open to ignore such a decision and treat it void ab initio until and unless such a decision is set aside by a competent authority.

APPLICATION :

Also to current assessment years.

Income Tax Act 1961 s.132

Search and seizure--RELEASE OF GOODS--Order under s. 132(12)--Regular assessment not a condition precedent to carry out.

HELD

In the absence of any provision contained in various sub-sections of s. 132 that the order passed by the CIT or Chief CIT under s. 132(12) would be subject to regular assessment and that the order passed under s. 132(2) cannot be made effective until and unless the regular assessment of the claimant and/or the assessee concerned or in respect of any person such an order was passed under regular assessment under s. 143 is misconceived. There was no provision that the authorities concerned should retain the goods or a part thereof until the regular assessment was made.

APPLICATION :

Also to current assessment years.

Bhagabati Prosad Banerjee, J.

1. This is an appeal against the order and judgment passed by K.M. Yusuf J., in C. O. No. 10358(W) of 1990. By the said order the learned trial judge directed the respondents to release the goods seized under Section 132(1) of the Income-tax Act, 1961, and retained pursuant to the order passed under Section 132(5) of the said Act.

2. The facts of this case are that, in connection with search and seizure made in respect of the goods of the respondent, National Forest and General Mills Pvt. Ltd., under Section 132 of the Income-tax Act which was carried out on January 12, 1990, and partly concluded on January 14, 1990. In the course of search and seizure action, the authorised officer seized under Section 132 of the Income-tax Act, 569 metric tons of imported CRCA sheets/coils found in the premises of the assessee, Messrs. National Forest and General Mills Pvt. Ltd., Bombay. The search was concluded on January 31, 1990, and a further quantity of 321.321 metric tons of CRCA imported sheets/coils were found in the said premises. The total quantity of the goods was 890.321 metric tons during the course of search under Section 132(1) and the stock of CRCA sheets/coils of about 569 metric tons and 321.321 metric tons was seized on January 14, 1990, and January 31, 1990, respectively. Thereafter, the Assistant Commissioner (Investigation) Circle 3(1), Bombay, passed an order under Section 132(5) of the Income-tax Act, dated May 7, 1990, retaining 643.221 metric tonnes of seized goods out of the total seizure of 890.321 metric tonnes of goods. In the said order under Section 132(5) CRCA sheets weighing 643.221 metric tonnes were held to belong to the assessee within the meaning of Section 132(4A) of the said Act and the value thereof worked out at Rs. 1,28,66,420 was held to be income of the assessee for the accounting year 1990-91. The Assistant Commissioner (Investigation), Bombay, also estimated the other business income of the assessee and since the value of unexplained seized CRCA sheets worked out at Rs. 128.66 lakhs was less than the tax liabilities of Rs. 198.78 lakhs, the unexplained seized CRCA sheets of 643.221 metric tons were retained under Section 132(5) of the said Act. It was found that in respect of

the total seizure of 890.321 metric tons of CRCA sheets, ownership was claimed by five different parties. The Assistant Commissioner (Investigation), Bombay, however, accepted the explanation of only one party, viz., Messrs. Twin Star Industries. According to the Assistant Commissioner (Investigation), the four other parties could not produce any evidence to prove that the goods belonged to them and also details about transportation of goods to the assessee's premises. According to the said authority, the goods were claimed to be owned by those four parties merely on the basis of income declared under Section 132(4). In the declaration under Section 132(4), according to the Assistant Commissioner (Investigation), these parties have not adduced any evidence about the exact source of income to them. It was further found by the said authority that Shri Rajib Ghai had given two contradictory statements and, therefore, held that CRCA sheets were found in the premises of the assessee and the same had to be considered by him in the case of this assessee while passing the order under Section 132(5) of the said Act.

3. Against the said order under Section 132(5) of the Income-tax Act, an objection was filed before the Commissioner of Income-tax under Sub-section (11) of Section 132 of the said Act and, on receipt of the said application, the Commissioner of Income-tax, Bombay City III, Bombay, after giving the applicant an opportunity of being heard, passed an order on June 9, 1990, under order No. BC III/S & S/143 of 1990-91. In the said order, the Commissioner of Income-tax, Bombay, held that the Department had no evidence except saying that goods were kept in the godown by the assessee, whereupon the said order under Section 132(5) of the Income-tax Act was passed. It was found that action under Section 132 was taken in the case of this assessee. The search started on January 12, 1990, and with some break continued up to January 14, 1990. It was also found that the four persons were even not served with any notice under Section 143(1). However, the statements were taken under the provisions of the Income-tax Act. The persons who gave the statements owned up the goods. Out of the four persons, three have paid the taxes as well. The Commissioner of Income-tax, Bombay City III, Bombay, after considering the facts and circumstances by the said order dated June 9, 1990, held : 'The fact, however, remains that the fourth person, Shri Mahendrakumar Choudhury, also made a

statement accepting a part of the goods belonging to him. I also find that, in the case of Shri P.K. Saraf and Messrs. Subkaran and Sons, orders under Section 132(5) were passed and, on the basis of that order, the Commissioner of Income-tax, West Bengal-9, passed an order on March 20, 1990. In the case of Messrs. Subkaran and Sons, the release order was passed by the Assistant Commissioner (Investigation). In view of the statements of the persons concerned, I do not see any reason not to accept the assessee's case that the goods in question belong to different parties and not to it. I am, therefore, of the opinion that the goods that have been owned up as belonging to different parties and on which the taxes have been paid should be accepted to be belonging to those persons. However, if the assessee or any other person produces evidence before the Assessing Officer to prove that even Shri Mahendrakumar Choudhury has made the tax payment, then the goods said to be belonging to him should be released. Otherwise, the same may be treated as belonging to this assessee. Under the circumstances, I direct that the goods which have been owned by the following persons :

1. Shri P.K. Saraf, Saroj Bhavan, 11A, Jatendra Mohan Avenue, Calcutta-700 006.
2. Shri Naranarayan Saraf, 507, Giriraj Building, Sant Tukaram Road, Bombay-9.
3. Messrs. Subkaran and Sons, 1, Pearl Mansion, 91, M. K. Road, Bombay-20,

should be released in their favour. As far as the goods claimed to belong to Shri Mahendrakumar Choudhury are concerned, till evidence is produced that Shri Choudhury has paid the taxes on the amounts disclosed to the Department, the goods need not be released. The Assessing Officer is so directed. Consequential order in the cases of the parties owning up the goods and paying the taxes should be passed by the Assessing Officer on the basis of this order.

4. The goods in respect of which P.K. Saraf claimed ownership had already been released by the income-tax authorities, after the regular assessment in so far as P.K. Saraf is concerned was completed and after he has paid his taxes under the regular assessment. Even though the writ petition was moved both by P.K. Saraf and Naranarayan Saraf, the appeal in so far as P.K. Saraf is concerned was not pressed by the Union of India as the goods had already been released by the

income-tax authority and this appeal is pressed by the Union of India only against the petitioner/ opposite party No. 2, Naranarayan Saraf.

5. Mr. S.K. Mitra, the learned advocate appearing on behalf of the appellant, contended that the order under Section 132(12) passed by the Commissioner of Income-tax, City III, Bombay, was without legal sanction, jurisdiction and was void ab initio on the ground that the relevant income-tax file of the assessee, Messrs. National Forest and General Mills Pvt. Ltd., stood transferred from the jurisdiction of the Commissioner of Income-tax, Bombay City III, Bombay, and as such on the strength of the said order passed by the Commissioner of Income-tax, Bombay City III, Bombay, under Section 132(12) of the said Act, the goods could not be released by this court and, in this connection, relied on an affidavit-in-opposition filed by Tapan Kumar Chakraborty, Assistant Commissioner (Investigation), Circle 16(1), Calcutta, wherein it was stated that the jurisdiction of the case of the respondent was transferred to the Assistant Commissioner, Central Circle 30, Bombay, under the Commissioner of Income-tax, Central II, Bombay, with effect from August 1, 1990, by the order of the Chief Commissioner of Income-tax, Central II, Bombay, in exercise of his power under Section 127 of the Income-tax Act. It was stated on affidavit that the legal consequence of the transfer order was that the application under Section 132(11), against the order under Section 132(5) dated May 7, 1990, in the case of respondent No. 2, namely, the assessee, was required to be disposed of by the Commissioner of Income-tax, Central II, Bombay, who had been vested jurisdiction over the case and, in support of his contention, Mr. Mitra relied on the provisions of Section 130(2) of the Income-tax Act to show that the Commissioner of Income-tax, Bombay City III, had no jurisdiction. But the provision of Section 130(2) of the Income-tax Act was deleted by Parliament, whereas the order was passed by the Commissioner of Income-tax, Bombay City III, on June 9, 1990, after the provision of Section 130(2) of the said Act was deleted from the statute book. It was next submitted by Mr. Mitra that the regular assessment of Naranarayan Saraf under Section 143 of the Income-tax Act had not been completed and it was further submitted that, unless the regular assessment of Naranarayan Saraf is completed under Section 143 of the Income-tax Act, the goods could not be released in accordance with the order of the Commissioner of Income-tax, Bombay City III, inasmuch as, after the regular

assessment is made, the tax liability would be determined and if at this stage the goods are released, in that event, it would be difficult on the part of the income-tax authorities to realise the income-tax of Naranarayan Saraf, if the goods in question are taken into consideration in the regular assessment. It was next submitted that, at a certain point of time, it was brought to the notice of the income-tax authorities that the brother of Naranarayan Saraf, Bijay Saraf, was the real owner and Naranarayan Saraf was the benamidar in respect of the goods in question and, unless Bijay's assessment is made, in that event the goods cannot be released. Mr. Mitra submitted that, after Bijay's assessment under Section 143 of the Income-tax Act is made, the tax liability of Bijay could be ascertained and that it is premature to estimate what would be the tax liability and rate of tax of Bijay and without realising the said amount, if the goods are released in that event the same is prejudicial to the interest of the income-tax authority.

6. Mr. Bajoria, the learned advocate appearing on behalf of the respondent, submitted in the first place that, when the Commissioner of Income-tax, Bombay City III, Bombay, found that, in an order passed under Section 132(12) of the Income-tax Act, when Naranarayan Saraf was entitled to get back 178.09 metric tons of the seized goods which was specified as consequential order passed by the Commissioner of Income-tax, Bombay III, dated August 23, 1990, in that event the income-tax authorities had no jurisdiction to withhold the goods in question refusing to carry out the order passed by the Commissioner of Income-tax, Bombay City III. It was submitted by Mr. Bajoria that the provision of Section 132 of the Income-tax Act is a separate and complete code in itself and that when an order is passed under Section 132(12), it is binding upon the authorities who have seized and retained the goods, pursuant to an order passed under Section 132(5) of the said Act.

7. Mr. Bajoria submitted that there is no provision in the Income-tax Act that, as soon as the file of the assessee is transferred, the Commissioner of Income-tax who is authorised under the law to exercise the appellate jurisdiction and/or any supervisory jurisdiction will cease to exercise any power before whom a proceeding is pending and it was submitted by Mr. Bajoria that the right of appeal is decided on the basis of the state of the Act when the original order is passed

and submitted that the principle is now well-settled that subsequent change does not and cannot take away or abridge or restrict the right of appeal because of the subsequent change, and it was pointed out that it was never the intention of the Legislature that, as soon as the income-tax file is transferred under Section 127 of the Income-tax Act, the Commissioner became defunct and had no jurisdiction to pass such an order and it was further submitted that the Assistant Commissioner of Income-tax cannot challenge the jurisdiction and/or authority and competency of the Commissioner of Income-tax. Mr. Bajoria submitted that even assuming that the order passed by the Commissioner is void ab initio, the same should remain operative unless and until declared to be so by a competent court and, in this connection, referred to the decision of the Supreme Court in the case of *State of Punjab v. Gurdev Singh Ashok Kumar* : (1992)ILLJ283SC . Next it was submitted by Mr. Bajoria that the submission that the goods cannot be released pursuant to the order under Section 132(5) of the said Act, unless regular assessments are made under Section 143 of the Income-tax Act is totally misconceived as the order under Section 132(5) is not subject to the regular assessment made under Section 143 of the Income-tax Act. It was further submitted that reading the provisions under Sections 132 and 143 of the Income-tax Act, such a situation is not contemplated. Further, it was not the intention of the Legislature that an order passed by the Commissioner or Chief Commissioner under Section 132(12) of the said Act will be subjected to any order passed by an Income-tax Officer in a regular assessment or, in other words, if the contention of Mr. Mitra is upheld, in that event this court has to hold that the Commissioner of Income-tax had the authority to set aside or to modify and/or to cancel the order passed by the Commissioner or Chief Commissioner of Income-tax under Section 132(12) of the said Act. On a perusal of the provisions of Section 132 of the Income-tax Act, it is clear that the said provision has the trappings of a small and separate code itself. It is not only concerned with the search and seizure, but it also provides a machinery as well as the procedure in its provision for estimating the undisclosed income determining the tax liability and other provisions. Parliament has made it clear that, against an order under Section 132(5) of the said Act, an application lies to the Commissioner or Chief Commissioner as provided under Section 132(11) of the said Act, whereupon the Commissioner or Chief Commissioner can

pass any order under Section 132(12) of the Income-tax Act. The provisions of Sub-sections (11) and (12) of Section 132 of the said Act are a safeguard provided to the assessee, in case the assessee or any person who objects for any reason to an order made under Section 132(1), can ventilate its or his grievance. In the instant case, in an order under Section 132(5) it was held that part of the goods does not belong to Naranarayan Saraf and the claim of Naranarayan Saraf was rejected. But the said claim of Naranarayan Saraf was upheld by the Commissioner of Income-tax, Bombay City III, and so long as the order under Section 132(12) of the said Act passed by the Chief Commissioner of Income-tax remains valid and is not set aside, in any other proceedings the same is binding upon the authorities subordinate to the Chief Commissioner of Income-tax, Bombay City III. In this connection, reference may be made to the decision of the Supreme Court in the case of Bhopal Sugar Industries Ltd. v. ITO : [1960]40ITR618(SC) , wherein it was held that a mandamus would lie in case of refusal by the Income-tax Officer to carry out the direction given by the Tribunal by its final order, if the Income-tax Officer refused to carry out the order passed by the Tribunal. In this connection, it was held that the High Court would be clearly in error if it refused to issue a writ on the ground that no manifest injustice has resulted from the order of the Income-tax Officer in view of the error committed by the Tribunal itself in its order. Such a view is destructive of one of the basic principles of the administration of justice. In the absence of any provision contained in the various sub-sections of Section 132 of the Income-tax Act to the effect that the order passed by the Commissioner or Chief Commissioner of Income-tax under Section 132(12) would be subject to the regular assessment and that the order passed under Section 132(12) of the said Act cannot be made effective until and unless the regular assessment of the claimant and/or the assessee concerned or in respect of any person such an order was passed under regular assessment under Section 143 of the Income-tax Act is misconceived in view of the fact this was not the intention of the Legislature. The goods in respect of which the order was passed under Section 132(5) could be retained as they are in the opinion of the authorities concerned, sufficient to satisfy the aggregate of the amounts referred to in Clauses (ii), (iia) and (iii) of Section 132(5) of the said Act and forthwith release the remaining portion, if any, to the assessee or to the

person from whose custody they were seized. On close scrutiny, it was clear to us that there was no provision that the authorities concerned should retain the goods or a part thereof until the regular assessment was made. Such a thing is never contemplated under the provisions of search and seizure as laid down in Section 132 of the Income-tax Act. Section 130 of the Income-tax Act provides the power and competency of any function in relation to the assessee and Sub-section (2) of Section 130 of the said Act provides that, subject to the provisions of Sub-section (1) for the purposes of Sections 132, 253, 254, 256, 263 and 264, the Commissioner referred to therein shall, in relation to an assessee, be the Commissioner having for the time being jurisdiction over the assessee. After the deletion of the said provision from the statute book, it cannot be said that the Commissioner loses his jurisdiction to pass any order under Section 132(12) of the said Act because of subsequent transfer of files within his jurisdiction to the jurisdiction of another Income-tax Officer beyond his jurisdiction. In any event, when an order has been passed, even assuming that the order is ultra vires and void, the same should remain operative unless and until declared to be so by a competent court or authority.

8. We are of the view that, as soon as the income-tax file is transferred by a Commissioner or by any higher authority, the appeal, revision and/ or any objection pending before the appellate, revisional or higher authority automatically stands transferred and those authorities become functus officio to deal with and dispose of the proceedings pending before them. It is a firmly established principle that the right of appeal is dependent on the law as was existing when the suit or proceeding was filed and subsequent change in the law cannot affect the right of appeal which was there at the time when the suit was filed and the right of appeal is determined on the basis of the law existing at the time when the suit was filed.

9. In our view, the same is applicable to the facts and circumstances of the case, inasmuch as we do not find any reason that as soon as the income-tax file is transferred under Section 127, the Commissioner or Chief Commissioner before whom the proceedings under Section 152(11) and (12) are pending become functus officio. This cannot be the intention of the Legislature, inasmuch as it has introduced an absurd, unworkable and illogical result which cannot be said to be

the intention of the Legislature. The stand taken by the Income-tax authorities that the Commissioner has no jurisdiction to uphold, in the facts and circumstances of the case, would be destructive of one of the basic principles of the administration of justice. If the subordinate refuses to carry out the order or direction given by the superior tribunal or authority in exercise of his statutory authority, the result would be chaos in the administration of justice.

10. Even in a case where it is found that a person was incompetent to hold a post, the order passed by the authority could not be said to be invalid, The question remains what is the effect of the acts done or orders passed while he was holding the post which it was ultimately found that he was not entitled to hold and/or act as such has been considered by the Supreme Court in *Gokaraju Rangaraju v. State of Andhra Pradesh* : 1981 CriLJ876 , wherein the Supreme Court observed (at page 1478) :

'A judge, de facto, therefore is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgment pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief.'

11. This principle was first highlighted in India by Sir Asutosh Mukherjee in *Pulin Behare v. King Emperor* [1912] 15 Cri LJ 517, wherein it was held (see AIR 1981 SC 1477) :

'The substance of the matter is that the de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and the individual where these interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. The doctrine in fact is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to collaterally challenge the authority of

and to refuse obedience to the Government of the State and the numerous functionaries through whom it exercised its various powers on the ground of irregular existence or defective title, insubordination and disorder of the worst kind would be encouraged. For the good order and peace of society, their authority must be upheld until in some regular mode their title is directly investigated and determined.' (see AIR 1981 SC 1477)

12. In the latest judgment of the Supreme Court in *Central Bank of India v. C. Bernard* : (1991)1SCC319 , the Supreme Court reiterated its earlier view that the de facto doctrine can be invoked in cases where there is an appointment to office which is defective but notwithstanding the defect to the title of the office, the decision made by such a de facto officer clothed with the powers and functions of the office would be as efficacious as that made by a de jure officer. The de facto doctrine saves official acts done by an officer whose appointment is found to be defective.

13. In our view, when an order is passed by a Commissioner of Income-tax who admittedly and undisputedly had jurisdiction to entertain such applications passes an order subsequent to the transfer of file from the Income-tax Officer, the Commissioner does not lose his jurisdiction to dispose of appeals and applications inasmuch as it is nowhere provided in the Income-tax Act that the transfer of income-tax files will operate as automatic transfer of all appeals and revisions filed against the Income-tax Officer before whom the file was there before the transfer of the file. Secondly, even in a case where it is found that the jurisdiction was defective, in that case also, it is not open to the appellant, Union of India to ignore such a decision and treat it as void ab initio until and unless such a decision is set aside by a competent authority.

14. In view of the principle laid down in the above case of the Supreme Court in *State of Punjab v. Gurdev Singh*, *Ashok Kumar* : (1992)ILLJ283SC , wherein the Supreme Court noted with approval an English decision in *Smith v. East Elloe Rural District Council* [1956] AC 736 (HL) and the observation of Prof. Wade in his *Administrative Law*, Sixth edition, page 352, that it is clear that a party aggrieved by the invalidity of the order has to approach the court for relief of declaration that

the order against him is inoperative and not binding upon him. An order bears no brand of invalidity upon its forehead, even, if the order was illegal. Unless the necessary proceedings are taken in law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as a valid order.

15. So it is clear that the order passed by the Commissioner of Income-tax to release the goods is binding upon the income-tax authorities and the Income-tax Department are under a statutory duty to carry out such an order.

16. Accordingly, we are of the view that the appellant had wrongfully refused to release the goods of Naranarayan Saraf in the facts and circumstances of the case. Accordingly, we do not find any reason to interfere with the decision of the learned trial judge and, accordingly, the appeal is dismissed. Mr. Bajoria, the learned advocate appearing on behalf of the respondent, Naranarayan Saraf has submitted that since Bijay Kumar Saraf is the brother of Naranarayan Saraf and moved this writ application on which the court exercised equitable jurisdiction, the writ petitioner is prepared to produce no objection certificate from Bijay Kumar Saraf before the income-tax authorities before the goods are released and accordingly, we direct the appellant concerned to release the goods in terms of the order passed by the learned trial judge forthwith on production of a no objection certificate as offered by Mr. Bajoria to protect the interest of the income-tax authorities, if any.

17. Accordingly, the appeal is dismissed without any order as to costs.

Abani Mohan Sinha, J.

I agree.