
(2006) 03 RAJ CK 0039

Rajasthan High Court (Jaipur Bench)

Case No: Special Appeal (Writ) No. 479 of 2005

Suresh Val Chand Jain

APPELLANT

Vs

Union of India (UOI)
and Others

RESPONDENT

Date of Decision: March 29, 2006

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 131, 132, 132(1), 132A, 132B

Citation: (2006) 205 CTR 271 : (2006) 287 ITR 384

Hon'ble Judges: S.N. Jha, C.J; R.S. Chauhan, J

Bench: Division Bench

Advocate: A. Kasliwal, for the Appellant; R.B. Mathur, for the Respondent

Final Decision: Dismissed

Judgement

S.N. Jha, C.J.

This special appeal is directed against the order of learned Single Judge dt. 19th April, 2005 in SB Civil Writ Petn. No. 186/2005 disposing of the writ petition with some observations. The appellant had filed writ petition seeking declaration that search of the premises and seizure of gold bullion was without any authority of law and null and void, and a direction upon the respondent authorities to handover the seized goods and cash of Rs. 6.5 lakhs to him forthwith.

2. The learned Single Judge under the impugned order dt. 19th April, 2005, without entering into merit of the case, observing that the petition involved several disputed questions of fact and there is provision for release u/s 132B of the IT Act (for short "the Act"), declined to direct release of gold but permitted the appellant to make application for release before the AO with a direction to the AO to examine the matter and if the appellant satisfies him about the source of acquisition of the gold, to release the same forthwith. The exercise was to be completed within a period of 15 days from receipt of

copy of the order. The appellant was directed to co-operate with the respondent authorities.

3. Pursuant to the said order, the appellant filed application u/s 132B of the Act for release of the gold before the Asstt. CIT, Central Circle-12, Mumbai. After hearing and on consideration of the facts and materials, the Asstt. CIT found that the appellant was not the actual owner of the bullion, he was acting as a carrier and name lender (entry giver) or a front man of somebody else and the gold which was the subject-matter was not his stock-in-trade, and accordingly rejected the application for release, vide order dt. 18th May, 2005. At this stage, on 24th May, 2005 the appellant filed this special appeal against the said order of the learned Single Judge dt. 19th April, 2005.

4. Shri R.B. Mathur learned Counsel for the IT Department took a preliminary objection that having filed application for release of gold-thereby accepting the order of the learned Single Judge, it is not open to the appellant to challenge the order in this appeal. On the contrary, counsel pointed out, the appellant can challenge the order in revision u/s 264 of the Act. This Court found prima facie force in the preliminary objection and postponed the hearing for some time to enable learned Counsel for the appellant Shri A. Kasliwal to take instructions. At the resumed hearing Shri Kasliwal informed the Court that the appellant would like to press this appeal. The case was accordingly fixed for final hearing.

5. Facts of the case leading to filing of writ petition are that on 9th Dec., 2004 54 kgs. of gold was recovered from the appellant and two others travelling in fake names of Jhala Ram Tolaji Devasi, Narayan Jat and Amrut Bhanwar Lal Mali at Santacruz Airport, Mumbai. On being asked they stated that the gold belonged to the appellant as proprietor of M/s Rajguru Bullion having branches at Mumbai, Jaipur and Coimbatore. The statements of the appellant and others were recorded and on consideration thereof gold was seized in the night on the same day. Later, the premises in question were searched, statements including those of family members were recorded on oath u/s 131 of the Act and documents, etc. were seized. On consideration of the facts and materials coming to light from the search and seizure and the statements referred to in the order of the Asstt. CIT dt. 18th May, 2005, the authority, i.e., the Asstt. CIT came to the conclusion that the appellant was not the actual owner of the business of M/s Rajguru Bullion, he was acting as a carrier and a front man for somebody else operating through his bank accounts. The gold found at the airport was not his stock-in-trade. The Asstt. CIT accordingly rejected the application for release of gold by the said order dt. 18th May, 2005.

6. Section 132 of the Act which provides for search and seizure, among other things empowers the authorities named therein, having reason to believe, in consequence of information in their possession, 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, or would not be, disclosed

for the purpose of Indian IT Act, 1922 or this Act (hereinafter in this section referred to as the undisclosed income or property),

to authorize any Asstt. Director or Asstt. CIT or ITO, among other things, to-

(iia) search any person who has got out of, or is about to get into, or is in, the building, place, vessel or aircraft, if the authorized 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:

Provided that bullion, jewellery or other valuable article or thing being stock-in-trade of the business, found as a result of such search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business.

According to the appellant by virtue of proviso to Clause (iii) of Sub-section (1) of Section 132, gold bullion in question which are his stock-in-trade of the business cannot be seized; the authorized officer could only make a note or inventory of such stock-in-trade.

7. We observed in course of hearing that crux of the matter lies in the question whether the gold is stock-in-trade of the appellant so as to stand out of the purview of seizure and make the seizure illegal. A concluded finding on consideration of the facts and materials on record having been recorded by the Asstt. CIT, which is a finding of fact that cannot be upset in a proceeding under Article 226 of the Constitution, there is no scope for interference by this Court at this stage. Any finding on the question as to whether or not the gold is stock-in-trade of the appellant can be effectively examined by the revisional authority. The proper course for the appellant therefore is to prefer revision against the order. If the finding that the gold is not the stock-in-trade of the appellant is set aside in revision, it would follow that the respondent authorities had no jurisdiction to effect the seizure and in that case, the gold will have to be returned to the persons from whose possession it was recovered, subject to the ultimate determination of liability under the IT Act.

8. On behalf of the appellant it was submitted that there is not even an iota of evidence that the appellant is a front man of somebody else, and if it was so the Department was obliged to disclose the name of the person whose front man the appellant is said to be, but apparently the Department has no clue as yet about the identity of any such person. The burden is on the Department to establish that the gold is not stock-in-trade of the appellant and in the absence of identity of its alleged real owner, the finding that the appellant is a front man cannot be final and correct. Counsel pointed out that all relevant documents are in possession of the Department.

9. It was also submitted that any thing which does not result in identification of undisclosed income is bad and illegal. Till date, liability has not been determined, even notice has not been issued to the appellant and therefore, there can be no justification to seize the goods or retain it. In support of the submission, reliance was placed on [AJIT JAIN Vs. UNION OF INDIA and Others](#), [Naresh Kumar Kohli Vs. Commissioner of Income Tax and Another](#), and [Commissioner of Income Tax Vs. Mukundray Kumar Shah](#),

10. Dealing with the preliminary objection on behalf of the Department it was submitted that the learned Single Judge erred in directing the appellant to approach the authority without deciding the question of validity or otherwise of the search and seizure of the goods. In justification of filing of appeal, reliance was placed on [Commissioner of Trade Tax, U.P. and Another Vs. Kajaria Ceramics Ltd.](#), It was submitted that taking recourse to Section 132B of the Act does not bar invoking the extraordinary jurisdiction under Article 226 of the Constitution and it was open to the appellant to seek both the remedies simultaneously. Whereas Section 132B of the Act deals with adjustment, the writ petition was filed for quashing of search and seizure.

11. Learned Counsel for the Department while controverting the submissions made on behalf of the appellant referred to various documents. He submitted that from the inquiries conducted by the authorities, it transpired that no stock of gold, bullion or jewellery was found at any of the premises. The office-cum-residence of M/s Rajguru Bullion at Mahim, Mumbai, was situated in one room flat. No books of account or computer containing books of account was ever maintained at their office-cum-residential premises. Person not less than son of the appellant, Kalpesh Suresh Jain, in reply to the question as to whether he had also ever carried these types of consignments from Jaipur to Mumbai and how much he was paid for this, answered as follows:

For the past two years, I have not done any such thing. However, prior to that I have been to Jaipur on 6 to 7 occasions and I have carried these consignments and handed over these to the persons waiting outside Mumbai airport as directed by my father. Rs. 1,000 is paid to every person apart from the reimbursement of expenses such as rail fare from Mumbai to Jaipur, food and lodging at Jaipur and then, air fare from Jaipur to Mumbai."

Our attention was also drawn to the following answer by Kalpesh Suresh Jain i.e., the appellant's son:

"No. As I have already explained, these bullions is handed over to the persons waiting outside the airport as instructed by my father on the basis of the description given by my father and none of the courier boys know the actual name and addresses of these persons."

12. The appellant also admitted that he had given blank signed cheques to others. He himself was not aware on 9th Dec., 2004 when his statement was being recorded at

Jaipur that his concern M/s Rajguru Bullion purchased gold worth Rs. 11 crores on 9th Dec., 2004 from Ahmedabad. He further admitted that he had not given any instruction to purchase or sell gold or deposit or withdraw through cheques through his bank accounts to anybody. The inquiries revealed that he does not have the capacity or source to do business of Rs. 620 crores. His capital was almost nil, as was evident from his bank statements. The appellant in his statement stated that he files return in Mumbai, but the returns were not found to have been filed under the jurisdictional charge of the CIT, Mumbai. The gold was recovered from persons who were travelling in fake names. One Pravin was travelling in the name of Narayan Jat, the appellant himself was travelling in the name of Jhala Ram Tolaji Devasi while one S. Jain in the name of Amrut Bhanvarlal Mali. 161 tickets of Indian Airlines and Jet Airways for the months of December, 2004, January and February, 2005, in the name of the appellant and others were found during the course of searches. The seized diary showed approximately 11.5 metric tons of gold was transported by M/s Rajguru Bullion from Jaipur to Mumbai during August to 8th of December, 2004. The appellant claimed to have branch office at Coimbatore, but no air tickets for Coimbatore were brought so that the carriers could take the gold there. The office at Coimbatore was acquired in the month of October, 2004, but not a single penny of transaction of purchase and sale of bullion was made there. No stock whatsoever was found there. The person incharge, Shri Kailash stated on oath that no business activity of M/s Rajguru Bullion ever took place there.

13. The respondents have stated that from reliable sources the Department had come to know that some persons were illegally transporting gold and silver bullion from Jaipur and Ahmedabad to Mumbai by hiring carriers having bank accounts at Mumbai, Jaipur and Ahmedabad. These carriers had no means to conduct business of this size on their own. Cheques to the tune of Rs. 10 to 13 lacs were transferred from the account of big traders to the account of said carriers at Jaipur/Ahmedabad. The carriers showed purchase of gold or silver bullion from authorised banks/public agencies at Jaipur/Ahmedabad, but instead of selling them at the apparent place of purchase, carried them to Mumbai to be sold at higher price. The carriers showed as if the gold/silver bullion had been sold at the place of purchase at a marginal price difference but the same was really sold in Mumbai. At the time of transport from Jaipur/Ahmedabad to Mumbai, documents used to be attached with the parcel in order to give the transaction semblance of branch transfer of accounted goods and if intercepted, the apparent explanation could be that it was a branch transfer accompanied by valid documents.

14. According to the respondents, the apparent reason for indulging in this kind of business is differential rate of sales-tax in the States of Rajasthan, Gujarat and Maharashtra. In July, 2004 sales-tax on gold/silver bullion was reduced from 1 per cent to 0.60 per cent in Rajasthan, and from 1 per cent to 0.25 per cent in Gujarat. The rate in Maharashtra on the other hand is 1 per cent with further levy of octroi @ 0.01 per cent. Thus the bullion purchased in Rajasthan or Gujarat on being brought to Mumbai can be sold in an unaccounted manner to earn the sales-tax difference while showing purchase

and sale on the same being with an insignificant margin.

15. The respondents have given further details of the result of inquiries all of which may not be mentioned in this order. It is to be kept in mind that the appeal arises from an order by which the learned Single Judge permitted the appellant to file application for release of the gold while declining to exercise jurisdiction under Article 226 of the Constitution in that regard. The learned Single Judge observed that the writ petition involves several disputed questions of fact and it is for the IT authorities to consider the matter. The appellant filed application for release and thus, acquiesced in the order. The order of the learned Single Judge cannot be said to be illegal and without jurisdiction. We do not think, the appellant can be permitted to challenge the order at this stage. Reliance on *Commr. of Trade Tax v. Kajaria Ceramics Ltd.* (supra) in this regard is totally misplaced. The point at issue in that case related to recovery of tax and on behalf of the assessee a submission was made that the Department having accepted the judgment of the High Court of its own even before the Supreme Court refused to stay the judgment, it cannot recover the tax. The Supreme Court noted that the Departmental appeals had been filed before taking any action pursuant to the decision of the High Court. Leave to appeal was granted on 11th Aug., 2000 and stay was refused on contest on 4th Jan., 2001. In the absence of any stay by the Supreme Court, the Department was bound to comply with the decision of the High Court. Such compliance by itself, the Supreme Court held, cannot destroy the Department's rights to press the appeals and recover the tax.

16. It was submitted on behalf of the appellant that the learned Single Judge did not decide the question of validity of search and seizure which was the main issue involved in the writ petition. The argument at the first instance sounds impressive but cannot be accepted especially in view of the findings arrived at by the Asstt. CIT on application u/s 132B of the Act. In considering the validity of the order of the learned Single Judge, this Court cannot overlook the result of inquiries and the findings of fact arrived at by the Asstt. CIT while deciding the application u/s 132B of the Act. It is true that a valid search is a prerequisite for invoking the power u/s 132 of the Act. An illegal search is no search and in such a case the provision has no application. In order to authorize search u/s 132, the conditions precedent are (i) information in possession of the named authority; and (ii) formation of reasonable belief in consequence of search information that the person concerned is in possession of money, bullion, etc. which represents, either wholly or partly, income which has not been or would not be disclosed for the purpose of the Act, i.e., undisclosed income or property. If any of these conditions are missing or has not been adhered to, power u/s 132 cannot be invoked. But whatever may be said about the state of affairs as on 9th Dec., 2004, the inquiries conducted in the matter came to reveal large scale money laundering operation by the appellant. In our opinion, in view of the facts and materials brought on record as a result of inquiries, it would not be an appropriate exercise of jurisdiction to make interference on any technical ground. While considering the grant of relief, the Court can take into consideration the subsequent events and mould reliefs, if warranted, accordingly.

17. All said and done, there are two aspects of the case-validity of search and validity of seizure. In view of the subsequent events the question as to validity of search has paled into insignificance; and as regards validity of seizure, gold can be released only if it is the stock-in-trade of the appellant. This is clear from a bare reading of the proviso to Clause (iii) of Section 132(1) quoted above. A categorical finding of fact having been recorded by the Asstt. CIT that the seized gold is not the stock-in-trade of the appellant, the proviso can have no application. It goes without saying that the said finding of the Asstt. CIT is a finding of fact which cannot be set aside in this appeal arising from a proceeding under Article 226 of the Constitution of India.

18. On behalf of the appellant, it was submitted that Section 132B of the Act envisages recovery of liability of the assessee as determined on completion of assessment from out of the seized assets and release of the rest after discharge of such liability.

19. Section 132B lays down the manner in which the assets seized u/s 132(1) requisition u/s 132A may be dealt with. In terms of Clause (i) of Sub-section (1), the seized assets may be utilized for recovering the existing liability of the assessee under the IT Act or the WT Act or the Expenditure-tax Act or the GT Act or the Interest-tax Act. The proviso to Clause (i) lays down that where the person concerned makes an application to the AO within thirty days from the end of the month in which the assets were seized for release of asset and the nature and source of acquisition of any such asset is explained to the satisfaction of the AO, the amount of any existing liability referred to in Clause (i) may be recovered out of such asset and the remaining portion, if any, of the asset may be released to the person from whose existing asset was seized.

Thus the seized asset can be released only where "source and acquisition of any asset gives explanation to the satisfaction of the AO". The assessee in the instant case having failed to explain the source to the satisfaction of the Asstt. CIT, there is no occasion for release of the seized gold. As a matter of fact, occasion for release u/s 132B may arise only after completion of the assessment proceeding. Though, therefore, it is arguable if the appellant could be relegated the remedy u/s 132B of the Act, as done by the impugned order of the learned Single Judge, the appellant's application for release under that section having been rejected by a well reasoned order, having regard to the nature of the facts and materials brought on record, we are satisfied that it would not be appropriate to exercise the discretion to interfere in the matter while exercising jurisdiction under Article 226 of the Constitution of India.

20. Amongst the decisions relied upon on behalf of the appellant, in the case of *Ajit Jain v. Union of India* (supra), the question for consideration was whether the conditions precedent for exercise of power u/s 132 of the IT Act were present and the consequent action of search and seizure was valid, the cases of *Naresh Kumar Kohli v. CIT* (supra) and *CIT v. Mukundray Kumar Shah* (supra) were cases of retention of assets in violation of Clause (i) of Section 132B(1) of the Act and, therefore, the decisions do not lend any assistance to the appellant in the instant case.

21. In the result, for the reasons mentioned above, we do not find any merit in this appeal, which is accordingly dismissed.