FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Arindam Sinha

ITA 11 of 2005

NAVIN KUMAR AGARWAL

Versus

COMMISSIONER OF INCOME TAX – XII, KOLKATA

Advocate for the appellant: Mr. R. N. Bajoria, Sr.Adv.
Mr. A. Gupta, Adv.

Advocate for the Respondent/Revenue: Mr. P. Dhudhoria, Adv.

Hearing concluded on: 27th April, 2015

Judgment delivered on:12th May, 2015

GIRISH CHANDRA GUPTA J. The subject matter of challenge in this appeal is a judgment and order dated 3rd September, 2004 pertaining to the block assessment for the assessment year 1990-1991 to 2000-2001. The questions formulated at the time of admission of the appeal are as follows:-

" *I) Whether in view of the fact that the warrant of authorization has been issued on 2nd December, 1999 and the*

search was conducted in execution of the said warrant of authorization on 8th December, 1999 and the further alleged search on 31st January, 2000 was alleged to have been made by an officer who was not authorized under the warrant of authorization dated 2nd December, 1999, the assessment which has been made under Section 158BC of the Act on 31st January, 2002 is barred by limitation in view of Section 158BE (b) of the Act?

II) Whether on a true and proper interpretation of Section 132(3) of the Act the prohibitory order made under Section 132(3) in respect of jewelleries which have been found in the course of search and which has been valued by the departmental valuer on the very day in the course of search when the authorized officer has not recorded any reasons as to why same cannot be seized under the second proviso to Section 132(1) of the Act, in the absence of any finding or reason the order under Section 132(3) of the Act is illegal, invalid and without jurisdiction?

III) Whether when the order under Section 132(3) is operative and the appellant is prohibited from removal or otherwise dealing with jewelleries covered under Section 132(3) of the Act the authorized officer has any competence or jurisdiction or authority to conduct any search in respect of said very articles in respect of which the prohibitory order is still operative?

IV) Whether in view of the authorization dated 2nd December, 1999 and in the absence of any further authorization the order passed under Section 158BC (c) on 31st January, 2002 is barred

by limitation and is therefore illegal, invalid and without jurisdiction?"

The facts and circumstances of the case appearing from the assessment order which do not appear to have been disputed before the appellate authorities nor before us are as follows:-

"A search & seizure was carried out on 8.12.99 and 25.1.2000 at the residence of Shri Navin Kr. Agarwal at 321 Samundra Mahal, Dr. A. B. Road, Worli, Mumbai – 18. Notice u/s.158BC dt.23.6.2000 was issued and duly served on the assessee. In response to the above notice u/s 158BC, return for the Block Period for A.Y. 1990-91 to 1999-2000 was filed on 15.9.2000 declaring total undisclosed income at NIL.

During the course of search, cash to the tune of Rs.1,06,700/- was found, of which Rs.80,000/- were seized. Jewellery and paintings worth Rs.15,57,021/- and Rs.29,07,000/- respectively were found and there was no seizure.

Mr. Ramesh Kr. Patodia, FCA and A/R of the assessee started effective compliance only w.e.f. 14.12.01. Mr. Patodia was requested to file some details e.g. Cash found and explanation with reference to bank Statement, if any, paintings found, jewellery, silver utensils, value added tax with reference to letters dt.8.10.99 addressed to shop owner at "Sandton City" etc. As stated the compliance came and Mr. Patodia filed only part of the details as per the requisition. Meanwhile, in order to record deposition of Mr. Navin Agarwal, notice u/s/131 dt. 26.12.01 was issued and served on the assessee duly but this

endeavour has not been successful inspite of repeated opportunities provided from this end. Finally, on 28.1.2002 Mr. Patodia vide a petition pleaded that due to work pressure (preoccupied too) it is not at all possible for his client to come all the way to Kolkata for attending the summon. Here it may be mentioned that vide notice u/s/131 dt.26.12.2001 opportunities for personal appearance were provided on 4.1.02, 21.1.02 and 28.1.02. The notice u/s 131 dt.26.12.01 was served on 27.12.01 and since then the assessee failed to pay any importance to the said notice till 28.1.02. It is improbable that the assessee could not come to Kolkata in a month's time. The act of the assessee has left no other alternative but to give me the impression that the assessee is not at all interested in appearing before me and in furnishing details as that will not be beneficial to his case."

The assessment was completed on 31st January, 2002. In an appeal preferred by the assessee, the CIT held that the assessment was barred by time. In an appeal preferred by the Revenue, the learned Tribunal reversed the order of the CIT and held that the assessment order was passed within the time limit prescribed under Section 158BE of the Income Tax Act, and the matter was restored to the file of the CIT (A) with the direction to decide the matter on merits. Challenging the aforesaid order the present appeal was preferred by the assessee.

Mr. Bajoria, learned Senior advocate has confined his arguments to the sole question as to whether the assessment order dated 31st January, 2002 is

barred by limitation? He contended that on 31st January, 2000 nothing really took place. The reference to 25th January, 2000 in the assessment order is an inadvertent mistake. The Assessing Officer intended to refer to the visit dated 31st January 2000. The search, according to him, was completed on 8th December, 1999. The restraint order imposed on 8th December, 1999 was vacated on 31st January, 2000. The search party drew the panchnama dated 31st January, 2000 stating that the search commenced at 15:20 hours and was closed at 15:30 hours.

According to him, the search dated 31st January, 2000 was only for the purpose of revocation of the restraint order dated 8th December, 1999 passed under Section 132 (3) of the Income Tax Act. He, therefore, contended that the period of limitation has to be reckoned from the search dated 8th December, 1999. Thus the period of limitation expired on 31st December, 2001, whereas the assessment order was passed on 31st January, 2002 which is clearly out of the prescribed period of limitation.

He in support of his submission relied upon a judgement in the case of CIT –Vs- S. K. Katyal reported in (2009) 308 ITR 168 (Delhi) wherein the question was whether the period of limitation is to be reckoned from 17th November, 2000 when the search took place or from 3rd January, 2001 when the keys were handed back to the assessee. The question was answered in the aforesaid case as follows:-

"what happened on January 3, 2001, as recorded in the panchnama of that date cannot be regarded as a search. There was no looking for, no quest for something hidden. All that was done was that the seals were inspected. After they were found to be intact, they were removed and the keys were handed back to the assessee. These circumstances clearly show that no search was conducted on January 3, 2001. For a search to conclude at a particular time and date, it must have continued till that time and date. Nothing was searched for after November 17, 2000. Thus, the search was concluded on that date. It did not continue any further and the mere mention in the panchnama that the search has been temporarily concluded for the day to be subsequently resumed, would not make any difference because the fact of the matter is that no further search was conducted after November 17, 2000. It follows that it is the panchnama of November, 2000, which is relatable to the conclusion of the search and not the panchnama of January 3, 2002. Consequently, the authorization for search was executed on November 17, 2000, and not on January 3, 2001."

We have not been impressed by the submissions advanced by Mr. Bajoria. The judgement, with respect, does not in our opinion, lay down the correct law. In two earlier judgements of the Delhi High Court itself contrary views were taken. In the case of M. B. Lal –Vs- CIT reported in (2005) 279 ITR 298 (Delhi), the following views were expressed:-

"Section 158BE(1) (b) and Explanation 2 which are relevant for our purposes may be extracted:

"158BE. (1) The order under Section 158BC shall be passed, within two years from the end of the month in which the last of authorisations for search under section 132 or for requisition under Section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997.

Explanation 2. ---- For the removal of doubts, it is hereby declared that the authorisation referred to in sub-section (1) shall be deemed to have been executed,-

(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued;

(b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the authorised officer."

From a plain reading of Explanation 2(a), it is evident that an authorisation referred to in sub-section (1) is deemed to have been executed on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued. What is noteworthy is that the time-limit for the making of an order under Section 158BC read with Section 158BE(1) will start from the last of the panchnamas.

In the instant case, the authorisation was issued on February 2, 2000. The search also started on the same date and

continued till June 29, 2000, during which period various articles and documents were seized. The Tribunal has recorded a finding to the effect that there was no delay in executing the search inasmuch as various lockers and steel almirah and cupboard were required to be searched. There was, therefore, no artificial extension of the search proceedings as argued by the appellants. If that be so, the search would end only upon revocation of the order passed under Section 132(3) which, in the instant case, was revoked only on June 29; 2000. The period of limitation for making an assessment order under Section 158BC read with Section 158BE of the Act would, therefore, have to be reckoned from June 30, 2000 (being the end of the month in which the last panchnama was drawn) and would end on June 30, 2002. The assessment order, in the instant case, was however made on June 27, 2002, which was well within the outer limit of two years prescribed by law. The Tribunal was, in that view, justified in repelling the contention of the assessee that the order of assessment was beyond the period of limitation prescribed for the same.

In the light of what has been stated above, these appeals fail and are hereby dismissed but in the circumstances without any order as to costs."

In the case of VLS Finance Ltd. and Another –Vs- CIT and Another Reported in (2007) 289 ITR 286 (Delhi) the following views were expressed:-

"The respondents could have, on the very first day of the search, seized all relevant and irrelevant documents and books of the petitioners, but they did not do so. We are of the view

that their decision on this (in favour of the petitioners) cannot be used against them. We have also kept in mind two facts, namely, that even by adopting this procedure, the respondents did not exceed the 60 day limit as provided by section 132(8A) of the Act and that for making the assessment order the respondents had still more than adequate time available, making it unnecessary for them to resort to any subterfuge so early on. Consequently, we are of the opinion that the respondents did not complete the search on June 22, 1998, as alleged by the petitioners, nor did they unduly prolong it. The search concluded on August 5, 1998, and so in terms of Explanation 2 to section 158BE of the Act the period of limitation would begin from the end of August, 1998, that is, August 31, 1998 onwards. The second issue raised by learned counsel for the petitioners would stand answered accordingly."

In the case of CIT –Vs- S. K. Katyal (supra) the Division Bench distinguished judgement in the case M. B. Lal on the ground that in that case there was no unexplained break in the search, whereas the judgement in the case VLS Finance Ltd. was distinguished on the ground that there were as many as 16 panchnamas. There was a mass of documents and the Court found that the search was concluded on 5th August, 1998. It was held that where search was, in fact, conducted on the day when the last panchnama was drawn is distinguishable from a panchnama which was prepared solely for the purpose of removing the seals and making over the keys.

Another reason, advanced by the Division Bench for the purpose of distinguishing both the judgements in the case of M. B. Lal and VLS Finance Limited is that the contention that the search ends upon revocation of a restraint order under Section 132(3) is illogical. The Division Bench expressed itself in the following words:-

"the learned counsel for the Revenue sought to derive the proposition that a search ends "only upon revocation' of a restraint order under section 132(3). And, therefore, the search in the present appeal concluded on January 3, 2001, on which date the restraint order was revoked. This line of thought does not appeal to us. The illogicality of this submission is easily demonstrated by asking the simple question "when would the search conclude in a case where there is no restraint order."

Although the Division Bench posed the question, as to when a search would come to an end where there is no restraint order, but did not answer the same. An answer to that question is to be found in Explanation 2(a) quoted above. Ordinarily an authorization for search is valid until the same has been executed. In order to avoid any controversy as to when was the authorization executed the legislature has provided in the aforesaid explanation that the authorization shall be deemed to have been executed on conclusion of search as recorded in the last panchnama. Therefore, the law insists upon a panchnama for the purpose of formal recording that the search is at an end. Without such recording the search once initiated does not come

to an end. We are unable to find any justification for the view that search comes to an end immediately after the search has been concluded for the day. Such an argument may possibly have been advanced in the absence of the deeming provision contained in Explanation 2 (a) to Section 158BE. Law as we can see it is that a search initiated pursuant to a written authorization may be kept in suspended animation so long as the same is not formally brought to an end in writing in the presence of witnesses by drawing a panchnama which is bound to be the last panchnama. Another line of reasoning may be as follows:-

Section 70 of the Code of Criminal Procedure provides as follows:-

"70. Form of warrant of arrest and duration. ------ (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed."

Section 70 relates to a warrant of arrest but Section 70 is also applicable to a search warrant as would appear from Section 99 of the Code of Criminal Procedure which provides as follows:-

"99. Direction, etc., of search-warrants.- The provisions of Sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search-warrants issued under section 93, section 94, section 95 or section 97."

Sub-section 13 of Section 132 makes all the provisions relating to search and seizure contained in the Code of Criminal Procedure to the searches and seizures under Sub-section (1) or Sub-Section (1A) of Section 132 of the Income Tax Act. To be precise Sub-section 13 of Section 132 of the Income Tax Act provides as follows:-

"(13) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1A)"

A restraint order under Section 132(3) is in aid of search and is valid for sixty days u/s. 132(8A) unless revoked earlier. During continuance of the restraint order the search itself cannot be said to have come to end.

The Division Bench appears to have been inclined to hold that resumption of search after a gap of time is illegal. The views expressed, in that regard are in paragraph 26 of the judgement which read as follows:-

"These decisions clearly establish (i) a search is essentially an invasion of the privacy of the person whose property or person is subject to search; (ii) normally, a search must be continuous; (iii) if it cannot be continuous for some plausible reason, the hiatus in the search must be explained; (iv) if no cogent or plausible reason is shown for the hiatus in the search, the second or "resumed" search would be illegal; (v) by merely mentioning in the panchnama that a search has been temporarily suspended does not, ipso facto, continue the search.

It would have to be seen as a fact as to whether the search continued or had concluded; (vi) merely because a panchnama is drawn up on a particular date, it does not mean that a search was conducted and/or concluded on that date; (vii) the panchnama must be a record of a search or seizure for it to qualify as the panchnama mentioned in Explanation 2(a) to section 158BE of the said Act."

The basis for the aforesaid views has not been disclosed. It is, though, true that a search is an invasion of privacy. But such invasion is permissible in appropriate cases. The legality of search was not in question either in the case of S. K. Katyal or before us. Therefore any observation in that regard was uncalled for.

The Division Bench has, in paragraph 26 of its judgement stressed upon the illegality of search where a search is unduly prolonged. The legality of search did not really arise for determination in the case of Katyal. Even assuming that such an argument has been or may be advanced, the question which one has to ask is "whether such illegality or irregularity has or may have the effect of making the search itself *non est*?"

An answer to this question shall necessarily depend upon the answer to a further question as to whether such irregularity or illegality has occasioned any failure of justice. This follows from Section 465 of the Code of Criminal Procedure which provides as follows:-

"465. Finding or sentence when reversible by reason of error, omission or irregularity. – (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

There can be no denial that by virtue of Section 132(13) quoted above the provisions contained in Section 465 of the Code of Criminal Procedure shall also become applicable. Reference may also be made to Section 461 of the Code which provides, inter alia, that if a search warrant is issued by a Magistrate in good faith though not empowered by law to do so, the proceedings shall not be set aside.

Construing Section 465 which is a successor of original Section 537 of the Code of Criminal Procedure 1898 the Supreme Court in the case of Birichh Bhuian and others –Vs- State of Bihar reported in AIR 1963 Supreme Court 1120 opined as follows:-

"As the object of all rules of procedure is to ensure a fair trial so that justice may be done, the section in terms says that any violation of the provisions to the extent narrated therein not resulting in a failure of justice does not render a trial void. The scope of clause (b) could be best understood, if a brief historical background necessitating the amendment was noticed. The Judicial Committee in Subrahmanya Ayyar v. King emperor, ILR 25 Mad 61: 28 Ind App 257 (PC) held that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by S.537 of the Criminal Procedure Code. There the trial was held in contravention of the provisions of Ss.233 and 234 of the Code of Criminal Procedure which provide that every separate offence shall be charged and tried separately except that the three offences of the same kind may be tried together in one charge if committed within a period of one year. It was held that the mis-joinder of charges was not an irregularity but an illegality and therefore the trial having been conducted in a manner prohibited by law was held to be altogether illegal. The Judicial Committee in 'Abdul Rehman v. Emperor, ILR 5 Rang 53: 54 Ind App 96 : (AIR 1927 PC 44) considered that a violation of

the provisions of S.360 of the Code which provides that the depositions should be read over to the witnesses before they sign, was only an irregularity curable under S.537 of the Code. Adverting to Subrahmanya Ayyar's case, ILR 25 Mad 61:28 Ind APP 257 (PC) it pointed out that the procedure adopted in that case was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused. The question again came before the Privy Council in 'Babu Lal Choukhani v. Emperor' ILR (1938) 2 Cal 295 : (AIR 1938 PC 130). One of the points there was whether the trial was held in infringement of S.239 (d) of the Criminal procedure Code. The Board held that it was not. Then the question was posed that if there was a contravention of the said section, whether the case would be governed by Subramanya Ayyar's case, ILR 25 Mad 61 : 28 Ind App 257 (PC) or Abdul Rehman's case, ILR 5 Rang 53, 54 Ind App 96: (AIR 1927 PC 44). The Board did not think it was necessary to discuss the precise scope of what was decided in Subrahmanya Ayyar's case, ILR 25 Mad 61: 28 Ind App 257 because in their understanding of S.239 (d) of the Code that question did not arise in that case. The point was again mooted by the Board in Pulukuri Kotayya v. Emperor, ILR (1948) Mad 1: (AIR 1947 PC 67). In that case there had been a breach of the proviso to S.162 of the Code. It was held that in the circumstances of the case the said breach did not prejudice the accused and therefore the trial was saved by S.537 thereof. Sir John Beaumont speaking for the Board observed at page 12 (of ILR Mad) : (at pp.69-70 of AIR):

"When a trial is conducted in a manner different from that prescribed by the Code, as in ILR 25 Mad 61: 28 Ind App 957 (PC), the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and none-the-less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind."

It will be seen from the said observations that the Judicial Committee left to the courts to ascertain in each case whether an infringement of a provision of a Code is an illegality or an irregularity. There was a marked cleavage of opinion in India whether the later decisions of the Privy Council modified the rigour of the rule laid down in Subrahmanya Ayyar's case, ILR 25 Mad 61:28 Ind App 957 and a view was expressed in several decisions that a mere mis-joinder of charges did not necessarily vitiate the trial unless there was a failure of justice, while other decisions took a contrary view. This Court in Janardan Reddy v. State of Hyderabad, 1951 SCR 344 : (AIR 1951 SC 217) left open the question for future decision. In this state of law, the Parliament has intervened to set at

rest the conflict by passing Act XXVI of 1955 making a separate provision in respect of errors, omissions or irregularities in a charge and also enlarging the meaning of the expression such errors etc. so as to include a mis-joinder of charges. After the amendment there is no scope for contending that mis-joinder of charges is not saved by S.537 of the Criminal Procedure Code if it has not occasioned a failure of justice."

Both search and seizure are steps in investigation. Investigation generally consists of the following steps as laid down by the Apex Court in the case of H. N. Rishbud and another –Vs- State of Delhi reported in AIR 1955 SC 196.

"Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the

necessary steps for the same by the filing of a charge-sheet under Section 173."

A restraint order under Section 132 (3) is undoubtedly in aid of the investigation and has been conceived as a substitute, not amounting to seizure, where it is not practicable to exercise the power of seizure as would appear from Sub-section 3 of Section 132 which reads as follows:-

"The authorised officer may, where it is not practicable to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing, [for reasons other than those mentioned in the second proviso to sub-section (1),] 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.

[Explanation.- For the removal of doubts, it is hereby declared that serving of an order as aforesaid under this sub-section shall not be deemed to be seizure of such books of account, other documents, money, bullion, jewellery or other valuable article or thing under clause (iii) of sub-section (1).]"

It was contended that on 31st January 2000 no search took place only the restraint order was vacated. From the panchnama dated 31st January 2000 it appears that at 15:30 hours the search finally concluded. The admitted fact that the keys were made over and the restraint order under Section 132(3) was lifted corroborates the fact that the search finally came to an end. The search could not have been at an end on any day prior to 31st January, 2000. The object of withholding the keys was to resume the search if and when it was felt necessary. The return of the keys manifested the intention that the search was at an end. Since the law required formal recording of conclusion of search the panchnama dated 31st January 2000 was drawn up and the business transacted on the day was recorded.

It is to be noticed that the period of limitation for the purposes of Income Tax Act under Section 158BE is dependent on the conclusion of search and not on the conclusion of the investigation. Investigation includes examination of witnesses which can be done under Section 131 of the Income Tax Act. The Assessing Officer wanted to examine the assessee but he did not turn up after the conclusion of the search as would appear from the assessment order quoted above. Another pertinent question in accordance with Section 465(2) of CRPC shall be "whether by keeping the search pending till 31st January 2000 any failure of justice was occasioned?" Neither in the case of Katyal nor before us any such point was canvassed. The second pertinent question shall be "was the point of limitation raised at the earliest stage before the assessing

officer? The assessee by his letter dated 28th January, 2002 addressed to the assessing officer contended that due to his preoccupation he was unable to appear before the latter to record his deposition. When the case of the assessee is that the time prescribed for assessment had expired on 31st December, 2001, he should have raised the point in his letter dated 28th January, 2002 which he did not do. Therefore prolongation of the search did not cause any prejudice to the assessee not to talk of occasioning any failure of justice. It appears from the assessment order that the assessee was served with a notice u/s 131 to appear for recording his deposition. Time to do so was extended on four occasions. The assessee by his letter dated 28th January, 2002 evinced his intention not to appear. In those circumstances the assessment was completed on 31st January, 2002 which otherwise might have been completed on or before 31st December, 2001.

For the aforesaid reasons, we are of the opinion that the period of limitation has to be reckoned from 31st January, 2000. The question No.1 is answered in the negative and in favour of the Revenue. The questions No.2, 3 and 4 were not pressed.

The appeal is, therefore, dismissed.

Parties shall bear their own costs.

(**GIRISH CHANDRA GUPTA, J.)**

I agree. **(ARINDAM SINHA, J.)**