

26.09.2022

Sl no. 5-10

Ct no. 2

P.M.

WPA 21545 OF 2022

Ashis Chatterjee & Ors.

- Vs -

Union of India & Ors.

With

WPA 21492 OF 2022

With

WPA 21497 OF 2022

With

WPA 21636 OF 2022

With

WPA 21578 OF 2022

With

WPA 21844 OF 2022

Mr. Kalyan Bandhopadhyay, Sr. Adv.,
Mr. S.N. Nag,
Mr. J. Mukherjee
... for the petitioner in WPA 21545 of 2022

Mr. Saptansu Basu, Sr. Adv.
Mr. Arunabho Ghosh,
Mr. Pushpal Chakraborty,
Mr. Victor Chatterjee
... for the petitioner in WPA 21492 of 2022

Mr. Phiroz Edulji,
Mr. S. Nag,
Mr. S. Das
... for the petitioner in WPA 21497 of 2022

Mr. Saptansu Basu, Sr. Adv.
Mr. S. Nag,
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... for the petitioner in WPA 21636 of 2022

Mr. Phoroze Edulji,
Ms. Somali Mukhopadhyay
... for the petitioner in WPA 21578 of 2022

Mr. Bikash Ranjan Bhattacharyya, Sr. Adv.
Mr. S. Nag,
Mr. Avishek Guha
Ms. Debarati Das
... for the petitioner in WPA 21844 of 2022

Mr. Vipul Kundalia,
Mr. Amit Sharma,
Mr. Anurag Roy,

The petitioners alleged that in none of these cases Income Tax authority concerned as per Section 132 (1) (a) & (b) had not any information in their possession or any material for having the reason to believe that any person to whom a summons under Section 142(1) of the Act was issued to produce or cause to be produced, any books of accounts or other documents has omitted or failed to produce such books of account or other documents as required by such summons or notice or had reasons to believe against these persons that if summons or notices had been issued to them would not produce or cause to be proceeded such books of account or any other documents as required by such summons or notice which will be useful for or relevant to any proceeding under the Income Tax Act 1961.

Petitioners have also challenged the use of para-military forces in course of impugned search and seizure proceeding on the ground of unreasonableness, malafide and in arbitrary manner without having any justification or any reasonable apprehension for using para-military forces which is a discretionary power conferred upon the authority under the statute in case of search and seizure as alleged and that it is well settled principle of law that

every discretionary power by an authority must be exercised in a reasonable manner and free from any arbitrariness which are absent in these cases as alleged.

There are also allegations of the petitioners that at the time of impugned search and seizure CCTV camera of the premises of the petitioners were switched off by the searching authority. If these allegations are proved to be true then it creates an impression before the Court that the search and seizure authority was not in a fair and transparent manner.

There are also allegations of petitioners that in case of search and seizure in respect of females, at the time of search and seizure no female officers were accompanied.

Mr. Banerjee, learned senior advocate appearing for one of the petitioners has relied on a decision of the Hon'ble Supreme Court in the case of Director General of Income Tax (Investigation), Pune & Ors. vs Spacewood Furnishers Private Limited & Ors. reported in (2015) 12 SCC 179 particularly in paragraph 6 and 8 of the said decision quoted herein below :-

“6. In Pooran Mal v. Director of Inspection (Investigation) the constitutional validity of Section 132 was under challenge. While negating the said challenge, this Court ITR at P. 515 of its report had held that : (SSC pp. 355-56, para 7)

“7. Dealing First with the challenge under Article 19(1) (f) and (g) of the Constitution it is to be noted that the impugned provisions are evidently directed against persons who are believed on good grounds to have illegally evaded the payment of tax on their income and property. Therefore, drastic measures to get at such income and property with a view to recover the government dues would stand justified in themselves. When one has to consider the reasonableness of the restrictions or curbs placed on the freedoms mentioned in Articles 19(1) (f) and (g), one cannot possibly ignore how such evasions eat into the vitals of the economic life of the community. It is a well- known fact of our economic life that huge sums of unaccounted money are in circulation endangering its very fabric. In a country which has adopted high rates of taxation a major portion of the unaccounted money should normally fill the Government coffers. Instead of doing so it distorts the economy. Therefore, in the interest of the community it is only right that the

fiscal authorities should have sufficient powers to prevent tax evasion.”

“8. The principles that can be deduced from the aforesaid decisions of this Court which continue to hold the field without any departure may be summarized as follows :

8.1. the authority must have information in its possession on the basis of which as reasonable belief can be founded that –

a. the person concerned has omitted or failed to produce books of account or other documents for production of which summons or notice had been issued

or

such person will not produce such books of accounts or other documents even if summons or notice is issued to him

or

b. such person is in possession of any money, bullion, jewellery or other valuable article which represents either wholly or partly income or property which has not been or would not be disclosed.

8.2. Such information must be in possession of the authorized official before the opinion is formed.

8.3 *There must be application of mind to the material and the formation of opinion must be honest and bona fide. Consideration of any extraneous or irrelevant material will vitiate the belief/satisfaction.*

8.4. *Though Rule 112(2) of the Income Tax Rules which specifically prescribed the necessity of recording of reasons before issuing a warrant of authorization had been repealed on and from 1-10-1975 the reasons for the belief found should be recorded.*

8.5. *The reasons, however, need not be communicated to the person against whom the warrant is issued at that stage.*

8.6. *Such reasons, however, may have to be placed before the Court in the event of a challenge to formation of the belief of the authorized official in which event the court (exercising jurisdiction under Article 226) would be entitled to examine the relevance of the reasons for the formation of the belief though not the sufficiency or adequacy thereof.”*

Mr. Kundalia, learned advocate opposing these writ petitions denies the allegations of the petitioners by contending that no CCTV camera in the places of search and seizure were switched off by the respondents. He also denies the allegation of not

accompanying of female officers at the time of search involving female petitioners.

He also submits that the search and seizure procedures were fully legal and there was no malafide. He also denies the allegations of the petitioners that in these cases para-military forces were used by the search and seizure team. He admits that CRPF's (Central Reserve Police Forces) assistance were taken at the time of impugned search and seizure proceeding.

Mr. Kundalia relies on a decision in the case of Principal Director of Income Tax (Investigation) & Ors. Vs. Laljibhai Kanjibhai Mandalia reported in 2022 SCC Online SC 872 in paragraphs 32 and 33 of the said judgment which are quoted below : -

“32. In the light of judgments referred to above, the sufficiency or inadequacy of the reasons to believe recorded cannot be gone into while considering the validity of an act of authorization to conduct search and seizure. The belief recorded alone is justiciable but only while keeping in view the Wednesbury Principle of Reasonableness. Such reasonableness is not a power to act as an appellate authority over the reasons to believe recorded.”

“33. We would like to restate and elaborate the principles in exercising the writ jurisdiction in the matter of search and seizure under Section 132 of the Act as follows :

i) The formation of opinion and the reasons to believe recorded is not a judicial or quasi-judicial function but administrative in character;

ii) the information must be in possession of the authorized official on the basis of the material and that the formation of opinion must be honest and bona fide, it cannot be merely pretence. Consideration of any extraneous or irrelevant material would vitiate the belief/satisfaction.

iii) The authority must have information in its possession on the basis of which a reasonable belief can be founded that the person concerned has omitted or failed to produce books of account or other documents for production of which summons or notice had been issued , or such person will not produce such books of accounts or other documents even if summons or notice is issued to him; or

iv) such person is in possession of any money, bullion, jewellery or other valuable article which represents either wholly or partly income or

property which has not been or would not be disclosed.

v) Such reasons may have to be placed before the High Court in the event of a challenge to formation of the belief of the competent authority in which event the court would be entitled to examine the reasons for the formation of the belief, though not the sufficiency or adequacy thereof. In other words, the Court will examine whether the reasons recorded are actuated by mala fides or on a mere pretence and that no extraneous or irrelevant material has been considered;

vi) Such reasons forming part of the satisfaction note are to satisfy the judicial consciousness of the Court and any part of such satisfaction note is not to be made part of the order.

vii) The question as to whether such reasons are adequate or not is not a matter for the court to review in a writ petition. The sufficiency of the grounds which induced the competent authority to act is not a justifiable issue;

viii) The relevance of the reasons for the formation of the belief is to be tested by the judicial restraint as in administrative action as the Court does not sit as a Court of appeal but merely reviews the

manner in which the decision was made . The Court shall not examine the sufficiency or adequacy thereof.

ix) In terms of the explanation inserted by the Finance Act, 2017 with retrospective effect from 1.4.1962, such reasons to believe as recorded by income tax authorities are not required to be disclosed to any person or any authority or the Appellate Tribunal.”

Considering the submission of the parties, relevant provisions of law under Section 132(1)(a) (b) of the Act and aforesaid judgments of the Supreme Court I am of the view that petitioners have been able to make out a prima facie case for calling for production of the record before this Court, relating to impugned search and seizure proceedings to substantiate the defence of the department that there was no malafide and arbitrariness and there were sufficient materials in their possession and had reasons to believe for invoking Section 132(3) of Act in all these cases. Respondents shall also produce record showing reasons necessitated in these cases for use of CRPF which has been admitted by Mr. Kundalia.

List these matters for further consideration on 29.09.2022 at the top of the list when Mr. Kundalia

will produce all relevant records as indicated in this order.

(Md. Nizamuddin, J.)

29.09.2022

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Mr. Jaydeep Biswas
... for the petitioner in WPA 21545 of 2022

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Mr. Avishek Guha
Ms. Debarati Das
... for the petitioner in WPA 21844 of 2022

Mr. Asok Kumar Chakraborty, ASG

Mr. Vipul Kundalia,
 Mr. Amit Sharma,
 Mr. Anurag Roy,
 Mr. Uneaza Ali

.... for the respondent Income Tax authorities

Mr. Y.J. Dastoor, Sr. Adv.
 Mr. A. Majumdar

..... for respondent No. 13 in WPA 21545
 of 2022 & WPA 21492 of 2022

Mr. S. N. Mookherjee, A.G.
 Mr. Anirban Ray, Ld. Govt. Pleader
 Mr. T.M. Siddiqui,
 Mr. S. Mukherjee,
 Mr. D. Ghosh,
 Mr. D. Sahu,
 Mr. N. Chatterjee,
 Mr. V. Kothari

.... For the State

Heard learned respective counsel appearing for
 the parties.

In compliance of my order dated 26th
 September, 2022 learned Additional Solicitor General
 has placed the record as the respondents were asked
 for to produce, in sealed cover.

I have perused the record and the materials
 relating to invoking of provisions of search and
 seizure proceeding under Section 132 of the Income
 Tax Act, 1961 and reasons for taking assistance of
 CRPF in these cases. The officer concerned of the
 department shall re-seal the documents which has
 been placed before this Court in presence of counsel
 for both the parties.

Mr. Bandyopadhyay, learned senior counsel appearing for one of the petitioners prays for leave to file supplementary affidavit incorporating some additional facts and points of law which according to him due to inadvertence could not be pleaded in these writ petitions.

Let such supplementary affidavit be filed by the petitioners by 3rd November, 2022 and the same shall be served upon the learned counsel appearing for the respondents within 3rd November, 2022 itself. Respondents shall file composite affidavit-in-opposition dealing with the allegations and grounds contained in both the writ petitions and supplementary affidavits within 5th December, 2022 and shall serve copies of the same upon the petitioners and petitioners to file reply thereto, if any, within 15th December, 2022.

Let the matters be added in the list for final hearing in the monthly list of January, 2023.

At the time of hearing, parties should be ready with short written notes of arguments.

Question of maintainability of the writ petitions raised by the learned Additional Solicitor General is kept open.

After re-sealing the records, the officer of this Court will put his/her endorsement on the same and the same shall be produced before the Court as and when asked for.

(Md. Nizamuddin, J.)