

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.8261 of 2017

Date of Decision :22.05.2019

Pawan Kumar Goel

....Petitioner

Versus

Union of India and others

...Respondents

**CORAM : HON'BLE MR.JUSTICE MAHESH GROVER
HON'BLE MR JUSTICE LALIT BATRA**

Present : Ms.Manisha Gandhi, Sr. Advocate with
Mr.Alok Mittal, Advocate and
Ms.Salina Chalana, Advocate
for the petitioner.

Mr.Yogesh Putney, Advocate
for the respondents.

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MAHESH GROVER, J.(O)

This writ petition has been filed with a prayer that the process of search and seizure conducted by the respondents on 06.09.2016 till 08.09.2016 on the business premises/residence of the petitioner be quashed.

On 06.09.2016 at about 11.30 a.m. officials of the respondent department entered the business premises of the petitioner situated in SCO No.76, MDC, Sector 5, Panchkula and the petitioner was allegedly asked to sign documents without disclosing their contents. Upon raising a question the respondents supplied him with a copy of summons dated 06.09.2016 under Section 131 of the Income Tax Act, 1961 (in short “the Act”) informing the petitioner that the officials wanted to carry a survey operation under Section 133-A of the Act. According to the petitioner, during this procedure he voluntarily disclosed the liquidity/cash that he had in the premises to the extent of more than Rs.2 crores. The petitioner also

cooperated with the officials of the department in providing them with the books of accounts, keys of lockers and all other necessary support during the survey. The petitioner disclosed that the amount of Rs.2,09,89,090/- was on account of advance that he had received from a reputed hospital in connection with his business. The grievance of the petitioner is that although the summons indicated survey operations but the procedure was converted into search and seizure which is impermissible in law. He further alleges complete violation of the provisions of Section 133 A (3) and (4) of the Act. The petitioner further asserts that he and all his staff members fully cooperated with the respondents and summons under Section 131 of the Act could not be issued and likewise no procedure under Section 133 (1) and (2) could be adopted unless the petitioner did not offer cooperation to attract the action under sub-section (6) of Section 133 A. Further it is stated that there has been a complete non-application of mind in issuing summons under Section 131 of the Act. If the petitioner was non-cooperative, it ought to have been mentioned before taking any further action against the petitioner. Besides, the summons was absolutely silent as to what information was required from the petitioner during the survey operation.

The respondents, on the other hand, justify the action taken by them.

Annexure P-3 is the summons issued to the petitioner under Section 131 of the Act, which indicates that the premises of the petitioner were converted into a camp office and advised to attend the office and give evidence or produce books of accounts, failing which a penalty of Rs.10,000/- for each default would be imposed upon him. Towards the bottom of the summons it is written "Books of accounts/documents specified". This, according to our mind, is totally vague as the summons is absolutely silent as to what information was required of him during the

survey operation. Even in the reply filed to the petition it has not been stated so. Thus, there is complete ambiguity in the language of the summons which failed to apprise the petitioner of what is required of him at the time of attending the office. Be that as it may, there is a specific assertion made by the petitioner that he had cooperated with the respondents voluntarily and disclosed the existence of cash to the tune of Rs.2,09,89,090/- in his safe and the keys were handed over to the officials of the respondents with an explanation of the cash being on account of advance received of a business transaction.

We would refer to the specific assertion only for the reason that the respondents have failed to dislodge this aspect. They have merely offered a denial simpliciter and no material has been produced before us or appended to the reply indicating that there was non-cooperation from the petitioner or his employees leading to subsequent course being adopted. Para 5(viii) of the petition reads as under :-

“5(viii) That the Respondents/Survey Team was also afforded the necessary facility by the petitioner to check and verify the cash and other valuable articles kept in the business premises of the petitioner and also the petitioner also disclosed and handed over an amount of Rs.2,09,89,090 to the Respondent No.3 which were kept in the cabinet of the petitioner.”

Reply of the respondents would be equally relevant and is, therefore, extracted herebelow :-

“5 (x) That the contents of clause (x) are wrong and thus denied. The petitioner failed miserably in explaining the source of physical cash amounting to Rs.2,09,89,090/- (Rupees Two Crores Nine Lacs Eighty-Nine Thousand and Ninety Only) found at his disposal. In this regard reference may be made to the statement of the Petitioner recorded on

oath during the survey under Section 133A of the Act and later during search under Section 132(4) of the Act which are detailed in para 2.4 and para 6 under the head “Preliminary Objections.”

We also notice that no satisfaction was ever recorded by the respondents that the survey has to be converted into search and seizure. The reply is absolutely silent although it states that the material would be disclosed to the court at the time of hearing. We fail to understand as to why it was not appended to the reply itself.

Now coming to the issue of violation of the procedure and its conversion from a survey to search and seizure, Section 131(1) of the Act confers the officers mentioned therein with the powers of a court under the Code of Civil Procedure in the matters such a discovery and inspection enforcing attendance of any person, compelling production of books of accounts and other documents and issuing commissions. Section 131(1) is extracted here-below :-

“131.(1) The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner ,Commissioner (Appeals), Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner and the Dispute Resolution Panel referred to in clause (a) of sub-section (15) of section 144C shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:-

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) issuing commissions.

The respondents have relied upon Section 131(1-A) which is

extracted herebelow :-

“**131.(1A)** If the Principal Director or Director General or Principal Director or Director or Joint Director or Assistant Director or Deputy Director, or the authorised officer referred to in sub-section (1) of section 132 before he takes action under clauses (i) to (v) of that sub-section, has reasons to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the income-tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other income-tax authority.”

There would be no quarrel about the powers conferred upon the officers but as is obvious that in order to resort to these provisions there has to be reasons to suspect that income has been concealed or is likely to be concealed by any person or class of persons that can prompt an enquiry or investigation to invoke the powers under Section 131(1) of the Act.

Learned counsel for the petitioner has contended that powers under Section 131(1) can be invoked only if the proceedings are pending, which is countered by the respondents with reference to Section 131(1A). But, even if it is so we are of the opinion that the officers are required to state the reasons of their suspicion that any income has been concealed or is likely to be concealed. We cannot be oblivious to the fact that the summons issued to the petitioner was of a survey and as stated by him he voluntarily disclosed the retention of cash in his premises. In this situation, it was imperative upon the officials to record their suspicion to initiate further action if they wanted to convert the survey into seizure.

Section 133A talks of the powers conferred upon an income-tax authority to enter in a place and inspect such books of accounts or documents as necessary.

If we see the provisions of section 133A(3), it empowers the income tax authority to examine the books of accounts but if any such book has to be impounded, then reasons have to be given. Section 133A(4) prohibits the income-tax authority to remove any cash, stock or other valuable article or thing and it is only upon the non-cooperation or refusal by the person under search that powers under Section 131(1) can be resorted to. Section 133A (4) & (6) are extracted herebelow :-

“133A.(4) An income-tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered, any cash, stock or other valuable article or thing.

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(6) If a person under this section is required to afford facility to the income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded either refuses or evades to do so, the income tax authority shall have all the powers under sub-section (1) of section 131 for enforcing compliance with the requirement made :

Provided that no action under sub-section (1) shall be taken by an Assistant Director or a Deputy Director or an Assessing Officer or a Tax Recovery Officer or an Inspector of Income-tax without obtaining the approval of the Joint Director or the Joint Commissioner, as the case may be.

Explanation. — In this section,—

(a) “income-tax authority” means a Principal Commissioner or Commissioner, a Joint Commissioner, a Principal Director or

Director, a Joint Director, an Assistant Director or a Deputy Director or an Assessing Officer, or a Tax Recovery Officer, and for the purposes of clause (i) of sub-section (1), clause (i) of sub-section (3) and sub-section (5), includes an Inspector of Income-tax;

(b) “proceeding” means any proceeding under this Act in respect of any year which may be pending on the date on which the powers under this section are exercised or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year.”

As observed by us earlier, the respondents have not demonstrated from any material as to whether the petitioner failed to cooperate, which is an eventuality where the income-tax authority would be required to record its reasons to resort to the provisions of Section 131(1) and convert the whole process into search and seizure. But this is completely missing from the process.

This to our minds is fatal to the cause of the respondents because in a procedure like this which can often turn draconian to inherent safeguard of at least recording a reason and satisfaction of non-cooperation to resort to other coercive steps need to be set out clearly by the income-tax authority.

This Court in *Gheru Lal Bal Chand v. Income-Tax Officer*, **1982 137**

ITR 190 PH observed as follows :-

“4. The learned counsel for the petitioner has argued that the ITO, A-Ward, wrongly issued notices (annexs.P-1 to P-4) and wrongly passed the order (annex P-5) during the process of survey under Section 133A of the Act. This contention of the learned counsel for the petitioner must prevail. Under Sub-section (1) of Section 133A of the Act, the ITO was competent to enter the business premises of the petitioner and further

to inspect the books of account or other documents as he may require.

It is admitted that the ITO did enter the business premises of the petitioner and whatever books of account and other documents he wanted to examine, were made available to him. Under Section (3) of Section 133A the ITO could place marks of identification on the books of account or other documents inspected by him or could make inventory of any cash, stock or other valuable article or thing checked or verified by him or record the statement of any person which may be useful for, or relevant to, any proceedings under the Act. It is again admitted that the petitioner caused no impediment for the ITO to exercise power under Sub-section (3) of Section 133A of the Act.

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6. It is clear that the ITO is debarred from removing the books of account or other documents etcetera from the business premises of the assessee under Sub-section (4) during the survey under Section 133A. The ITO can, however, resort to powers under Sub-section (1) and (2) of Section 131 of the Act, in case the assessee refuses or evades to co-operate in terms of Sub-section (6) of Section 133A. It is undisputed that the petitioner neither refused nor evaded to co-operate on 11th April, 1978. Under these circumstances, the ITO had no jurisdiction to resort to the powers under Sub-sections (1) and (2) of Section 131 of the Act while surveying the accounts of the petitioner under Section 133A on 11th April, 1978. It is obvious that the ITO issued notices (annexs.P-1 to P-4) under Section 131 of the Act to the petitioner in excess of the jurisdiction vested in him. These notices are, consequently, liable to be quashed.”

The action of the respondents is therefore bad in the eyes of law.

Besides, the summons issued to the petitioner was totally vague. No documents were mentioned which were required of the petitioner and

neither was any other thing stated.

In *G.M.Breweries v. Union of India*, **2000(2) BCR 160** a Division Bench of the Bombay High Court held as follows :-

“5.The powers given to the Income-Tax Authorities under section 131(1) are powers of the Court of law. While exercising these powers, the Income-tax Authorities act in a quasi-judicial capacity. These powers must be exercised strictly for the purposes set out in sub-section (1) of section 131 of the Act and not for any extraneous purposes. Powers under section 131 can be exercised only if proceedings are pending before the authority concerned under the Income-Tax Act. The same is the position under the Wealth-Tax Act and the Gift Tax Act. In the present case, the petitioners seriously challenged the exercise of the powers by the Income-tax Officer. It was contended by the petitioners before the Income-tax Officer that no proceedings whatsoever were pending before him for the purpose for which the books of account and documents called for could have been required. The jurisdiction of the Income-tax Officer to issue the summons was also questioned. The Income-tax Officer did not bother to consider the same. On the other hand, he directed the petitioners to comply with the same under the threat of penalty for non-compliance. It is in such circumstance that the petitioners challenged the summonses and notices before this Court.”

In *Messrs Jamnadas Madhavji & Company and another v. J.B.Panchal, Income Tax Officer and another* **1986(2) BCR 63** the Bombay High Court framed the following question :-

“Can, in the matter of an assessee's completed and concluded assessment, a summons under section 131(1) of the Income-tax Act (for short, “the Act”) be issued against him without there being in existence before the officer issuing the same a pending proceeding?”

In the answer the following are the observations :-

“11. Again, under sub-section (3) of section 131, any authority referred to in sub-section (1) or sub-section (1A) of section 131 may impound and retain in its custody any books of accounts or other documents produced before it in any proceeding under this Act. Further still, Explanation 2 to section 132 of the Act also indicates that but for its artificial and extended definition of the word “proceeding”, proceeding would mean one actually pending and not one completed and concluded. Also relevant to the context is the form of the summons (under section 131(1) of the Act) which commences with the words:

“Whereas your attendance is required in connection with the proceedings under the Income-tax Act in your case.”

Framed and prescribed at and since about the time section 131(1) was enacted, this form constitutes, in a sense, a contemporaneous exposition aiding and assisting a correct interpretation of section 131 (1). The form also assumes and presupposes the existence of a pending proceeding before the concerned officer.

12. There is yet another infirmity invalidating the impugned summons. The officer(respondent No. 1) issuing it has himself disclosed the reason for doing so. His letter of October 30, 1980 *inter alia* states:

“The purpose of the information called for was with a view to investigate the information with me whether the above assessments should be reopened u/s 147 or not.”

It is obvious thus that the officer has yet to come to a stage where he can, within the meaning of section 147, be said to have “reason to believe” that income chargeable to tax has escaped assessment. He is still at a pre-reason to believe stage. There is a vital distinction between the pre-reason to believe stage (stage 1) and the post-reason to believe stage (stage 2). The impugned summons here, as the above letter indicates, is at stage 1 viz. pre-reason to believe stage. Section 131(1) does not confer power to compel (i) attendance of the assessee

or (ii) production of documents at this stage. Indeed, stage 1 or the pre-reason to believe stage connotes a purely administrative function of a unilateral character. At this stage, the assessee does not come into the picture at all. It is not the object of this provision to even at this stage compel an assessee to appear and produce evidence before the officer. It is for the officer to first decide whether he has reason to believe. And only if he decides that question in the affirmative, can he then initiate proceedings under section 147 and only thereupon he becomes entitled to invoke section 131(1). “Reason to believe” is not the same as “reason to doubt” or “reason to suspect”. Difference between the two concepts is vital and substantial. If power under section 131(1) is held to be exercisable at any time and at any stage, proceeding or no proceeding, pending or not pending, instituted or not instituted and regardless of whether there is or there is not reason to believe, it may as well result in mischief and/or likely abuse and/or arbitrariness. A completed assessment is a valuable right. It cannot be lightly ignored nor can it, at the mere whim of the officer, be put into jeopardy. To permit such a course would be akin to permitting entry into the penumbra so speculative uncertainty. For reopening an assessment, the Act sets down stringent conditions. The same must first be fulfilled before issuing summons to the assessee. A request simpliciter to the assessee to assist without anything more and without any consequence in default may stand upon an altogether different footing than a summons under section 131(1) with penalty in default of compliance therewith. Such, however, is not the case here.”

Similarly, we are in agreement with the argument of the learned counsel for the petitioner that provisions of Section 131(1) could be invoked only if some proceedings were pending. In the instant case there was only a survey operation and no proceedings were pending at that point of time. But

the income-tax authority exercised the powers of a court in the absence of

any pending proceedings. This issue was determined by a Division Bench of Patna High Court in *Rina Sen v. Commissioner of Income-Tax and others* reported as **1999(235) ITR 219** and it was observed as follows :-

“6. Mr.Binod Poddar, learned counsel for the petitioner, contended that the Assessing Officer and/or the Appellate Officer have power to issue commission under section 131(1)(d) of the Act but the power can be exercised only in connection with a pending proceeding. The power, it was submitted, is the same as that of a civil court under the relevant provisions of the Code of Civil Procedure and since the civil court has power to issue commission and/or to pass other orders referred to in clauses (a), (b) and (c) of section 131(1) of the Act while trying a suit, as said so in the section itself, the power of the Assessing Officer, etc., under the Income-tax Act cannot be enlarged and be exercised even though no proceeding is pending, under the Act. Counsel relied on *Jamnadas Madhavji and Co. v.J.B.Panchal*, ITO (1986) 162 ITR 331 (Bom.) and *Dwijendra Lal Brahmachari v. New Central Jute Mills Co.Ltd.* (1978) 112 ITR 568 (Cal.).”

To our minds the income-tax authority violated the procedure completely. Nowhere was any satisfaction recorded either of non-cooperation of the petitioner or a suspicion that income has been concealed by the petitioner warranting resort to the process of search and seizure.

The High Court of Bombay in *L.R.Gupta and others v. Union of India and others*, **1992(46) DLT 14** observed as under :

“35. Sub-clause (b) of Section 132(1) refers to cases where there is reason to believe that if any summons or notice, as specified in the said sub-clause (a) has been issued or will be issued then that person will not produce or cause to be produced the books of accounts etc. In other words, the said provision refers to the belief which may be formed by the Appropriate Authority to the effect that the person concerned is not

likely to voluntarily or even after notice produce documents before the Income Tax authorities. Where, for example, there is information that a person is hiding or likely to hide or destroy documents or books of accounts which are required or are relevant for the purposes of the Act then in such a case it can be said that unless and until search is conducted the said books of account or documents will not be recovered. The belief of the authority must be that the only way in which the Income Tax Department will be in a position to obtain books of accounts and documents from a person is by the conduct of a search and consequent seizure of the documents thereof. In our opinion some facts or circumstances must exist on the basis of which such a belief can be formed. For example, if the Department has information that a person has duplicate sets of account books or documents where *havala* transactions are recorded then the Department can legitimately come to the conclusion that if a notice is sent then that person is not likely to produce the said documents etc. Duplicate books of accounts and such like documents are maintained primarily for the reason that they are not to be produced before the Income Tax authorities. To put it differently, the nature of the documents may be such which are not, in the normal course, likely to be produced before the Income Tax authorities either voluntarily or on requisition being sent. It may also happen that the documents may exist and be in the custody of a person which would show the existence of immovable property which he may have acquired from money or income which has been hidden from the Income Tax Department. The past record of the assessee, his status or position in life are also relevant circumstances in this regard. Where, however, documents exist which are not secretly maintained by an assessee, for example pass books, sale deeds which are registered and about the existence of which the Department is aware, then in such a case it will be difficult to believe that an assessee will not produce

those documents.

36. Sub-clause (C) refers to money, bullion or jewellery or other valuable articles which either wholly or partly should have been income of an assessee which has not been disclosed for the purpose of the Act. The said sub-clause pertains only to moveable and not immoveable assets. Secondly it pertains to those assets which wholly or partly represent what should have been income. The expression income “which has not been or would not be, disclosed for the purposes of Income Tax Act” would be mean that income which is liable to tax but which the assessee has not returned in his Income Tax return or made known to the Income-Tax Department. The sub-clause itself refers to this as “undisclosed income or property”. In our opinion the words “undisclosed”, in that context, must mean income which is hidden from the Department. Clause (c) would refer to cases where the assessee knows that the moveable asset is or represents income which is taxable but which asset is not disclosed to the Department for the purpose of taxation. Those assets must be or represent hidden or secreted funds or assets. Where, however, existence of the money or asset is known to the Income Tax Department and where the case of the assessee is that the said money or the valuable asset is not liable to be taxed, then, in our opinion, the provisions of sub-clause (c) of Section 132(1) would not be attracted. An assessee is under no obligation to disclose in his return of income all the moneys which are received by him which do not partake of the character of income or income liable to tax. If an assessee receives, admittedly, a gift from a relation or earns agricultural income which is not subject to tax, then he would not be liable to show the receipt of that money in his Income Tax return. Non-disclosure of the same would not attract the provisions of Section 132 (c). It may be that the opinion of the assessee that the receipt of such amount is not taxable, may be incorrect and, in law, the same may be

taxable but where, the Department is aware of the existence of such an asset or the receipt of such an income by assessee then the Department may be fully justified in issuing a notice under Section 148 of the Act, but no action can be taken under Section 132(1)(c). Authorisation under Section 132(1) can be issued if there is a reasonable belief that the assessee does not want the Income Tax Department to know about the existence of such income or asset in an effort to escape assessment. Section 132(1)(c) has been incorporated in order to enable the Department to take physical possession of those moveable properties or articles which are or represent undisclosed income or property. The words “undisclosed income” must mean income which is liable to be taxed under the provisions of the Income Tax Act but which has not been disclosed by an assessee in an effort to escape assessment. Not disclosed must mean the intention of the assessee to hide the existence of the income or the asset from the Income Tax Department while being aware that the same is rightly taxable.

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43. A search which is conducted under Section 132 is a serious invasion into the privacy of a citizen. Section 132(1) has to be strictly constructed and the formation of the opinion or reason to believe by the authorising officer must be apparent from the note recorded by him. The opinion or the belief so recorded must clearly show whether the belief falls under sub-clause (a), (b) or (c) of Section 132(1). No search can be ordered except for any of the reasons contained in sub-clause (a), (b) or (c). The satisfaction note should itself show the application of mind and the formation of the opinion by the officer ordering the search. If the reasons which are recorded do not fall under clauses (a), (b) or (c) then an authorisation under Section 132(1) will have to be quashed. As observed by the Supreme Court in *Income Tax Officer v. Seth Brothers*, 74 ITR 836.

“Since by the exercise of the power a serious invasion is made upon the right, privacy and freedom, of the tax payer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorises it to be exercised. If the action of the officer issuing the authorisation or of the designated officer is challenged, the officer concerned must satisfy the court about the regularity of his action. If the action is maliciously taken or power under the Section is exercised for a collateral purpose, it is liable to be struck down by the court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed.”

For the reasons above, we have no hesitation to conclude that the present petition deserves to succeed. The impugned action of the respondents is quashed. The consequential benefits would flow to the petitioner forthwith. Ordered accordingly.

(MAHESH GROVER)
JUDGE

May 22 , 2019
dss

(LALIT BATRA)
JUDGE

Whether speaking/reasoned	Yes
Whether reportable	Yes