

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 03.02.2020
CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
AND
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

W.A.No.1183 of 2018 and C.M.P.No.9440 of 2018

1. The Principal Commissioner of Income Tax-6,
Mahatma Gandhi Road, Nungambakkam,
Chennai - 600 034.
2. The Income - Tax Officer,
Corporate Ward - 6(3), Room No.706, 7th Floor,
Wanaparthi Block, 121, Mahatma Gandhi Road,
Chennai - 600 034. : Appellants/Respondents 1 & 2

Vs.

1. K.Inbasakaran
2. M/s.Silver Shoes Pvt. Ltd.,
T-62, Anna Nagar,
Chennai - 600 040. : 2nd Respondent/3rd Respondent

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent to set aside the order made in W.P.No.35234 of 2016 dated 13.07.2017 and allow the writ appeal.

Prayer in W.P.No.35234 of 2016: Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus, calling for the records of the second respondent relating to the impugned order dated 30.06.2016 passed by the second respondent in proceedings No.PAN:AAPI3331C/2016-17 and quash the same and consequently direct the second respondent to re-issue the refund order as per law.

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For Appellants : Mr.A.P.Srinivas,
Senior Standing Counsel
For Respondents : Mrs.R.Maheswari for R1
Mr.P.H.Aravind Pandian,
Senior Counsel
for Ms.Kalaiselvi for R2

JUDGMENT
[made by P.VELMURUGAN, J.]

This writ appeal has been directed against the order made in W.P.No.35234 of 2016 dated 13.07.2017.

2 The appellant's Department conducted a raid in the residential premises of the first respondent on 13.09.1993 under Section 132 of the Income Tax Act, and found some incriminating records and cash about Rs.30,18,650/-, US Dollars, Gold Biscuits, Fixed Deposits and the Department seized all the above. Based on the seizure, the Department has filed a case against the first respondent in Spl.C.C.No.16 of 1997 on the file of the learned Special Judge I (XI Additional Judge, City Civil Court), which ended in conviction, but, subsequently on an appeal filed by the first respondent before this Court in Crl.A.No.231 of 2000, he was acquitted by this Court, aggrieved against which, the appellant Department has filed an appeal before the Hon'ble Supreme Court, wherein, the judgment of acquittal passed by this Court was confirmed. The Income Tax Officer, vide letter dated 13.01.2016 intimated the first respondent about the refund of tax in the individual case. The first respondent sent a communication dated 28.01.2016 stating that refund has to be given to the second respondent M/s.Silver Shoes Pvt. Ltd., The second appellant rejecting the same, had passed an order dated 30.06.2016 granting refund in the name of the first respondent for a sum of Rs.17,14,640/-. The first respondent returned the cheque and filed petition under Section 154 of the Income Tax Act against the refund order and the same was rejected by the second appellant vide order dated 07.09.2016 as there is no mistake apparent from the record. Thereafter the first respondent filed a writ petition in W.P.No.35234 of 2016 and the learned Single Judge, passed a detailed order dated 13.07.2017, directing the second appellant to pass orders in favour of the second respondent herein. Aggrieved by the order dated 13.07.2017, the Department has filed the present writ appeal.

3 The learned Senior Standing Counsel appearing for the appellants submitted that during a search conducted by the Department in the residential premises of the first respondent, some incriminating records and unaccounted money of Rs.30,18,650/-, US Dollars, Gold Biscuits, Fixed Deposits etc., were seized and criminal proceedings was also initiated, which ended in conviction. But, subsequently, the wife of the first respondent had retracted her earlier statement saying that all the seized articles belong to her and not to her husband and hence on an appeal filed by the first respondent, he was acquitted by this Court, which was also confirmed by the Hon'ble Supreme Court. Therefore, refund of tax was rightly made in

favour of the first respondent as per Section 132-B (3) of the Income Tax Act, wherein, the Act clearly says that the assets have to be discharged forthwith from whose custody it was seized and there is no reference about the original owner of the assets. The Department has rightly refunded the assets in favour of the first respondent and further, there is no mentioning either in the order of this Court in the criminal appeal or in the order of the Hon'ble Supreme Court, to whom the assets have to be refunded. The wife of the first respondent has filed an affidavit stating that all the seized articles were acquired by her own through sale proceeds of M/s.Silver Shoes Private Limited and M/s.Southern Rims (P) Limited, in which, she was the Director and M/s.A.V.J.Marketing Services, in which she was the Proprietor. The Hon'ble Supreme Court has held that the money seized at the time of search stated to be owned by wife of the first respondent is unaccounted and further it was not stated that as to whether the seized assets and monies were taxed or not and how much belonged to her and how much belonged to the Companies owned by her is also not clearly stated. Under these circumstance, the order of the learned Single Judge directing the appellants to make refund in favour of the second respondent is not justifiable and the same is against law, which warrants interference.

4 Learned Senior Counsel appearing for the second respondent vehemently contended that subsequent to the search made in the house of the first respondent, the Department has filed criminal case, which ended in conviction, but, on an appeal filed by the first respondent, this Court acquitted him and the case went to Supreme Court, wherein, the acquittal of the first respondent was confirmed. The Hon'ble Supreme Court has accepted that the seized assets from the house of the first respondent belonged to his wife and hence confirmed the acquittal of the first respondent. Once the Supreme Court has held that the seized articles did not belong to the first respondent, the refund order passed by the appellant Department in favour of the first respondent is illegal and against the judgment of the Hon'ble Supreme Court and hence the first respondent filed writ petition. The learned Single Judge after an elaborate discussion on the entire facts of the case, has rightly pointed out that refund order has to be done in favour of the second respondent and not in favour of the first respondent. Further it was rightly held by the learned Single Judge that "interpretation to be given in the facts and circumstances of the present case is by interpreting the words 'from whose custody the assets were seized' as found in Section 132-B (3) of the Income Tax Act should be interpreted bearing in mind the decision of this Court in CrI.A.No.231 of 2000 and the decision of the Hon'ble Supreme Court in CrI.A.No.48 of 2002". The above order is being well founded and reasoned, does not

warrant any interference of this Court, which would amount to controverting the decision of the Hon'ble Supreme Court.

5 Heard the learned counsel appearing on either side and perused the materials available on record.

6 The main contention raised by the appellant Department is that even though, the criminal case filed against the first respondent ended in conviction and subsequently, this court acquitted the first respondent, which was also confirmed by the Hon'ble Supreme Court, there is no specific direction or order either by this Court or by the Hon'ble Supreme Court regarding refund of the assets and further the appellants were not parties to the criminal proceedings. The learned counsel for the respondents contended that it was observed in the criminal appeal that the first respondent and his wife were jointly living in the house, where the seizure had taken place and the wife has given statement before the Assistant Director of Income Tax (Investigation) Unit - I, Department of Vigilance and Anti-Corruption stating that all the properties belonged to her and she earned the same through sale proceeds of three Companies owned by her and the Hon'ble Supreme Court has also accepted the same.

7 On a careful reading of the judgment of this Court as well as the Hon'ble Supreme Court, it is revealed that the Court has held that at the time of search, the wife of the first respondent was also residing with him and she has given statement saying that all the properties belonged to her and she has also stated the source of income for the same and the Hon'ble Supreme Court has accepted the same and found that prosecution has failed to establish that all the properties seized belonged to the first respondent and therefore confirmed the acquittal of the first respondent made by this Court. Subsequent to the judgment of this Court and the Hon'ble Supreme Court, the Department has passed the refund order in favour of the first respondent, against which the first respondent filed writ petition, which was allowed in his favour. It is true that in the criminal proceedings, the Department was not a party, but, at the same time, the Hon'ble Supreme Court has held that the seized assets do not belong to the first respondent and it only belongs to his wife. Under these circumstances, the stand of the Department is not correct that they can pass refund order only in favour of a person, from whose custody, the assets were seized. But, at the same time, the learned Single Judge has not appreciated the factual position and also the finding of the Hon'ble Supreme Court regarding the ownership of the assets. The wife of the respondent herself stated in the affidavit that she earned some monies, when she was staying in America and she also paid income tax at America, and after repatriating to India,

she started business and all the seized assets recovered during the search were acquired only out of her business through the three Companies mentioned above.

8 The seized assets were assessed at the hands of the first respondent for the A.Y. 1994-95 vide order dated 29.03.1996. Neither the first respondent nor his wife or the second respondent has challenged the said order so far. Further, neither this Court nor the Hon'ble Supreme Court held that all the seized properties belong to the second respondent herein, where the wife of the first respondent is the Director. Further as rightly pointed out by the learned Standing Counsel appearing for the appellants that the search was not conducted in the premises of the Company and while giving the statement, the wife of the first respondent has not stated that all the properties are belong to the Company and in order to escape from the clutches of law and to safeguard her husband, she has given that statement stating that all the properties belong to her and not to her husband and she has shown some source of income. If at all based on the decision of the Hon'ble Supreme Court, the learned Single Judge ought to have directed the appellants to pass refund orders in favour of the wife of the first respondent, but, without any materials or sufficient proof, refund order cannot be passed in the name of the second respondent. The learned Single Judge has failed to consider the observations made by the Hon'ble Supreme Court in CrI.A.No.480 of 2002 dated 07.12.2005 reported in (2006) 1 SCC 420 and the relevant portion of the judgment is extracted hereunder:

" 15. We have heard both the learned counsel at length. The basic question that emerges in the present case is whether the accused could be saddled with all the unaccounted money at his hand or not. It is the admitted position that both the husband and wife were living together. The wife was running three concerns though those concerns were running in loss. Yet she could manage to earn black money by selling goods without bills and amassed this wealth without disclosing the same to the Income-tax authority and when the raid was conducted she disclosed the unaccounted money and accepted herself for being assessed by the Income-tax Department. Therefore, in this context, the question arises whether the joint possession of the premises by the husband and wife and the unaccounted money which has been recovered from the house could be said to be in exclusive possession of the accused. There are no two opinions in the matter that the initial burden has to be discharged by the prosecution. The prosecution in order to discharge that burden has examined the Investigating Officer, P.W.53- Shri Viswanathan, D.S.P. (Investigation).

P.W.53- Viswanathan has collected all the materials from various places and he has given the details of his investigation. He has also supported the recoveries which have been made by the Income-tax Department. He in his statement, has also deposed that some money was deposited at various branches of Punjab National Bank at Bangalore and he has examined all the Senior Managers of Punjab National Bank to show that various amounts were deposited in their Banks and the prosecution has also produced them in the witness box to substantiate their allegation as P.Ws.22, 23, 24, 25, 26 and 32. He has also examined the persons against whose names those amounts were deposited in the witness box. He has also examined the Income-tax Officer as P.W.14, P.W.44 Assistant Director of Income-tax (Investigation) and P.W.51- S. Ganapathy Iyer. By this evidence the prosecution has established that the money was recovered at the house of the accused as well as various purchases of immovable properties made by the wife of the accused. The prosecution has tried to establish that all the moneys which had been recovered from the house of the accused, various deposits in the Punjab National Bank at various places through the influence of the Regional Manager of Punjab National Bank and the recovery of the gold ornaments as well as the recovery of foreign exchange i.e. dollars belong to accused. Thus, the prosecution has tried to establish that all the moneys belonged to the accused and after taking sanction, prosecution was launched against the accused. There are no two opinions in the matter that the initial burden lies on the prosecution. In the case of C.S.D.Swami v. The State reported in AIR 1960 SC 7, this Court has taken the view that in Section 5 (3) of the Prevention of Corruption Act, 1947 a complete departure has made from the criminal jurisprudence still initial burden lies on the prosecution and in that context it has been observed as follows :

"Section 5(3) does not create a new offence but only lays down a rule of evidence, enabling the court to raise a presumption of guilt in certain circumstances- a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him."

16. Therefore, the initial burden was on the prosecution to establish whether the accused has acquired the property disproportionate to his known source of income or not. But at the same time, it has been held in State of M.P. Vs. Awadh Kishore Gupta that accused has to account satisfactorily for the money received in his hand and satisfy the court that his explanation was worthy of acceptance. In order to substantiate the plea taken by the accused that all the monies which had been received belonged to his wife and in support thereof he has examined as many as 13 witnesses including himself, his wife and his son-in-law. D.W. 12 is the wife of the accused. She has deposed that the entire money belonged to her. She has admitted the raid on her house and she has also admitted that she has amassed the wealth by selling cycle rims and leather products without any bill and out of the money amassed by her she had persuaded her husband to deposit the same at various banks. She has come forward and admitted the recovery of the foreign exchange at her house and she has accounted for the same. She has also admitted the recovery of the gold ornaments at her house and she has explained that she has purchased those gold ornaments. She has also submitted that some real estate was purchased out of self-earning as well as the loan from the mother of the son-in-law and some contribution was made by the son-in-law which the son-in-law has also admitted. Likewise, D.W.8 her son-in-law, Thiru S.Rajasankar also appeared in the witness box and admitted that he had also saved certain foreign exchange when he had gone on various visits abroad. He has also admitted to have carried some money to be deposited in the bank. The accused has also come forward in the witness box as D.W.13 and has deposed that all the monies belonged to his wife and when he came to know about the unaccounted money at his house, he gave a piece of his mind to her. He has admitted that on one or two occasions the money was carried by himself to be deposited in the account in Punjab National Bank and some money was also deposited on account of some of the members of the family by D.W.8, S. Rajasankar, the son-in-law. Therefore, under these circumstances, the respondent has explained the possession of unaccounted money."

9 On a careful reading of the above paragraphs, it is revealed that even though, the Hon'ble Supreme Court confirmed the acquittal of the first respondent, it has observed that the

wife of the first respondent has admitted that she has amassed the wealth by selling cycle rims and leather products without any bill and out of money amassed by her, she had persuaded her husband to deposit the same in various banks. She has also admitted that the recovered seized assets belong to her. Therefore, whether she has been prosecuted for the above non-disclosure or not is not brought before this Court.

10 In fine, however, the learned Single Judge failed to consider the above and directed the appellants to pass refund order in favour of the second respondent, which warrants interference of this Bench. It is not proved that all the seized properties were assessed in the name of the second respondent. Therefore, the order passed by the Single Judge is set aside to that extent alone. Hence the second appellant is directed to verify as to whether the seized assets have been shown in the returns filed by the wife of the first respondent at any point of time. If it is so, the second appellant is directed to pass orders in accordance with law, after verifying the returns filed by the wife of the first respondent, if not, the appellants are directed to take action against the wife of the first respondent in accordance with law for not showing assets in her returns and not paying the income tax. Further the Department of Commercial Tax and the Department of Wealth Tax, are directed to take action against the wife of the first respondent for selling the products without any bill and amassing wealth.

11 With the above directions, the writ appeal is partly allowed to the extent stated above. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1. The Principal Commissioner of Income Tax-6,
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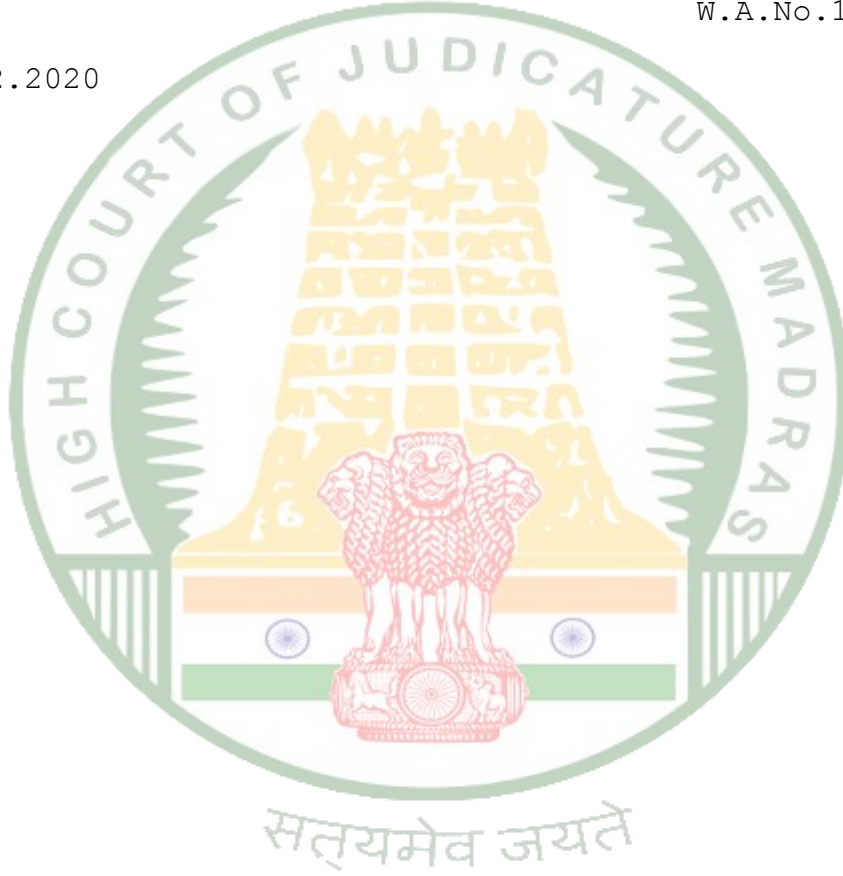
Copy to: 1.The Department of Commercial Tax,
Chennai.

2.The Department of Wealth Tax,
Chennai.

+1cc to Mr.A.P.Srinivas, Advocate, SR.No.8726.
+1cc to Ms.R.Maheswari, Advocate, SR.No.8060.

W.A.No.1183 of 2018

VG II(CO)
CSR: 28.02.2020



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