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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision:- 09.01.2020

+ W.P.(C) 5343/2019

KHEM CHAND MUKIM

..... Petitioner

Through: Mr. Inder Paul Bansal and Mr. Vivek
Bansal, Advs.

versus

PR. DIRECTOR OF INCOME TAX, (INV.)-2, A.I.U. & ORS.

..... Respondents

Through: Ms. Vibhooti Malhotra, Sr. Standing
counsel with Mr. Shailendra Singh,
Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (Oral):

1. The Petitioner-proprietor of M/s Shrimati Gems and Jewels has filed the present writ petition impugning the search and seizure action carried out under Section 132 of the Income Tax Act (hereinafter 'the Act') including the order whereby his stock-in-trade (jewellery) was seized.

2. The facts in brief, as set out in the petition are that the Petitioner - is in the business of trading in jewellery since 2010. He travelled from Delhi to Guwahati to attend a jewellery exhibition which was held from 07.09.2018 to 09.09.2018. On his return, he was stopped by Respondent No. 2 at Indira

Gandhi International Airport, New Delhi and a search was conducted on him. The jewellery found in his possession was valued by the Revenue through a Registered Government Valuer at Rs. 1,58,62,924/- and the same was seized and panchnama dated 11.09.2018 was drawn in this behalf. Subsequently, Assistant Director of Income Tax (INV)-2 issued summons to the Petitioner under Section 131(1A) of the Act, dated 10.09.2018 and 11.09.2018, calling upon him to furnish details regarding the seized jewellery. Later, on 13.09.2018, another summon was issued calling upon him to give certain information and documents. In response to the above summons, Petitioner filed a reply dated 17.09.2018, submitting details as required by ADIT, Investigation (AIU). He also made a request for the release of the jewellery, asserting that the same was his stock- in- trade and the seizure has resulted in hampering his business. This was followed by a reminder dated 17.09.2018, submitted with the department on 20.09.2018. On 09.10.2018, a similar request was made to the Pr.CIT-18 calling his attention to the fact that one month had expired since the seizure of stock-in-trade. Petitioner protested against the seizure, pleaded for immediate release of the seized stock-in-trade as he had been deprived of his source of livelihood.

3. At a later date, when Petitioner made further requests to the Tax Officers, he was informed that all the documents furnished by him had been submitted to the Investigation Officer of AIU Wing, who would examine the same and furnish a report to the Assessing Officer, whereafter the stock-in-trade would be released. However, such representations did not have the desired outcome and the Petitioner continued to make representations to other Tax

Officers. On 18.10.2018, ACIT asked further information which was duly furnished vide letter dated 27.12.2018. Since then, there has been no response from the Income Tax Department, constraining the Petitioner to file the present writ petition, impugning the action of search, inter alia, on the ground that it is contrary to the mandate of the Act as the pre-conditions laid down in Clauses (a) to (c) of Section 132 (1) have not been fulfilled.

4. Learned counsel for the Petitioner has contended that to initiate a valid search, it is mandatory for the Respondents to form “reason to believe” and one of the three conditions enumerated in Clauses (a) to (c) of Section 132 (1) of the Act must be satisfied to enable the authority to issue a valid search warrant. Since, the Petitioner was in the possession of jewellery, the only Clause, if any, that can be attracted is clause ‘(c)’. In any event, the said Clause is also not applicable since the Petitioner is carrying on the business of sale and purchase of jewellery, and he was legitimately carrying the same as his stock-in-trade, from Delhi to Guwahati for an exhibition. In such a situation, no circumstance existed justifying the initiation of the action of search. Furthermore, evidence of participation in the exhibition at Guwahati is based on documents that had been furnished to the authorities. It conclusively establishes that the jewellery seized is Petitioner’s stock-in-trade. This is also corroborated by the books of account and the supporting vouchers, which were produced before the concerned authorities. Despite justifying the lawful possession of the jewellery, the unlawful seizure continues.

5. He further argued that once the Petitioner was able to demonstrate that the

jewellery in question was his stock-in-trade, the continuation of seizure is against the law viz. the proviso to Clause (iii) of Section 132 (1) of the Act and the 3rd proviso to Section 132(1)(v) of the Act. In support of his submissions, learned Counsel for the Petitioner relied upon the decision of ***Puspa Ranajan Sahoo vs Assistant Director of Income Tax (INV)*, [2012] 210 Taxman 217 (Orissa)(MAG).**

6. Ms. Vibhooti Malhotra, learned senior standing counsel for the Revenue, assisted by Mr. Shailendra Singh, on the other hand, opposed the petition by arguing that the Investigation Wing of the Income Tax Department was in possession of credible information, on the basis whereof the AO formulated 'reason to believe' that the Petitioner was in possession of jewellery, representing its undisclosed income and, therefore, the search was a valid exercise of power under Section 132 (1)(c) of the Act. It was further submitted that in terms of Section 132 (1)(b)(iii), Respondent No.2 was competent to seize the jewellery found as a consequence of search. Petitioner has erroneously sought to take refuge under the proviso to the said provision which prohibits seizure of stock-in-trade of the business. He was afforded adequate opportunity to present evidence so as to demonstrate that the jewellery found was part of his regular stock-in-trade, but he failed to do so. Respondent No.2 had conducted an on spot verification of Petitioner's business premises wherein he had failed to produce the stock register and the delivery challans. In fact, during the course of recording his statement under Section 132(4) of the Act, a specific query was raised seeking Petitioner's explanation for non-availability of the stock register and the delivery challans. The query remained unresolved, as the Petitioner cited his inability

to provide the said details. In absence of any material forthcoming from the Petitioner to suggest that the jewellery seized was indeed his stock-in-trade, the benefit of the proviso relied upon cannot be availed by him. Petitioner had the onus to produce adequate material so as to make evident that the items seized were part of his regular stock-in-trade, and since he failed to do the same, the seizure is valid and justified.

7. Ms. Vibhooti Malhotra also referred to Section 132B of the Act to argue that the said provision unequivocally provides that the items seized during the course of search would be applied towards any pre-existing demand or liability determined as a consequence of post-search assessment. The said provision provides for release of seized goods on satisfaction of two conditions, namely; (a) nature and source of acquisition has to be explained to the satisfaction of the AO, and; (b) the amount of existing liability may be recovered from the seized item, and the remaining, if any, may be released. She also argued that since, despite several opportunities, Petitioner failed to prove the nature and source of the seized jewellery, the release of the seized articles was not permitted.

8. Ms. Malhotra next argued that AIU (Inv.), New Delhi acted on specific information in respect of Petitioner, gathered from the office of AIU, Guwahati. The statement of the Petitioner was recorded on oath under Section 131(1A) of the Act and the search and seizure action was well within the jurisdiction of competent authority conducting the proceedings, emanating from the statement recorded on oath under Section 131 (1A) of the Act and by virtue of the incriminating documents found during the spot

verification conducted on Petitioner's business premises.

9. We have given our thoughtful consideration to the submissions advanced by the learned counsels for the parties and have carefully evaluated the facts of the case and also the material placed on record. There cannot be any dispute that the Petitioner is in the business of sale and purchase of jewellery and is being assessed regularly for income tax. In support of this contention, the returns of income from AY 2015-16 to AY 2018-19 have been filed along with the petition. In the backdrop of the facts noted above, we have to examine the validity of the search and seizure action by the Respondents under Section 132 of the Act. At the outset, it would thus be apposite to refer to Section 132 of the Act, to the extent the same is relevant for the purpose of deciding the present petition. The same reads as under:

“132. Search and seizure.-(1) Where the Principal Director General or Director General or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner, or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that-

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account, or other documents

as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income Tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),

then,-

(A) the Principal Director General or Director General or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be may authorise any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer, or

(B) such Additional Director or Additional Commissioner or Joint Director or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer,

(the officer so authorised in all cases being hereinafter referred to as the authorised officer) to-

(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other

documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(ii-a) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(ii-b) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (i) of sub-section (1) of Section 2 of the Information Technology Act, 2000, to afford the authorised officer the necessary facility to inspect such books of account or other documents;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

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

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion,

jewellery or other valuable article or thing:

Provided that where any building, place, vessel, vehicle or aircraft referred to in clause (i) is within the area of jurisdiction of any Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, but such Principal Chief Commissioner or Chief Commissioner] or Principal Commissioner or Commissioner] has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c), then, notwithstanding anything contained in Section 120, it shall be competent for him to exercise the powers under this sub-section in all cases where he has reason to believe that any delay in getting the authorisation from the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner having jurisdiction over such person may be prejudicial to the interests of the revenue:

Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may 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 authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii):

Provided also that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business.

Provided also that no authorisation shall be issued by the Additional Director or Additional Commissioner or Joint Director or Joint Commissioner on or after the 1st day of October, 2009

unless he has been empowered by the Board to do so.

Explanation.-For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.”

[Emphasis Supplied]

10. Before proceeding further, we must note that on 08.11.2019, we had directed the Respondents to file an additional affidavit in response to the statement filed along with the writ petition, whereby the Petitioner had co-related the seized articles as per the description given in the inventory prepared by the registered valuer, with entries in his books of account. The endeavour was to verify Petitioner's contention that each seized article had been accounted for and already included in the books. At the time of the hearing, Respondents also produced the satisfaction note for the perusal of this Court, recording the reason, for authorizing the search. The original file containing the satisfaction note was tendered in a sealed cover. The same was de-sealed and perused, and retained for perusal at the time of dictation of the order.

11. The satisfaction note is claimed to be privileged. We, however, do not find anything confidential in the same, as virtually the entire content thereof has been reproduced in the counter affidavit filed by the Respondents and, therefore, we consider it appropriate to extract the facts alluded to in the counter affidavit which forms the entire basis for authorizing the search. The same reads as under:

“a. It is submitted that the Petitioner namely, Sh. Khem Chand Mukim while travelling from Guwahati to Delhi was intercepted by the Air Intelligence Unit (AIU) Team at Terminal- ID, IGI Airport, New Delhi and a search under section 132 of the Income Tax Act, 1961 was conducted on the Petitioner. During the search, the Petitioner was found carrying jewellery of Rs. 1,58,62,924/-. On interrogation, the Petitioner stated that he was the proprietor of M/s Shrimati Gems and Jewels, Ansari Road, Daryaganj, Delhi and the said jewellery belonged to his entity. In order to verify the said claim, summons under section 131(1 A) of the Act dated 10.09.2018, was issued to M/s Shrimati Gems and Jewels whereby it was asked to produce stock register and delivery challan issued to the Petitioner.

b. Thereafter, on spot verification made at the address of the business place provided by the. Petitioner viz. M/s Shrimati Gems and Jewels at 4835, Ansari Road, Daryaganj, Delhi, it was revealed that there was no entry for "stock in transit" in the stock summary nor any copy of delivery challan issued to the Petitioner was available. Consequently, warrant under section 132(1) of the Act was executed against the Petitioner. The Petitioner was also required to furnish copies of delivery challans which he failed to do so. During the course of on-spot verification at the business place of the Petitioner, statement of Sh. Vidit Jain, (staff of Shrimati Gems & Jewels) under section 132(4) of the Act dated 11.9.2018 was recorded. However, no evidence w.r.t the stock in transit could be provided. Further, no other supporting document of any kind was made available in this regard.”

[Emphasis Supplied]

12. Let’s now refer to the case law on this issue. The Supreme Court in its decision in *Director General of Income Tax (Investigation), Pune vs. Spacewood Furnishers Private Limited and Ors.*, 2015 SCC OnLine SC

481, laid down the principles that must be adhered to for authorizing search and seizure under Section 132 of the Act. The relevant portion is reproduced hereunder:

“8.1. The authority must have information in its possession on the basis of which a 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 account 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 authorised 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 authorisation 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 authorised 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.”

[Emphasis Supplied]

13. On a plain reading of sub section (1) of Section 132, it emerges that for taking action of search and seizure, the concerned authority must have ‘reason to believe’ that any of the circumstances provided under Clauses (a) to (c) of sub section (1) of Section 132 of the Act is fulfilled in consequence of information in his possession. In other words, it is an imperative and mandatory requirement of law that in order to authorize an action of search and seizure, at least one of the conditions precedent, as set out in the said provision exist in fact, and such reasons have to be recorded in writing before authorization is issued to conduct search and seizure. The ‘reason to believe’ as recorded should be on the basis of relevant materials which have a bearing on formation of believe as search warrants cannot be issued for making a fishing and roving enquiry. Only if such conditions are fulfilled, the action of authorization can be said to have been validly exercised. The Manual of Office Procedure Volume -III Chapter 5 - Search and Seizure, further confirms strict compliance an adherence of the procedure and preconditions in regards of search and seizure of jewellery, bullion and stock in trade.

14. In the present case, Respondents have sought to validate the exercise of power under Clause (c) of sub section (1) of Section 132 of the Act. This is

evident from the following averments made in the counter affidavit: ***“It is submitted that the said search was a valid exercise of power under Section 132(1)(c) of the Income Tax Act (hereinafter referred to as 'the Act'), conducted by Respondent No. 2. The Investigation wing of the Income Tax Department was in possession of credible information and thereafter formulated its reason to believe that the Petitioner was in possession, of, jewellery representing its undisclosed income or property.”***

15. The satisfaction note recorded on 11.10.2018, notes that an information was received on 10.09.2018 by the AIU team at IGI Airport, Delhi that one Shri Khem Chand Mukim is carrying jewellery amounting to Rs.1.5crores, weighing around 8586.7 grams. On the basis of this information, Shri Khem Chand Mukim was intercepted on 10.09.2018 and he admitted to be in possession of jewellery. He clarified that he was the proprietor of M/s Shrimati Gems & Jewels and had travelled on 06.09.2018 from Delhi to Guwahati for participating in an exhibition with the jewellery. Since copy of stock register was not submitted at that time, spot inquiry was conducted and summons were issued to collect the copy of the stock register from M/s Shrimati Gems & Jewels. **Shri. Vidit Jain was found at the showroom of M/s Shrimati Gems & Jewels, but since he failed to produce any documentary evidence in support of the jewellery found in the possession of Shri Khem Chand Mukim, the ADIT (INV),(AIU, New Delhi) formulated the reason to believe, noting that Shri Khem Chand Mukim was in possession of jewellery which is not related to M/s Shrimati Gems & Jewels and which is not disclosed and would not be disclosed for the purpose of the Act and accordingly, invoked the**

provision of Section 132 (1) of the Act and sought warrants of authorization. The Principal DIT (Inv) and DGIT (Inv) after perusing the satisfaction note considered it to be a fit case for search and seizure under Section 132 (1) of the Act and issued warrants of authorization.

16. A division bench of this Court in ***L.R Gupta vs. Union Of India*, [1992] 194 ITR 32/[1991] 59 Taxman 305 (Delhi)**, while discussing the scope of exercise of jurisdiction under Section 132 held as under:

“(33) The expression "information" must be something more than mere rumour or a gossip or a hunch. There must be some material, which can be regarded as information, which must exist on the file on the basis of which the authorising officer can have reason to believe that action under Section 132 is called for any of the reasons mentioned in Clauses (a), (b) or (c). When an action of the issuance of authorisation under Section 132 is challenged in a Court it will be open to the petitioner to contend that on the facts or information disclosed, no reasonable person could have come to the conclusion that action under Section 132 was called for. The opinion which has to be formed is subjective and, Therefore, the jurisdiction of the Court to interfere is very limited. A Court will not act as an Appellate Authority and examine, meticulously, the information in order to decide, for itself, whether an action under Section 132 is called for. But the Court would be acting within jurisdiction in seeing whether the act of issuance of an authorisation under Section 132 is arbitrary or mala fide or whether the satisfaction which is recorded is such which shows lack of application of mind by the Appropriate Authority. The reason to believe must be tangible in law and if the information or the reason has no nexus with the belief or there is no material or tangible information for the formation of the belief, then in such a case action taken under Section 132 would be regarded as bad in law.

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(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 assessed which has not been disclosed for the purpose of the Act. The said sub-clause pertains only to moveable and not Immovable assets. Secondly it pertains to those assets which wholly or partly represent what should have been income. **The expression "which has not been or would not be, disclosed for the purposes of Income Tax Act" would mean that income which is liable to tax, but which the assessed 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 assessed 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 assessed 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 assessed 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 assessed 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 assessed 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 the assessed 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 assessed 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 assessed in an effort to escape assessment. Not disclosed must mean the intention of the assessed to hide the existence of the income or the asset from the Income Tax Department while being aware that the same is rightly taxable."

[Emphasis Supplied]

17. One of the questions that arises for our consideration is whether in the present case, the provisions of Section 132(1)(c) the Act were satisfied, or not, before authorizing the search. On a perusal of the satisfaction note as well as the counter affidavit on behalf of Respondent Nos. 3 and 4, it is evident that the sole ground for the action of search and seizure is that the Investigation Wing of the Income Tax department was in possession of credible information that Petitioner was in possession of jewellery which represents his undisclosed income or property. Apart from mere reproduction of the said words, no cogent basis for arriving at this conclusion is discernible from the satisfaction note. There is plethora of case law holding that the term "reason to believe" cannot be interpreted and construed as "reason to suspect". The reason to suspect that the Petitioner has undisclosed assets, and that there is likelihood that the same would not be disclosed, does not amount to saying that there are reasons to believe that

the Petitioner is in possession of undisclosed assets, and intends to evade tax. This is the fundamental flaw in the action initiated by the Respondent No. 2 and we have no hesitation to say that the entire exercise is vitiated and unlawful.

18. The facts as they have transpired, show that the search party comprising ADIT (INV), AIU and ITO (INV), (AIU), has executed the warrant to search at Terminal-1 (T-1) of Indira Gandhi International Airport, New Delhi. The warrant of authorization is dated 11.09.2018 - issued under Section 132 of the Act. This was issued pursuant to the satisfaction note recorded on 11.09.2018. The search commenced on 11.09.2018 at 08:40 p.m. and closed on the same day at 10:20 p.m. The panchnama was also drawn on 11.09.2018. At the same time, it is critical to note that the Petitioner was, admittedly, intercepted on 10.09.2018. The government registered valuer for jewellery, prepared the inventory and valued the same. The valuation note is also dated 10.09.2018, and was served on the Petitioner on 11.09.2018 at 02:00 A.M, prior to the commencement of search. The Assistant Director of Income Tax also affixed his signatures on the same on 11.09.2018. The Assistant Director of Income Tax (INV), Air Intelligence Unit (Respondent No.4), issued a summon dated 10.09.2018 under Section 131(1A) of the Act for the appearance of the Petitioner and served on him at 11.30P.M on 10.09.2018. Thus, concededly the Petitioner was intercepted on 10.09.2018 at night, and the proceedings apparently continued during the night up to 2:00 a.m. on 11.09.2018. For the Respondents to have intercepted and conducted the search on the person of the Petitioner on 10.09.2018, the reasons to believe were required to be formed prior to the action of search

and seizure. However, the mandatory reasons to believe and the search authorization were obtained subsequent to the action of search. The satisfaction note is dated 11.09.2018, and its contents clearly disclose that the formulation of “reason to believe” is post the search and seizure.

19. Interestingly, the reasons, inter alia, record that ***“Acting upon the information, Sh. Khem Chand Mukim was intercepted on 10.09.2018 and preliminary enquiry was made inside the terminal.”*** and ***“Shri Khem Chand Mukim is in possession of jewellery which is not related to M/s Shrimati Gems & Jewels and which is not disclosed and would not be disclosed for the purpose of Income Tax Act, 1961”***. This purported reasoning recorded in the note reinforces the fact that the same was prepared after the search was carried out, and Shri Khem Chand Mukim was found to be in possession of jewellery and it was assumed that the same is not related to M/s Shrimati Gems & Jewels and is an undisclosed asset. This is plainly ex-post facto formation and recording of reason to believe, subsequent to the act of intercepting and conducting search and seizure on the Petitioner at the Airport. Further when the Petitioner explained that he was participating in an exhibition with his jewellery, summons were issued to collect the copy of the stock register from M/s Shrimati Gems & Jewels and, concurrently, a warrant of authorization was sought by invoking Section 132 (1) of the Act on the premise that Mr. Khem Chand Mukim was in possession of jewellery which did not relate to M/s Shrimati Gems & Jewels. The mere possession of jewellery *ipso facto* cannot be sufficient for the officer to form a belief that the same had not been, or would not be disclosed for the purpose of this Act. The satisfaction as required under Section 132, must be formed on the

basis of material on record and on the objective assessment of such material. Under no circumstances, on the basis of the information that is seemingly relied upon by the officer, can a reasonable person come to a conclusion that ingredients contained in Clause (c) of sub Section (1) of Section 132 were met.

20. If the search action was indeed subsequent to interception, as the Revenue wants us to believe, even then we would say - it is evident that the officer in question has completely misdirected himself and acted in an arbitrary manner. The proviso to Section 132(1)(iii) and 3rd proviso of Section 132 (1) (v) of the Act deals with bullion, jewellery or other valuable article or things being stock-in-trade of business found as a result of search shall not be seized. The words in the statute are precise and unambiguous, and we are bound to uphold and expound these words in the natural and ordinary sense. The officer was already aware that the jewellery found in the Petitioner's possession was his stock-in-trade and, consequently, he was entitled to the protection provided in the proviso appearing after sub clause – (iii) to sub Section (1) of Section 132 of the Act. The officer failed to take this provision into consideration. Further, sub Section (v) of sub Section (1) of Section 132 of the Act, additionally provides that the officer is only required to inventorize money, bullion, jewellery or other valuable article or thing which is found during the course of search and seizure. This was also ignored. The proviso to Section 132(1)(iii) has been added with effect from 01.06.2003 with the obvious intent that the stock-in-trade ought not be seized but, instead, should be inventorized so that the same can be used at the time of assessment and for other follow up actions. Further, proviso

appearing after sub clause (v) of sub Section (1) of Section 132 also provides that where it is not possible or practical to take physical possession of any valuable article or thing, and removal of it to a safe place is not possible or practical due to its volume, weight or other physical characteristics, the authorizing officer may serve an order on owner, or the person who is in the immediate possession or control thereof that he shall not remove it, part with or otherwise deal with it, except with the previous permission of such authorized officer, and such action of the authorized officer shall be deemed to be seizure of such valuable article or thing under clause (iii). The 3rd proviso to section 132 (1) provides that nothing in the second proviso shall apply in the case of any valuable article or thing being stock-in-trade of the business. Circular No.8 of 2003 dated 18.09.2003 issued by CBDT explains the purpose behind insertion of the aforesaid proviso which reads as under:

"60. Amendment in Section 132 to provide that stock-in-trade not to be seized during search:

60.1 XXXX

60.2 The Finance Act, 2003, has amended Section 132 to provide that any bullion, jewellery or other valuable article or thing being stock-in-trade of the business, found as a result of search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade. Thus, stock-in-trade of business cannot be seized during search and seizure operations conducted on or after June 1, 2003.

60.3 XXXX

60.4 The Finance Act, 2003, has inserted a third proviso providing that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-

trade or the business.

*60.5 These amendments will take effect from June 1, 2003
[Section 59(a)]" [Emphasis Supplied]*

21. The crux of the matter is that the reasons were, firstly, not recorded before undertaking the search and was, therefore, completely unauthorized and a high-handed action on the part of the Respondents. The Respondents do not state that jewellery was concealed, or was kept by the Petitioner surreptitiously. Merely because the assessee was in possession of the same, it cannot be said that the same represents income or property which has not been disclosed or will not be disclosed. Section 132(1) as noted above is a serious invasion on the privacy of the citizens, and has to be resorted to when there are pre-existing and pre-recorded good reasons to believe that the action under section 132(1) is called for. While revenue can argue that element of surprise is critical and essential for a successful operation of search and seizure, nevertheless, it has to be cognizant that to balance the rights of the citizens, legislature has built in sufficient safeguards. This is to ensure that undue hardship and harassment should not be caused by the arbitrary and unfounded action of the raiding party. Moreover, as discussed above it is not imperative that every article found as a result of search has to be seized. For this purpose, the provision itself restrains and curbs the authority to make seizure of stock-in-trade.

22. We have no hesitation to observe that the officer in this case has completely ignored the mandate of law. It is also to be mentioned that despite the unlawful action, the Petitioner has been denied release of the jewellery, regardless of his repeatedly representations made to the

department. The provision for dealing with release of the seized assets is provided under Section 132 (B) (1) of the act which reads as follows:

“132B. (1) The assets seized under section 132 or requisitioned under section 132A may be dealt with in the following manner, namely:—

(i) the amount of any existing liability under this Act, the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1987 (35 of 1987), the Gift-tax Act, 1958 (18 of 1958) and the Interest-tax Act, 1974 (45 of 1974), and the amount of the liability determined on completion of the assessment under section 153A and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245C, may be recovered out of such assets :

Provided that where the person concerned makes an application to the Assessing Officer within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained to the satisfaction of the Assessing Officer, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, to the person from whose custody the assets were seized:

Provided further that such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or for requisition

under section 132A, as the case may be, was executed;

(ii) if the assets consist solely of money, or partly of money and partly of other assets, the Assessing Officer may apply such money in the discharge of the liabilities referred to in clause (i) and the assessee shall be discharged of such liability to the extent of the money so applied;

(iii) the assets other than money may also be applied for the discharge of any such liability referred to in clause (i) as remains undischarged and for this purpose such assets shall be deemed to be under distraint as if such distraint was effected by the Assessing Officer or, as the case may be, the Tax Recovery Officer under authorisation from the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner under sub-section (5) of section 226 and the Assessing Officer or, as the case may be, the Tax Recovery Officer may recover the amount of such liabilities by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule.

(2) Nothing contained in sub-section (1) shall preclude the recovery of the amount of liabilities aforesaid by any other mode laid down in this Act.

(3) Any assets or proceeds thereof which remain after the liabilities referred to in clause (i) of sub-section (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized.

XXXX

[Emphasis Supplied]

23. The first proviso to Section 132B provides that in a case where the person concerned has made an application to the AO within 30 days from the end of the month, in which the asset was seized, for release of the asset and the source of acquisition of any such asset is explained to the satisfaction of the AO, the amount of any existing liability referred to under

Section 132B(1)(i) may be recovered out of such asset and the remaining portion, if any, of the seized asset may be released with the prior approval of the Principal Chief Commissioner/Commissioner, to the person from whose custody the asset is seized. The second proviso provides a deadline of 120 days from the date of authorization for search under Section 132 or requisition under Section 132A, as the case may be, was executed.

24. Further, the Manual of Office Procedure Volume -II Chapter 3 Assessment Procedure (Search and Seizure) provides under clause 3(ii), also mandates the release of assets within 120 days, which is reproduced hereunder:

"3. Custody and release of seized material: the following points have to be borne in mind with regard to custody and release of seized material: -

i. XXX

ii. U/s 132B, the explained assets except those required to meet any existing liability should, with the prior approval of the prescribed authority, be released within 120 days from the, date of the search. The AO should give the assessee adequate opportunity to furnish his explanation and evidence in support thereof."

[Emphasis Supplied]

25. After the seizure, Petitioner has been endlessly writing to the Respondents for the release of the seized articles. He had furnished all the necessary documents to explain as to how the articles seized are indeed his stock-in-trade. In fact, as noted in the preceding paragraphs, we had called upon the Respondents to give a specific response by way of an affidavit to the chart giving details of books of account provisioning for the articles seized. In response thereto, the Respondents have no plausible explanation

and with the intent to deny the relief to the Petitioner, they have contended that the purchase invoices of the Petitioner are of bulk goods and cannot be identified with the individual seized items.

26. Obviously, when the Petitioner - who is in the business of making jewellery, would necessarily have certain items as purchases in bulk for the purpose of molding them into specific jewellery articles such as ear rings, ear tops, sets etc. Petitioner had placed material on record to substantiate the fact that jewellery found in his possession at the time of search was his stock-in-trade. Since the Respondents did not raise any serious dispute in their counter affidavit or in the additional affidavit, therefore, in view of the mandate contained in the proviso to Section 132B(1)(i), the Respondents have no authority to retain the seized jewellery beyond the said period. The outer limit of 120 days as provided under Section 132B has also expired in the month of January 2019.

27. Before parting we may add that the opinion which has to be formed is subjective, and though the jurisdiction of the Court to interfere is very limited, and we are not to act as an Appellate Court and meticulously examine the information in order to decide whether an action under Section 132 is called for, yet at the same time we may emphasize that the power to search a person is a stringent power provided by law and this requires the officers to scrupulously follow the mandate and the rigor of the law prior to authorizing such an action, and unless the conditions to exercise such power are shown to exist, we would have no hesitation in striking down such an action. We are compelled to interfere as there was complete lack of

information prior to the action of search, exhibiting gross non application of mind and arbitrariness by the appropriate authorities. The reason to believe in the present case was nonexistent prior to the search. Even after the search, there was no material to conclude that no such disclosure had been made, or that no disclosure would be made so as to satisfy the prerequisites of Section 132 of the Act. The Respondents have merely acted on the basis of surmises and conjectures, and without due authorization. Their actions are in contravention of law, making the action of search and seizure bad in law.

28. We may also record that a very feeble attempt was made by the Respondents during the course of arguments to contend that there was no search or seizure at the Airport and, after preparing an inventory, the jewellery articles were given back to the Petitioner and continued to remain in his possession. It was also argued that mere suspicion that the income is concealed, or is likely to be concealed, is sufficient to trigger the exercise of power under Section 131 (1) of the Act for making an enquiry or investigation relating thereto, and that the action of interception was under Section 131 (1) of the Act. Though the rigor of law under Section 131 (1) of the Act - which permits the officers to make enquiry or investigation, when contrasted with the authorization for search and seizure under Section 132 (1) is different, however, in the present case, the verbal arguments advanced by the counsels are a desperate attempt to somehow sustain and justify the action. The record produced before us does not show that any action has been taken under Section 131 (1) of the Act. The satisfaction note is for issuance of warrant of authorization under Section 132 (1) of the Act, and there cannot be any two views about the same. The Officer, present in the

Court, vaguely submitted that certain information was received prior to interception. However, when confronted with the specific queries in this regard, he admitted that he cannot disclose – even to us in confidence, as to what was the information received, and by whom, and conceded that there is no recording of such information.

29. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned search and seizure and ex post facto warrant of authorization dated 11.09.2018 issued by Respondent No.2 under Section 132 of the Act is hereby quashed. Consequently, all the actions taken pursuant to such search and seizure are declared illegal. The Respondents shall forthwith return to the Petitioner, the jewellery seized. Since the action of the Respondent is found to be grossly arbitrary, and the entire action is vitiated, in order to discourage the Respondents from resorting to unwarranted action of search, we are inclined to saddle the Respondents with costs which are quantified at Rs.50,000/-. The costs shall be payable to Delhi Legal Service Authority within four weeks of a copy of this decision being served on them.

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SANJEEV NARULA, J

VIPIN SANGHI, J

JANUARY 09, 2020

Pallavi