CASE NO.:
Appeal (civil) 769 of 2008

PETITIONER:
K.C.C. Software Ltd. and Ors.

RESPONDENT:
Director of Income Tax (Inv.) and Ors.

DATE OF JUDGMENT: 29/01/2008

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No.3654 of 2007)
Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Delhi High Court dismissing the writ petitions filed by the appellants.

3. Background facts in a nutshell are as follows:

A search and seizure was conducted by the respondents in the premises of the appellants pursuant to warrants of authorization dated 3.8.2005. On 4.8.2005 certain assets including jewellery, cash and fixed deposit receipts were seized. On that very day, appellants received a letter from the HDFC Bank at B-28, Community Centre, Janakpuri, New Delhi that operation of five bank accounts of appellant No.1 had been restrained by order issued under Section 132 (3) of the Income Tax Act, 1961 (in short the \021Act\022). The Bank issued a similar letter to appellant No.3 intimating that the said appellant had been restrained from operating her Savings Bank account by order dated 3.8.2005 passed under Section 132(3) of the Act. Appellant\022s stand was that existence of the lockers and the bank accounts were disclosed by the appellants in the regular books of account maintained and no opportunity was provided to establish the said fact. It was further submitted that the computers which contained the details of the bank accounts were available at the business premises at Janakpuri and no opportunity was allowed to the appellants to place these before the authorities.

Grievance is made that apart from the non grant of opportunity no effort whatsoever was made to ascertain whether the accounts had been disclosed in the regular books of account maintained by the appellants. On 8.8.2005 appellant addressed a letter to the Additional Director of Income Tax stating inter alia that all bank accounts under restraint have been disclosed in the regular books of account and also that the restraint order was hampering the day to day operations of the business of the company. On the same day, appellant No.3 wrote another letter to the concerned authority requesting him to remove the restraint order in Savings Bank account. On 16.9.2005, appellant No.1 addressed another letter to the Assistant Director of Income Tax (Investigation) again reiterating its stand that the bank accounts have been disclosed in the regular books of account and there was no justification for keeping the restraint on the operation for the

bank accounts.

4. According to the appellants no reply was received to the letters dated 8.8.2005 and 16.9.2005 and the respondents did not make any effort to verify the correctness of the appellant\022s contentions. On 21.9.2005 appellant No.3 moved an application under Section 132(B) of the Act to the Deputy Commissioner of Income Tax for release of jewellery worth Rs.4,76,588/- and FDR of Rs.1,79,710/-. Since the nature and source was duly explained, the limitation of 60 days in terms of Section 132(8A) expired w.e.f. 31.8.2005 i.e. the date of issuance of the order of restraint. On 3.10.2005 appellant No.2 addressed a letter to the Manager, HDFC Bank informing him that as per provisions of Section 132 (8A) of the Act, the restraint order was no longer operative. On 4.10.2005 Bank through its Bank Manager sought clarification from the Deputy Director of Income Tax. The Income Tax Department on 4.10.2005 issued two fresh warrants of authorization under Section 132 of the Act in respect of the bank accounts. It is alleged that the appellants were not informed about the warrants of search. On 5.10.2005 the bank accounts of the appellants were searched and seized through withdrawal of cash by demand drafts. Appellant\022s stand in essence is that the fresh warrants of authorization were without jurisdiction and in any event since the accounts had been duly disclosed in the regular books of account, there was no scope for operating Section 132 (3) of the Act. The earlier order passed under Section 132 (3) of the Act ceased to be operative w.e.f. 2/3.10.2005. On 8.10.2005 the bank by a letter informed the appellants about search and seizure of the bank accounts under Section 132 (3) of the Act and also gave details of demand drafts issued in favour of respondent No.2 withdrawing the money from the accounts of the appellants.

5. On 28.10.2005 the appellants were supplied with copies of the Panchnama. On 29.10.2005 appellant No.1 requested the respondents to adjust towards self assessment tax of Rs.77,68,177/- for the assessment year 2005-06 from the seized amount of Rs.1,81,91,982/- and to release the balance. On 29.11.2005 appellants Nos.1 and 3 moved an application under Section 132 (B) of the Act for release of the amount seized on 5.10.2005 i.e. within 30 days of the end of the month in which seizure took place. Several documents were filed to substantiate the claim. Again on 16.2.2006 Income tax authorities were requested for adjustment of Rs.40,00,000/- as advance tax for the assessment year 2006-07 from the seized amount and to release the balance. Since the respondents failed to respond to the requests of the appellants, writ petitions Nos.6313-6315 of 2006 were filed inter alia for the following directions:

\023(a) to respondents to release the balance amount of Rs.61,85,502/- to petitioner No.1 after accepted adjustments;
(b) to respondents to release amount of Rs.25,27,035 to petitioner No.3;
(c) quash and set aside Warrants of Authorization dated 4.10.2005;
(d) declare restraint order dated 3.8.2005 as illegal;
(e) release FDRs/jewellery of petitioner No.3 seized on 4.8.2005.

6. The respondents filed counter affidavit contending inter alia as follows:

\023(i) Ist order of search and seizure was passed and

served only on 4th August, 2005;

(ii) The application dated 29.11.2005 had been disposed off vide order dated Ist February, 2006 (which order was not communicated to the petitioners).

(iii) It is contended that in the search and seizure operations carried out on 4.8.2005 authorized officer arrived at the conclusion that the Bank accounts in question were undisclosed and immediately passed as restraint order.

(iv) The respondent acknowledged that 60 days from the date of issue of restraint order expired on 3.8.2005.

(v) It is admitted that on 4.10.2005 warrants of authorization in respect of the same accounts only were again issued by DIT.

(vi) On the strength of such warrants and seizure operation on 4th and 5th October, 2005 amount of Rs.80,59,539, Rs.1,01,32,443 and Rs.25,27,035 respectively were seized from the said Bank accounts.

(vii) That the entries in the books of accounts etc. were 27.7.2005 and no entries were found between 28.7.2005 to 4.8.2005 hence non disclosure in books of accounts since books were not written for 5/6 days.

(viii) It was alleged that the amounts lying in the Bank were not disclosed and not accounted for and therefore there was no question of lifting the restraint order.\024

7. A rejoinder affidavit was filed on 2.11.2006 taking the stand that the order dated 1.2.2006 was not served and there were apparent contradictions as regards the search and seizure in the pleadings. By the impugned order the writ petitions were dismissed observing that the respondents had taken a stand that there was estimated tax liability of approximately Rs.10,00,000/-. The satisfaction note dated 13.9.2005 of ADIT, Unit I and the notings of the Director (investigation) clearly indicated that the stand of the appellants was without substance.

8. Learned counsel for the appellants submitted that the factual scenario clearly shows that the authorities acted without jurisdiction in directing either to retain the amount after adjustment of the self assessment and advance tax or also withdrawing the amount by demand drafts from the bank accounts. The order passed under Section 132B shows that it was retained for estimated liability. Such a course is not available after deletion of the provision relating to estimated liability in 2002. Similarly, the provisions relating to block period assessments in Chapter XIV were deleted w.e.f. 1.6.2003. As the authorities themselves permitted adjustment of self assessment and advance tax, there was in effect release accepting the stand of the appellants and the balance amount of Rs.81,00,000/- has perforce to be refundable. The power under Section 132(1)(iii) relates to seizure and the proviso deals with assets which cannot be seized. There is no dispute that Section 132 (3) read with Section 132 (8A) restricts the period of operation of the order of restraint to 60 days. Section 132B relates to adjusting liability on completion of assessment under Section 153A and it is relatable to the year in which search and seizure was initiated and block period in terms of Chapter XIV-B. Section 158 relates to retention and not appropriation.

9. Stand of the respondents on the other hand was that reference to Section 153A in Section 132B shows that it relates to estimated liability. Though it is accepted that the provision relating to estimated liability in terms of Section 132 (5) was deleted w.e.f. 1.6.2002, yet in view of Section 153B the period of assessment is continuing. The amount even though withdrawn has not been taken to the consolidated funds. There is no appropriation in that sense.

10. It was stated that the order passed under Section 132 (3) was revoked but a fresh order was passed. The money has been withdrawn in terms of \023Search and Seizure Manual, 1989\024, particularly Paras 5.01 and 5.02 thereof. The adjustment that has been done is for existing liability. There is no appropriation in that sense because it can be done only after assessment is completed by transfer.

11. Stand of the appellants essentially was that there is no power for retaining any amount seized for the purpose of meeting estimated liability. That according to the appellants was permissible upto 1.6.2002 and by deletion of Section 132 (5) the position has been materially changed.

12. Stand of the revenue on the other hand seems to be that what is appropriated can be cash and not money. The bank account in essence is not cash but is money. There are different stages under Section 132 (1). First stage is seizure, then comes adjudication on the non disclosure aspect and then determination relatable to Section 132 (8A). Lastly, the order can be passed under Section 132B. It has been specifically stated by learned counsel for the revenue that Section 132(3) order was revoked. It is stated in para 10 of the affidavit filed on 15.11.2007 as follows:

\023That it is submitted that in the instant case the power under Section 132(3) was exercised at the initial stage for the purposes of verification of the source of funds lying in the bank account. Thereafter, when the assessee was unable to satisfactorily explain the source of these funds, the same were seized under a fresh warrant under Section 132(1) issued by the Director of Income Tax (Inv.), who duly recorded his satisfaction as provided under Section 132 (1)(c).

13. In paragraph 11 it has been stated as follows.

\023It is submitted that an Authorized Officer acting under Section 132 (1)(iii) of the Act has full power and jurisdiction to seize cash balance lying in bank account as these would come within the meaning of \021money\022 and/or \021assets\022 as provided under Section 132 (1)(iii) of the Act. It is submitted that the subsequent action of converting these balances into a demand draft is only a safeguard for safe custody of these assets and is irrelevant to the legality of the seizure itself. It is therefore submitted that in the instant case, the seizure was made legally and as per the powers vested in the Director of Income Tax (Investigation), respondent No.1 under Section 132 (1) of the

Act.\024

14. \023The Search and Seizure Manual\024 to which reference has been made deals with in Chapter V under heading \023Post Search Work\024. The relevant paras 5.01 and 5.02 read as follows:

\0235.01 After the return of the search parties, a check list should be prepared for pending and immediate follow up work. The check list may inter alia include:-

(a) List of places where search has to be continued.

(b) Details of bank lockers sealed and to be opened subsequently.

(c) List of places where valuables are sealed in premises itself on the ground that verification with Wealth-tax records is not possible or pending valuation of assets.

(d) List of godowns holding stocks, in respect of which prohibitory orders have been issued.

(e) List of places where police guards have been posted.

(f) Details of bank accounts which have been frozen under Section 132 (3).

(g) List of places where further section has to be taken for any other reason.

(h) List of promissory notes, fixed deposit\022s receipts, Hundies etc. requiring special attention.

(i) Details of packages of cash which are to be deposited into the Personal deposit Account in the Reserve Bank/State Bank.

(j) Details of packages of bullions, jewellery etc. required to be deposited in the strong room/safe deposit vault of the bank.

(k) Work regarding valuation of jewellery seized.

(l) Details of sealed covers containing damaged/mutilated documents.

(m) Particulars of complaints filed in police, as result of any incident during the search, which are required to be followed up.

5.02 Deposit of Cash

The cash seized is required to be deposited in the bank in the Personal Deposit Account of the Commissioner, at the earliest

opportunity preferably on the next working day. However, if due to unavoidable reasons, it is not possible, the cash with other valuables may be kept in the strong room of the Commissioner or the safe deposit vault of the bank. Where cash has been brought in sealed packet, it is expected that the authorized officer has already issued a letter to the assessee requesting him to be present before the ADIT-in-charge on the following morning before 12 O\022 clock. Where the cash seized relates to an assessee who is assessed in the charge of some other Commissioner, a crossed account payee demand draft in favour of the concerned Commissioner should be obtained and dispatched to him.\024

15. It is stated that amount has not become a part of the Consolidated Fund of India and is deposited in separate PD account of the concerned Commissioner and is held in the custody till final determination of the tax liability by the assessing officer for the relevant assessment years.

16. On a bare reading of the Manual it is clear that the same is relatable to cash seized and cash in bank is conceptually different from cash in hand.

17. In Shanti Prasad Jain v. The Director of Enforcement (1963 (2) SCR 297) it was inter alia observed as follows:

\023Under the law the time relationship between a Banker and a customer is that of a debtor and creditor and that it makes no difference in that relationship that the deposits were conditional.

xx xx xx

Now the law is well settled that when moneys are deposited in a Bank, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. And it makes no difference in the jural relationship whether the deposits were made by the customer himself, or by some other persons, provided the customer accepted them. There might be special arrangement under which a Banker might be constituted a trustee, but apart from such an arrangement, his position qua Banker is that of a debtor, and not trustee. The law was stated in those terms in the old and well-known decision of the House of Lords in Foley v. Hill (1848 11 H.L.C. 289 E.R. 1002) and that has never been questioned.\024

18. In the judgment of House of Lords in Foley v. Hill [(1843

to 1860) All E.R. Re-print 16] referred in the aforesaid judgment of the Constitution Bench, it was inter alia held as under:

\023Money, when paid into a bank, ceases altogether to be the money of the owner, it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the bankers, is money known by the customer to be placed there for the purpose of being under the control of the banker; It is then the banker\022s money; he is known to deal with it as his own; he makes what profit on it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places\005. He is guilty of no breach of trust in employing it, he is not answerable to the customer if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of the customer, but he is, of course, answerable for the amount because he has contracted, having received that money, to repay to the customer, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established, to be the relative situation of banker and customer, the banker is not an agent or factor, but he is a debtor.\024

19. At this juncture, it is to be clarified about the impermissibility to convert assets to cash and thereafter impound the same. We need not go into the broader issue in view of the fact that there is no challenge to the order passed under Section 132B of the Act. But it has been stated by learned counsel for the revenue that it is permissible to complete the assessment by 31st March, 2008. In view of the aforesaid scenario, we dispose of the appeal with the following directions:

(i) In view of the non challenge to the order passed under Section 132B, no relief can be granted to the appellants.
(ii) However, it would be in the interests of the assessee as well as the revenue if the amount transferred to the PD account of the Commissioner is kept in interest bearing fixed deposit as ultimately in the event the assessee succeeds, would be entitled to interest as provided in the statute. The assessment has to be completed on or before 31st March, 2008 i.e. within the time statutorily provided.

20. The appeal is dismissed subject to the aforesaid directions. There will be no order as to costs.