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**IN THE HIGH COURT OF ORISSA AT CUTTACK
WRIT PETITION (CIVIL) Nos.16498 and 16502 of 2016**

(Applications under Articles 226 and 227 of the Constitution of India)

W.P.(C) No.16498 of 2016

M/s. Shiva Cement Limited and *Petitioners*
Others

-versus-

Director of Income Tax (Inv.), *Opposite Parties*
Bhubaneswar and Others

AND

W.P.(C) No.16502 of 2016

M/s. Shivom Minerals Ltd. and *Petitioners*
Others

-versus-

Director of Income Tax (Inv.), *Opposite Parties*
Bhubaneswar and Others

Appeared in both the cases:

For Petitioner(s) : Mr. Firoze Andhyarujina
Senior Advocate
Mr. L. Mishra, Advocate

For Opposite Parties : Mr. R.S. Chimanka
Senior Standing Counsel

**CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY**

JUDGMENT
29.09.2021

Dr. S. Muralidhar, CJ.

1. These two writ petitions arise out of a common set of facts and are being disposed of by this common judgment.

2. Writ Petition (Civil) No.16498 of 2016 is by five Petitioners. Petitioner No.1 is M/s. Shiva Cement Limited (hereafter 'Shiva') having its registered Office At P-25, Civil Township, Rourkela, District-Sundargarh operating a mini cement plant at Telighana, Biringitoli near Kutra in Sundargarh District. Petitioner No.2 is its Managing Director (MD), Petitioner No.3 is the Executive Director, and Petitioner No.4 its non-executive Director. Petitioner No.5 Shri Vikash Gupta is described as "neither the Director nor the employee" of Petitioner No.1 but "a separate entity".

3. The prayer in this petition is to quash the notices dated 19th February, 2016 issued by the Deputy Commissioner of Income Tax (DCIT), Central Circle, Sambalpur under Section 153A of the Income Tax Act ('Act') calling upon Shiva and the Petitioners 2 to 5 to file a true and correct copy of their returns of income for the Assessment Years (AYs) 2009-10 up to 2014-15. The other prayer is for a declaration that the search warrants issued are invalid.

4. Writ Petition (Civil) No.16502 of 2016 is by four Petitioners. Petitioner No.1 is Shivom Minerals Ltd. (hereafter 'Shivom'), a company located at Rourkela engaged in beneficiation of iron ore and having its plant at village Kusumdihi, Koira in Sundargarh District. Petitioner No.2 is its MD and Petitioner No.3 is its Director. Petitioner No.4 is stated to be an Independent Director of Shivom. Here again the prayers are for quashing of the notices dated 19th February, 2016 issued to each of the Petitioners under

Section 153A of the Act for the AYs 2009-10 up to 2014-2015 and the further prayer that the search warrants should be declared invalid.

5. In both the writ petitions the Opposite Parties are the Income Tax Department ('Department') through the Offices of the Director of Income Tax and Additional Director of Income Tax (Inv), Bhubaneswar and the Assistant Commissioner of Income Tax (ACIT) and the Commissioner of Income Tax (CIT) at Sambalpur.

6. In both the writ petitions, separate orders were passed by this Court on 30th November, 2016 to the effect that the proceedings pursuant to the impugned notices may continue but no final orders should be passed till the next date of listing. Those interim orders have continued since then.

Case of the Petitioners

7. The background facts are that both Shiva and Shivom are stated to be 'Group Companies'. It is stated that as far as Shiva is concerned, on 5th September, 2000 a search was conducted at its registered Office as well as the factory apart from the residential premises of its MD and Director, who are arrayed as Petitioner Nos.2 and 3 in W.P.(C) No.16498 of 2016. Thereafter block assessment under Section 158 BC (now repealed) of the Act was made for the AYs 1991-92 to 2000-01. The Assessing Officer (AO) of the Department determined the undisclosed income of Shiva for the aforementioned period at about Rs.1.14 crores. It is

stated that Shiva and its Directors were not in a position to pay such a huge demand. As a result, their Bank accounts were seized and the factory was closed for nearly six months. It is stated that Shiva and its Directors as well as its employees had to suffer for nearly five years till relief was obtained from the Income Tax Appellate Tribunal (ITAT), Cuttack which partly allowed Shiva's appeal i.e. IT (SS) A No.47/CTK/2004 by an order dated 6th May, 2005.

8. As far as the present round of litigation is concerned, it is stated that on 18th September, 2014 the Additional Director of Income Tax (ADIT) (Inv.), Bhubaneswar authorized, under Section 133A of the Act, a survey to be conducted in the factory/plant premises of Shiva. The said survey operation under Section 133A commenced at 10 am on 24th September, 2014. Simultaneously a search was undertaken under Section 132 of the Act of the office/business premises of Shiva and the residential premises of its MD and Directors i.e. Petitioner Nos.2 to 4 in W.P.(C) No.16498 of 2016. It is alleged that the Department coerced Shiva's MD to declare Rs.10 crores as undisclosed income and pay tax thereon. It is further alleged that the Petitioners refused to accept the above illegal demand or to make any statement under Section 132 (4) of the Act.

9. Similar averments have been made in the companion petition, Writ Petition (Civil) No.16502 of 2016 by Shivom and its MD and Directors. A search was also conducted in the business and

residential premises of Shivom and its Directors on 24th September, 2014.

10. It is stated in both the writ petitions that on 25th September, 2014 the Accounts Officers of both the company appeared before the DDIT (Inv), Rourkela and furnish information as required. In both the petitions an identical statement is made that the Petitioners were pressurized by the Department to disclose the undisclosed income of a sizeable amount and pay the tax and that “there was no reason for admitting such fault which the Petitioners are not competent”.

11. As regards Shiva there are averments in its writ petition admitting to not filing ITRs for AYs 2012-13 and 2014-15 due to “acute fund crisis and inability to pay the admitted tax.” It is added that the return for AYs 2009-10, 2010-11, 2011-12 and 2013-14 have been filed. It is further stated that the balance sheet was downloaded to the website of Stock Exchange for informing the shareholders as per the listing agreement with the Stock Exchanges that are regulated by SEBI. It is accordingly submitted that since the above documents were available in the public domain as well as the Department no adverse inference could be drawn about suppression of income on the ground of non-filing of the ITRs.

12. As far as Shivom is concerned, there is an admission in para 10 of its writ petition that it could not file ITRs for the AYs 2009-10, 2013-14 and 2014-15 “due to acute fund crisis and inability to

pay admitted tax.” It is added that for the remained AYs in question ITRs have been filed. However, it is added, “the profit and loss account and balance sheet was uploaded in the computer and has been brought to the knowledge of the income tax officials.” It is stated further that since the audited balance sheet and P/L accounts were downloaded from the website of the Registrar of the Companies for information to the shareholders, these were available and therefore, no adverse inference could be drawn against Shivom regarding suppression of income on the ground of non-filing of ITRs.

13. In both the petitions, it is stated that in response to the letters of the DDIT (Inv) in January, 2015, replies have been submitted by both Shiva and Shivom. It is submitted that the attempt in issuing notices under Section 153 A of the Act to the Petitioners is “only an attempt made by the Revenue to somehow rather collect post search evidence for the purpose of making block assessment and to raise high pitch demand against the company as well as the Directors”. It is under the apprehension that both these writ petitions have been filed.

Case of the Department

14. In both the petitions, counter affidavits have been filed by the Department more or less on similar terms. At the outset it is contended that Section 132(1) of the Act makes it clear that the warrant of authorization is “qua the premises” and not “qua the assessee”. Therefore, even though the two Assesses i.e. Shiva and Shivom are separate entities engaged in different businesses, they

are operating from the same premises and, therefore, there could be a common search warrant.

15. It is pointed out by the Department that the registered Office of both Shiva and Shivom are same. Shri Akash Gupta is the common Director in both the companies. Reference is also made to Section 292 CC of the Act as enabling a common panchanama and warrant of authorization for both the companies.

16. It is contended that requirements of Section 132 (1) of the Act were duly complied in both cases. Reference is also made to the admission of both the companies regarding non-filing of ITRs for certain AYs. In the case of Shiva, it is pointed out that the estimated undisclosed income as per appraisal report was Rs.37.14 crores “due to negative cash balance in the imprest account, unsecured loans, suppression of sale of cement and disallowance under Section 40A (3) of the Act.” As far as Shivom is concerned, the estimated undisclosed income is stated to be Rs.59.63 crores, again for the same reasons.

Further pleadings of the parties

17. In the rejoinder affidavit filed by the Petitioners, the above averments regarding the impermissibility in law of a common search warrant and common panchanama is raised. It is contended that the material seized during the search should be capable of identification; otherwise a common panchanama would result in a “hotch patch of various assets and accounts” and that this cannot “be the basis for undisclosed income of an Assessee”. It is

reiterated that the pre-conditions in Section 132(1) (a)(b) and (c) of the Act have not been complied with.

18. A reply has been filed by the Department to the rejoinder affidavit of the Petitioners in both the cases. It is contended out that the search was undertaken only after thorough inquiry made by the investigation wing and after approval from the appropriate higher authority on the basis of a satisfaction note prepared for each Petitioner. Shivom is a regular defaulter as far as regular filing of ITRs is concerned.

19. In para 18 of the affidavit of the Department reply to the rejoinder, it is averred that on the basis of the incrementing seized documents like SMLO-01 to SMLO-52 and impounding survey documents SCLP-01 to SCLP-28 undisclosed income was determined in the hands of the Petitioners. Likewise in the case of Shivom, it is stated that the books of accounts identified SMLO 01 to SMLO-52 were seized and similarly in the factory books of account identified as SLMC 01 to 33 were seized and there the undisclosed income was determined on the basis of these documents. It is contended that without credible materials the Department would never proceed with an action under Section 132 of the Act. It is stated that at this stage the materials seized may be made available to the Court and not to the Petitioners.

20. This Court has heard the submissions of Mr. Firoze Andhyarujina, learned Senior Advocate appearing for the Petitioners and Mr. R.S. Chimanka, learned Senior Standing

Counsel for the Opposite Parties (Department) in both the writ petitions.

Submissions of the Petitioners

21. The principal contentions advanced on behalf of the Petitioners are as follows:

(i) There was no information possessed by the Department so as to form a reasonable belief that unless a search warrant is issued the undisclosed income cannot be unearthed and that in the garb of a search warrant under Section 132 (1) of the Act, the Department is conducting a “roving and fishing” inquiry.

(ii) Both in terms of Section 131(1)(a) and (c) of the Act there was no information available with the authorized officer to order a search.

(iii) Neither in the previous search conducted in 2000 nor in the search conducted under Section 2014 was any undisclosed money or asset found by the Department as far as Shiva is concerned. Therefore, the pre-condition for the search in terms of Section 132(1)(c) of the Act was non-existent. Reliance was placed on the decision of the Allahabad High Court in ***Ganga Prasad Maheshwari v. Commissioner of Income Tax (1983) 139 ITR 1043***; of the Gujarat High Court in ***Laljibhai Kanjibhai Mandalia v. Principal Director of Income-Tax (Investigation) (2019) 416 ITR 365 (Guj)***; of the Delhi High Court in ***Madhu Gupta v. Director of Income Tax (Investigation) ILR (2013) IV Delhi 2919*** and the decision dated 15th February, 2021 in ITA No.37 of 2021 (***Principal Commissioner of Income Tax, Delhi v. Param Dairy Limited***).

(iv) A common search warrant was issued for search of the business premises of both Shiva and Shivom although they were two separate juristic persons, different income tax assesseees, filing separate income tax returns (ITRs). There could not have been a common panchnama for the seizures made during the search. In any event, in neither search was any incriminating material found warranting the invocation of Section 153-A of the Act.

(v) A search under Section 132 of the Act and a survey operation under Section 133-A of the act qua the same Assessee/ entity cannot be simultaneously undertaken.

Submissions of the Department

22. Mr. Chimanka, learned Senior Standing Counsel appearing on behalf of the Opposite Parties (Department) contended that the Petitioners had an efficacious remedy of an appeal against the assessment orders that would be passed pursuant to the notices issued under Section 153A of the Act. He submitted that but for the stay order of this Court, the assessment orders would have been passed by now. If aggrieved by those assessment orders, it would be open to the Petitioners to seek further remedies as provided under the Act.

23. Mr. Chimanka further submitted that this is not a case where the Department has acted arbitrarily without any material whatsoever. The Court would not at this stage interfere with the proceedings. The Department was entitled under the relevant provisions of the Act to undertake simultaneously survey and search operations. Further, there could be a common search

authorization and common panchanama in relation to both entities since they operated from the same premises. He also referred to Section 292CC to urge that the question regarding validity of the authorization to issue the search warrant under Section 132 of the Act cannot be raised.

Analysis and reasons

24. The above submissions have been considered. It must be mentioned here that the Court repeatedly asked to Mr. Andhyarujina whether both the Petitioners wanted to invite findings from this Court on the legal and factual issues raised in the petitions at this stage lest it should prejudice the Petitioners in the further challenge if any to the assessment orders? The petitions were passed over to enable him to take instructions of this specific point. When the cases were again called out, Mr. Andhyarujina stated that on instructions that the Petitioners would want a judgment from this Court notwithstanding that it could prejudice them at a subsequent stage in the proceedings. Consequently, this Court proceeds to examine and render a judgment on the issues that have been posed for determination.

25. One of the principal contentions raised on behalf of the Petitioners is that the requisite satisfaction of the authorized officer who authorized the search could not have been validly arrived at since there was no information available qua each of the Petitioners to justify the search.

26. In order to appreciate the submission, the relevant portion of Section 132 (1) of the Act may be referred to, which reads as under:

“132. Search and seizure.—

(1) Where the Principal Director General or Director General or Principal Director 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, 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)...”

27. In the present case, on the basis of the pleadings, it appears that the Department’s case does not pertain to Section 132(1) (a) or (b) but 132(1)(c). The Department’s contention is that it is in possession of information which led it to form reason to believe that the Petitioners are in possession of “any money, bullion, jewellery or other valuable articles or things and such money, bullion, jewellery represents either wholly or partly income or property which has not been disclosed”. Both Shiva and Shivom have admitted in their respective writ petitions that they in fact did not file ITRs for certain AYs. Even this information, if available with the Department would have been sufficient for them to form a reason to believe for the purpose of Section 132(1)(c). In other words, it is not mandatory that in the present case there should have been summons under Section 131 of the Act for the Department to proceed to initiate action under Section 132 of the Act.

28. It is then argued that if indeed there was such information available for the purposes of search, why did the Department have to undertake a ‘survey’ of the factories of both Shiva and Shivom under Section 133A of the Act? It appears to the Court, *prima facie*, that there is nothing in either in Section 132 or 133A of the Act that prohibits the Department from undertaking a survey of an entity exclusive to one location of its operations, whereas it may have credible information for search as regards the operations in

another location. As rightly pointed out by the Department, search is qua a 'place' and not necessarily qua the 'Assessee'. Survey by its very nature could be of the entity and any place from where such entity may operate. It is perfectly possible that while conducting survey and search of the premises of an entity, for which an authorisation has been issued, the Department can come across material pertaining to some other person or entity. The provisions like Section 153C of the Act deal with such contingencies. However, that is not to say that a survey or a search cannot happen in two different premises simultaneously. Further, if search is qua the place, the Court sees no reason why if there are two entities in one premises, there cannot be a common search operation.

29. In this context reference may be made to Section 292 CC of the Act which reads as under:

“292-CC. Authorization and assessment in case of search or requisition.- (1) Notwithstanding anything contained in this Act,—

(i) it shall not be necessary to issue an authorisation under section 132 or make a requisition under section 132A separately in the name of each person;

(ii) where an authorisation under section 132 has been issued or requisition under section 132A has been made mentioning therein the name of more than one person, the mention of such names of more than one person on such authorisation or requisition shall not be deemed to construe that it was issued in the name of an association of persons or body of individuals consisting of such persons.

(2) Notwithstanding that an authorisation under section 132 has been issued or requisition under section 132A has been made mentioning therein the name of more than one person, the assessment or reassessment shall be made separately in the name of each of the persons mentioned in such authorisation or requisition”.

30. Consequently, the Court is not prepared to accept the plea of the Petitioners that in the present case the search and survey operations were entirely without jurisdiction. The Court would like to add that this conclusion is of a *prima facie* nature since despite the petitioners having insisted on a finding by this Court, the right of the Assesseees to agitate this issue again in the further proceedings cannot be lost sight of.

31.1 Mr. Andhyarujina, learned Senior counsel for the Petitioner, placed considerable reliance on the decision of the Allahabad High Court in ***Ganga Prasad Maheshwari (supra)***. The facts of that case were that there was a family dispute between brothers which led to the filing of a First Information Report (FIR) by Chaturbhuj Das Maheshwari (‘CDM’), for the theft of jewellery, against his own brother Ganga Prasad Maheshwari (GPM), as well as the wife and son-in-law of GPM. Subsequently, three of them were acquitted in the criminal case. In the operative portion of the judgment of the criminal court, it was directed that the property seized should be returned to GPM under intimation to the Income tax Department after expiry of the period of appeal.

31.2 CDM then submitted a written complaint to the Department under the fake name of Dinesh Chandra Sahu alleging that GPM was possessed three hundred tolas of gold which he claimed, in the criminal proceedings, to have received in a family partition, but did not disclose it in the returns under the Wealth Tax Act. This set the ball rolling for proceedings under Section 132A of the I.T. Act. The validity of these proceedings were challenged before the Allahabad High Court. In the search proceedings, summons was issued to GPM and his statement was recorded. In response to the question whether he was an Assessee under the Act or the Wealth Tax Act, he answered in the negative. As regards the property returned to him under the order of the criminal court he is made to disclose belonging to his wife and about some portion of it having been received in the family partition and so on. This was then treated as information to enable the Commissioner to take action under Section 132 A of the Act.

31.3 In the above background, the Allahabad High Court concluded that apart from the statement of GPM and the complaints lodged by Mr. Sahu “there was no other evidence or material on record”. Holding the said material to be wholly insufficient, the Allahabad High Court concluded that the Commissioner had issued the authorization “without there being any reason to believe that the jewellery which was in possession of the Petitioner represented wholly or partly the undisclosed income”. Therefore, the action was held to be without jurisdiction. It was further held that “mere fact that an authorization has been issued does not amount to having reason to believe that the person

against whom it was being issued was in the possession of jewellery or bullion which represented as undisclosed income.

31.4 There are many distinguishing features as far as the above decision is concerned. In the first place, it was about jewellery which the Department found had not been disclosed to the Department. Further, on facts it was found in that case that there was no material other than the statement made by GPM. In the present case, however, the details of the information on the basis of which the search warrant was issued is yet to emerge.

31.5 It is not clear whether the Petitioners have asked to inspect the records of the Department. Nevertheless, that is an issue that will be dealt with by the AO if the Petitioner has made that request. The Court does not intend to say anything on this aspect at this stage. The Court clarifies that it has expressed no opinion on the contention of the Petitioners that there was no information available with the Department for the purposes of authorising a search under Section 132 of the Act. Equally no opinion is expressed on the contention of the Department to the contrary.

32. Turning now to the decision in *Madhu Gupta (supra)* the Delhi High Court there had an occasion to actually examine the satisfaction note and give detail findings thereon. In the present case, the Petitioners have not even stated whether they have asked to peruse the satisfaction note. Therefore, again the Court does not consider it appropriate to say anything further on this aspect at

this stage. The Court finds the decision in *Param Dairy Limited (supra)* also to be distinguishable on facts.

33. It is trite that under Section 132(1) of the Act, the jurisdictional facts should be established by the Department to justify a search authorization. But there cannot be any presumption that there is no such information available with the Department. The observations by the Delhi High Court that the information which forms the basis of such search operation must be based on credible information and there must be a nexus between the information and the search ordered are unexceptionable. To the same effect, the decision in *Laljibhai Kanjibhai Mandalia (supra)*, where the Gujarat High Court found in favour of the Assessee after perusing the satisfaction note. Whether the legal requirement is met will obvious depend on the facts of each case. In the present case, there can be no presumption in this regard in the absence of the original record of the search in regard to which the Petitioners have not made any request to this Court. In any event, there is sufficient opportunity available to the Petitioners in this regard at the further stages, if any, of these proceedings.

34. Consequently, the Court is not satisfied that any ground is made out by either of the Petitioners for grant of any of the reliefs as prayed for at this stage. Although the Court has expressed its prima facie view on the legal and factual issues raised, on the insistence of the Petitioners, it is clarified that after the assessment orders are received and if the Petitioners are aggrieved thereby, it

would be open to them to urge all the grounds raised in the present petitions, apart from any further grounds they may have, before the Appellate Authority in accordance with law.

35. The petitions are dismissed in the above terms, but in the circumstances, with no order as to costs. The interim orders stand vacated.

36. An urgent certified copy of this judgment be issued as per rules.



S.K.Jena/PA