



[2023:RJ-JP:25020]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



S.B. Civil Writ Petition No. 10226/2021

1. M/s Bhagwati Jewellers, G-12, Vimal Chambers, Opposite Kamla Nehru Girls School, Haldiyan Ka Rasta, Johari Bazar, Jaipur Through Proprietor Ram Gopal Soni.
2. Ram Gopal Soni Son Of Shri Banwari Lal Soni, Aged About 50 Years, Proprietor M/s Bhagwati Jewellers, G-12, Vimal Chambers, Opposite Kamla Nehru Girls School, Haldiyan Ka Rasta, Johari Bazar, Jaipur (Rajasthan)

-----Petitioners

Versus

1. Directorate Of Enforcement, 2nd Floor, Jeevan Nidhi-II, LIC Building, Bhawani Singh Road, Jaipur 302005 Through Joint Director.
2. Assistant Director, Directorate Of Enforcement, 2nd Floor, Jeevan Nidhi-II, LIC Building, Bhawani Singh Road, Jaipur 302005
3. Union Of India, Through Secretary, Ministry Of Finance, Department Of Revenue, Govt. Of India, Having Its Office At The Central Secretariat, North Block, New Delhi-110001

-----Respondents

For Petitioner(s)	:	Mr. Siddharth Ranka Mr. Rohan Chatter Ms. Satwika Jha Ms. Shivangi Mewal Ms. Apeksha Bapna
For Respondent(s)	:	Mr. R.D. Rastogi, ASG with Mr. Akshay Bhardwaj Mr. Chandra Shekhar Sinha

HON'BLE MR. JUSTICE GANESH RAM MEENA

Order

Date of Reserve	::	Sept. 12, 2023
Date of pronouncement	::	October 05, 2023



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1. The factual matrix of the case in brief is that the official respondents conducted a search operation at the business premises of the petitioners on 15.02.2020/ 16.02.2020. During such search operations, gold bullion of 3773.52 gm. was seized along-with other articles like electronic devices mobile phones, hard disk etc.

2. The petitioners filed instant writ petition stating that they are engaged in the business of trade of gold bullion and the petitioner firm is duly registered under the VAT/ Goods and Service Tax Act (GST). During the search operations by the respondents, 3773.52 gm. Gold bullion which is stock in trade was seized along-with other articles. It is further stated that the petitioners requested the respondents that all the seized goods are duly recorded in the accounts of books of the petitioner firm and also are in stock in trade, which as per the law cannot be seized but the respondents did not pay any heed to their request and at the time of seizure, the persons of the Raid Party misbehaved, mishandled and physically assaulted the petitioner No.2 and the employees of the petitioner firm. It has been further stated that a representation was submitted to the respondents on 19.02.2020 but the respondents did not care to consider and pass any order on the same. The petitioners by way of present writ petition have prayed that the gold bullion



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which was seized from the petitioners during the search operation which is stock in trade, may be ordered to be released by the respondents to them.

3. The respondents in the reply to the writ petition raised a preliminary issue that Section 16 of the Foreign Exchange Management Act, 1999 (for short 'the FEMA') provides for adjudication of disputes by the Adjudicating Authority and further Section 19 of the FEMA provides for an appeal to the Appellate Tribunal. If one feels aggrieved by the decision of the Appellate Tribunal, an appeal can be preferred under Section 35 of the FEMA to the High Court. The respondents have also submitted that summons have been issued to the petitioners but they are not cooperating in the on-going investigation. The respondents also stated that input was received that smuggled gold was being purchased by the bullion traders/ jewelers of different locations and the transactions were done via hawala and on the basis of the information the search and seizure were made and during the search, various gold bars, unaccounted cash, unrecorded gold jewelery, foreign currencies etc. and voluminous incriminating documents including digital devices were also recovered. The search at the premises of the petitioners also resulted in recovery of unaccounted and unrecorded gold bullion and incriminating documents, digital messages which may result in



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establishing connection between the persons involved in dealings of smuggled gold.

The respondents have denied the allegations leveled in the petition and stated that all the seizure proceedings have been conducted as per the procedure given under the law.

4. In rejoinder to the reply to writ petition, the petitioners have also stated that Section 37 of the FEMA read with Sections 132 and 132B of the Income Tax Act, 1961 (for short 'the Act of 1961') provides that where a person 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 nature and source of acquisition of any such asset is explained to the satisfaction of the Assessing Officer, such asset or any portion thereof shall be released within a period of one hundred and twenty days from the date on which the last of the authorizations for such search under Section 132 or for requisition under Section 132A, as the case may be, was executed. He further submitted that the gold bullion seized by the respondent authorities during the search was stock in trade and the petitioners are entitled to retain the same. Therefore, the petitioners after seizure of this 3773.52 gm. gold bullion, made a representation on 19.02.2020 to the respondents. Even though the petitioners have explained that how



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the seizure gold bullion was stock in trade, the same has not been released so far, even after passing of three and half years and the concerned authorities have also not considered and decided their representation. It has also been submitted that in view of specific provisions under the FEMA and the Act of 1961, the respondents were under an obligation to release the seized gold bullion which is stock-in-trade and other valuable belongings seized during the search.

5. Learned ASG apart from the preliminary objections, as stated in the foregoing paras, has submitted that the petitioners are gold smugglers and they are not cooperating in the on-going investigation even after repeated summons. He further submitted that the petitioners have raised an issue of Section 132B of the Act of 1961 in the rejoinder to the writ petition which is a new pleading and the petitioners cannot create a new pleading in the rejoinder. He also stated that since the petitioners have approached this Court by filing the present writ petition on 01.09.2021 but the respondent authorities could not decide their representation as required to be decided under Section 132B of the Act of 1961 because the matter was sub-judice before this Court. He also submitted that in view of the observations of the Hon'ble Supreme Court for period of pandemic COVID, the



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respondents cannot be blamed for not deciding the representation till 31.03.2022.

6. Considered the submissions made by the counsels for the respective parties and perused the material available on the record.

7. Firstly, the Court is dealing with the preliminary objections raised by the learned ASG.

8. Learned ASG appearing for the respondents submitted that after seizure of the gold and other articles, the petitioners have been issued summons on 25.02.2020, 29.09.2021, 11.10.2021 and 29.10.2021 under the FEMA and the petitioners are not cooperating in the on-going investigation and also are not appearing before the competent authority after service of summons. He further submitted that there is a remedy available to the petitioners against the summons issued to them under the FEMA. He has also referred para 1 of the judgment delivered by the Hon'ble Apex Court in the case of *Commissioner of Customs, Calcutta & Ors. Vs. M.M. Exports & Anr. & one connected matter, reported in (2010) 15 SCC 647*, which is quoted as under:-

"1. By consent the impugned order is set aside. However, we wish to make it clear that as far as possible the High Court should not interfere at the stage when the Department has issued the summons. This is not one of those exceptional cases where the High Court should have interfered at the stage of issuance of the summons. It may be



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mentioned that all other questions on merits are expressly kept open. We have not examined the merits of the case. The Department is entitled to proceed in accordance with law. The appeals are accordingly disposed of."



In the aforesaid judgment the Hon'ble Apex Court has observed that except in exceptional cases the High Court should not interfere at the stage of issuance of the summons.

In the present case the petitioners are not stressing upon the challenge to the issuance of summons under the FEMA which are required to be issued for contravention and penalties. The petitioners in the writ petition have stated that after search and seizure, they submitted a representation to the respondents on 19.02.2020 showing their credentials for retaining the gold bullion seized which is stock in trade but the respondents have not decided the said representation even though they were under an obligation to decide the said representation and return the seized gold bullion within 120 days from the date of such representation.

9. Learned ASG also relied para 21 of the judgment delivered by the Madras High Court in the case of *T.T.V. Dinakaran Vs. Enforcement Officer, Enforcement Directorate, reported in 1995 SCC OnLine Mad 893*, wherein it has been observed as under:-



“21. Section 40 of the Foreign Exchange Regulation Act simply says that if any Gazetted Officer of Enforcement considers necessary either to give evidence or to produce document during the [sic] courts of investigation, he has power to summon any person. So far as the documents called for in this case, as already pointed out, are only the documents relating to the petitioner. In the case in hand, there is no vagueness in respect of the documents called for. The Documents have been specifically stated. In view of the above discussion, I am of the view that all the three judgments cited by the learned senior counsel for the petitioner are of no help to him. The petitioner has challenged the summons in this writ petition. As pointed out already the summons is issued only enabling the authorities to get the particulars required for completion of any investigation pending before them. It is the bounden duty of the petitioner to appear before such authorities as per Section 40(3) of the FERA Act to attend before the authority and to assist the investigation. By avoiding to appear before the authorities, the petitioner merely creates a suspicion in the mind of the respondent.”

The aforesaid judgment is regard to challenge to the summons and since there is no challenge to the summons in this case, the aforesaid case has no bearing in the present petition.

9. Learned ASG also referred the order dated 05.04.2022 passed on the second stay application



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No.3316/2022 (in SBCW P.No.10463/2019, M/s. Jai Exports & Ors. Vs. Joint Director, Directorate of Enforcement, Jaipur & Ors.), the relevant part referred by the learned ASG is as under:-

“This Court finds that the complaint which was filed against the petitioner, has resulted into issuance of show cause notice to the petitioner and thereafter, adjudication has to take place and as such the petitioners cannot be allowed to state that part of cause of action, has arisen in the territory of State of Rajasthan.

This Court finds that initially the petitioner had filed writ petition against show cause notice in the Punjab and Haryana High Court at Chandigarh and after an order being passed to approach the respondents by giving a detailed and comprehensive representation, the Authorities have finally adjudicated the issue of violation of Foreign Exchange and order dated 26.04.2019 has been passed.

The submission of learned counsel for the petitioners that the petitioners are residents of Jodhpur and further, they are having their business operations in the State of Rajasthan and as such, this Court has ample jurisdiction to entertain the writ petition, suffice it to say by this Court that the residence of the petitioners or their place of carrying business, cannot constitute as part of cause of action.

The other reason with regard to maintainability of writ petition before this Court on account of violation of



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principle of natural justice, suffice it to say by this Court that if the petitioner has any grievance in respect of violation of any provisions of Rules of 2000 or the Act of 1999, the Appellate Forum has been constituted by the legislature and all issues including the issue of violation of principle of natural justice or delay can all be agitated by the petitioner before the Appellate Forum.

This is beyond comprehension of this Court that when an appeal is provided, before the Appellate Authority, then litigant cannot raise the issue of violation of principle of natural justice/delay/competence of any Authority to issue the orders.

This Court finds that the alternative statutory remedy available to the litigant/petitioners is available to them and the order, which is put to challenge itself makes a reference of such a remedy/Authority for raising the grievance.

This Court, in the wake of statutory alternative remedy available to the petitioners, would not like to entertain the present petition filed under Article 226 of the Constitution of India.

Learned counsel for the petitioners, at this juncture, submitted that the writ petition is pending before this Court since 2019 and there is a timeline provided under Section 19 of the FEMA, 1999 to file an appeal and as such the petitioners would be deprived to file their appeal and they will not be able to defend themselves, suffice it to say by this Court that the



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provisions, contained in Section 19 of the FEMA, 1999, gives power to the Appellate Tribunal to consider the issue of limitation and if proper cause is shown by the litigant, the Authorities can also condone the delay period after considering the entire facts and law. Therefore, this apprehension of the petitioners is wholly unfounded.

Learned counsel for the petitioners submitted that there is requirement of pre-deposit of entire penalty amount and as such, the petitioners would be having great difficulty in preferring an appeal after depositing the penalty amount and in view of COVID19 situation, the petitioners would not be able to collect huge amount of penalty, suffice it to say by this Court that under proviso (2) as contained in Section 19 of the FEMA, 1999, it is for the litigant/petitioners to show before the Appellate Tribunal that depositing of penalty will cause undue hardship to them. The Appellate Tribunal has been given power to dispense with such deposit, subject to the conditions as it may deem fit to impose to safeguard the relaxation of the penalty. It is always open to the petitioners to move appropriate application before the Appellate Tribunal showing their difficulty in their business and claiming exemption from depositing the penalty as pre-deposit for filing appeal.

Accordingly, this writ petition is dismissed on account of alternative, statutory remedy available to the petitioners as well as on the ground of



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lack of cause of action arisen before this Court.”

Again the order passed in the aforesaid case is not in regard to the consideration and decision on the representation submitted by the petitioners under the provisions of Section 132 and 132B of the Act of 1961 read with Section 37 of the FEMA.

10. Counsel for the petitioners has submitted that the respondents should have decided the representation of the petitioners and on a satisfactory explanation given by them the respondents should have released the seized gold bullion and thereafter the respondents could have proceeded against them for contravention and penalties under the FEMA as per procedure given under law.

In view of the above, the preliminary objections of alternative remedy of appeal available to the petitioners raised by the learned ASG appearing for the respondents is not sustainable and therefore rejected.

11. Learned ASG appearing for the respondents also raised a preliminary objection that a new plea cannot be taken in the rejoinder. He submitted that a plea regarding compliance of provisions of Section 37 of the FEMA read with Sections 132 and 132B of the Act of 1961 has been raised in the rejoinder



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which is a new plea and the same cannot be entertained. In support of the submissions, learned ASG has also referred para 41 of the judgment delivered by this Court in the case of *Jwala Prasad Vs. State of Rajasthan (D.B. Civil Misc. Writ Petition No. 1083 of 1972)*, decided on 22nd November 1972, which is quoted as under:-

"41. It may be noticed here that the learned counsel for the petitioner wanted to enlarge the scope of his contention by making reference to the points raised by him in the rejoinder and submitted that all these points should be taken into consideration. We may observe in this connection that when this case came up for hearing before our learned Brother Gattani, J., sitting singly (before the case was referred to us) an objection was raised by the opposite party that the rejoinder should not be looked into as it contains new pleas and our learned Brother Gattani J., by his order dated 26-9-1972 held "that the rejoinder may be taken on record and the matter contained therein so far as it relates to the new points raised in the replies be taken into consideration. But so far as disputed questions of fact are involved the court may pass proper order when the occasion arises." In our opinion, we cannot allow the petitioner to extend the scope of his writ application by adding new matters in the reioinder which involve controvert-ed question of fact, and new pleas which had not been taken in the writ application. In this view of the



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matter the petitioner must confine himself to the grounds taken by him in the writ petition."

12. The petitioners in the present writ petition have prayed to issue directions to the respondents to release / return the seized stock in trade gold bullion of 3773.52 gm. and other valuable belongings to them and they may also be directed to look into the documents produced by them to show that seized gold bullion being stock in trade and are duly accounted in the books of accounts and accordingly the respondents may be directed to consider the representation dated 19.02.2020 on 20.02.2020.

The petitioners in the memo of petition have also stated the facts in regard to submitting the representation and the explanation that the seized gold bullion is stock in trade and duly accounted in the books of accounts. The relevant documents and the representation were also enclosed by the petitioners with the memo of petition. In the rejoinder the petitioners have merely quoted the provisions of the FEMA and the Act of 1961 in regard to filing and disposal of the representation.

13. Pointing out the facts and enclosing the relevant documents along-with the petition and thereafter pointing out the relevant provisions related to the representation and its disposal in



the rejoinder, does not amount to a new plea taken. Therefore, the said objection of the learned ASG appearing for the respondents is not sustainable.

14. The counsel appearing for the petitioners submitted that after the seizure of gold bullion and other valuable belongings during the search made on 15.2.2020/ 16.02.2020, the petitioners submitted a detailed representation on 19.02.2020 to the concerned authority, as mentioned in the provisions of the Act of 1961, stating that the seized gold bullion being stock in trade and are duly accounted in the books of accounts. Therefore, the respondents may be directed to return the seized gold bullion and other articles. Counsel has referred the provisions of Section 37 of the FEMA and sections 132 and 132B of the Act of 1961, relevant part of which are reproduced as under:-

“Power of search, seizure, etc.-

37. (1) *The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.*

(2) *Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.*





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(3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act.”

“Search and Seizure

132. (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) “ “ “, or

(b) “ “ “, 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) “ “ “, or

(B) “ “ “

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



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- (i) “ “ “;
(ii) “ “ “;
(ia) “ “ “;
(ib) “ “ “

(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;”

“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 the 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)



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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;"

15. To support the contentions, the learned counsel for the petitioners has relied upon various judgments.

He referred paragraphs No.2,5, 18, 19, 21 and 24 the judgment delivered by this Court in the case of *Harshvardhan Chhajed Vs. Director General of Income Tax (Investigation) [in SBCWP.No.6097/2020]* decided on 07.09.2021, which are reproduced thus:-





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"2. Brief facts to be noticed are that on 24.02.2020 the petitioner No.3-Kantivardhan Pradeep Choraria was intercepted and searched at Jaipur Airport during his journey from Mumbai to Jaipur while he was carrying jewellery and diamonds, by the Income Tax Authorities. The said jewellery found in his possession was seized in terms of [Section 132](#) of the Income Tax Act, 1961 (hereinafter referred to as "the Act of 1961")."

"5. A letter was sent by the petitioner No.1 on 26.02.2020 to release the stock attached and explained the stock details, purchase details, sales details, challans issued, stock register, (3 of 15) [CW-6097/2020] audit reports, income tax return, air ticket bills and certificate from Chartered Accountants etc. and justification of goods found from the possession of petitioner No.3 were also explained. Similarly, petitioner No.2 also sent a letter on 18.03.2020. Another application was submitted on 22.05.2020 wherein additionally other documents including PAN Card, GST Registration Certificate, Income Tax Return for the year 2018-19, GST return for the year 2019-20 and Bank statements from January 2020 to March 2020 of M/s Maha Pragma Jewellers were also submitted. It was also informed that some stock of the petitioner/s was left with his brother-in-law Siddharth Baid at Mumbai who was engaged in the same business while travelling from Jaipur to Kolkata and Kolkata to Mumbai. The challan relating to the stock for the said period was also produced."



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"18. In case of Sri Puspa Ranjan Sahoo Vs. Assistant Director Income Tax (Investigation), Bhubaneshwar reported in 2012 (9) TMI 432, the Division Bench of Orissa High Court has held as under:-

"27. In view of the above, we are of the view that the seizure of jewellery being stock-in-trade by the authorized officer is wholly without authority of law and contrary to the statutory provision contained in proviso to [Section 132](#) (1) (iii) and third proviso to [Section 132](#) (1) (v). Therefore, the opposite parties- Income Tax Department are directed to return the jewellery (gold and silver ornaments) seized by the Authorized Officer in course of search on 9.9.2011 forthwith to the petitioner-assessee after complying with the requirement provided, i.e., making a note or inventory."

19. In case of Director General of Income Tax & Anr. Vs. Diamondstar Exports Ltd. & Ors. reported in 2006 (3) TMI 140, the Supreme Court has observed as under:-

"5. Without going into the question as to value of goods found by the court to have been illegally seized, we hold that the appellants are liable to compensate the respondents at least by way of costs. The loss obviously suffered by the respondents during the pendency of the proceedings before the High Court was further aggravated by the delay in complying with the High Court's decision. In the circumstances, we direct the appellants to pay a sum of Rs. 75,000 to the respondents on account of costs which the respondents will accept in full and final settlement of the claim towards the



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quantum of interest under the impugned order. Such payment is to be made within a period of four weeks. In the event such payment is not made, this appeal will stand dismissed with costs.

6. The appeal is disposed of."

"21. From the perusal of the aforesaid judgments and law laid down, it is apparent that the seizure has to be conducted after due care and caution. Merely on account of reasons to suspect, seizure of goods ought not to be undertaken as held in Khem Chand Mukim (supra). In fact the investigation wing has to show reason to believe that a person is carrying undisclosed asset."

"24. Keeping in view, this Court holds that the seizure itself was wholly illegal and all consequential actions based on such seizure are illegal and contrary to the provision of [Section 132\(1\)\(iii\)](#) of the Act of 1961. Hence, the petitioners were entitled to receive back the goods from the respondents as more than one year and six months have lapsed. The petitioners would also be entitled to interest of a sum of Rs.1 lakh which was paid as a gross amount towards retention of the jewellery which is stock-in-trade and is marketable."

He also referred paragraphs No.20, 23, 24, 26 and 29 delivered by Delhi High Court in *Khem Chand Mukim Vs. PR. Director of Income Tax (Inv.)*, reported in 2011 (1) TMI 1114, which are reproduced thus:-



"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

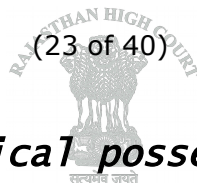




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to take physical possession of any valuable article or thing, and removal of it to a safe place is not possible or practical due to its volume, weight or other physical characteristics, the authorizing officer may serve an order on owner, or the person 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.



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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)]"



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:



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"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."

"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."



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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."

He also referred paragraphs No.17, 18 and 27 of the judgment delivered by Orissa High Court in *Sri Puspa Ranjan Sahoo vs. Assistant Director Income Tax (Inv.)*, reported in 2012 (9) TMI 432, which are reproduced thus:-

"17. Question nos.(ii) and (iii) relate to seizure of stock-in-trade found in course of search operation by authorized officer. These two questions being inter-related they are dealt with together. **Section 132(1)(iii)** empowers the Authorized Officer to seize any such



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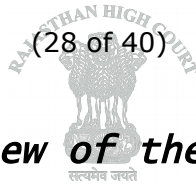
books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search which represent either wholly or partly undisclosed income or property of the person.

However, the proviso craves out an exception. It provides 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 authorized officer shall make a note or inventory of such stock-in-trade of the business. Therefore, even if the Authorized officer is of the view that any bullion, jewellery or other valuable article or thing which is in form of stock-in-trade either wholly or partly represents the undisclosed income or property of the person/ assessee searched, he cannot seize the same. But he shall make a note or an inventory of such stock-in-trade of business.

18. Prior to insertion of proviso to [Section 132](#) (1)(iii) with effect from 01.06.2003 stock in trade can be seized at the time of seizure if it represents either wholly or partly the undisclosed income or property of the person/assessee searched. However, after insertion of the proviso with effect from 01.06.2003 it shall not be seized but a note or inventory of such stock in trade shall be prepared. The obvious purpose is to use it at the time of assessment and for other follow up actions."



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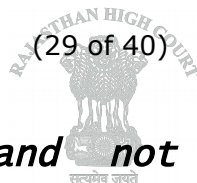
"27. In view of the above, we are of the view that the seizure of jewellery being stock-in-trade by the authorized officer is wholly without authority of law and contrary to the statutory provision contained in proviso to [Section 132](#) (1) (iii) and third proviso to [Section 132\(1\)](#) (v). Therefore, the opposite parties-Income Tax Department are directed to return the jewellery (gold and silver ornaments) seized by the Authorized Officer in course of search on 9.9.2011 forthwith to the petitioner-assessee after complying with the requirement provided, i.e., making a note or inventory."

He further referred paragraphs No.2,8, 11 and 12 of the judgment delivered by Gujarat High Court in *Nadim Dilipbhai Panjvani Vs. Income Tax Officer*, reported in 2016(1) TMI 811, which are reproduced thus:-

"2. The petitioner, on 24.03.2014, was travelling from Morbi to Rajkot carrying cash of Rs. 20,07,000/-. According to him, he had to handover such cash to his friend Manoj P. Rajdev. The vehicle, in which, the petitioner was travelling, was intercepted by the police authorities being the election period for general election to the parliament. The police authorities, after being satisfied that the cash, which the petitioner was carrying, had no connection with the ensuing election, informed the Income Tax Department which, later on 25.03.2014 seized the cash from the petitioner. The case of the petitioner, as reflecting from the present petition is that, the cash belonged to said Shri Manoj



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P. Rajdev and not to the petitioner. However, since the same was seized from the petitioner, the petitioner filed a petition dated 14.04.2014 before the authority for releasing the cash which was filed on 17.04.2014. Under communication dated 12.09.2014, the petitioner reminded to the respondent authority that the petition was still pending. On 13.07.2015, the petitioner once again applied to the respondent for release of cash citing the decision of this Court in case of Mitaben R. Shah v. Deputy Commissioner of Income Tax and anr. reported in , 331 ITR 424. Finally, on 20.07.2015, the respondent authority rejected the application of the petitioner inter alia on the grounds that cash can be released only when the source is explained to the satisfaction of the Assessing Officer. The petitioner failed to satisfy this requirement. Assessment under Section 153A of the Income Tax Act, 1961 was still pending. The final assessment of the tax and penalty liabilities is still not completed. Only after the completion of such proceedings, question of release of seized asset can be considered. The Assessing Officer did not accept the contention of the petitioner that such decision should have been taken within the time envisaged under further proviso to Clause (i) of sub-section (1) of Section 132B of the Act. The judgement of this Court in case of Mitaben R. Shah v. Deputy Commissioner of Income Tax and anr. (supra) was distinguished. Decision in case of Jinkal Dineshbhai Virvadiya v. Commissioner of Income Tax reported in , 367 ITR 713 was cited, in which, when it was found that the petitioner failed to satisfy the authority





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about the source of the asset, rejection of the request for release of the same was upheld."

"8. Further proviso to Clause (i) of Sub-section (1) of Section 132B of the Act provides that such asset or any portion thereof, as is referred to in the first proviso shall be released within a period of 120 days from the date on which the last of the authorizations for search under Section 132 or for requisition under Section 132A, as the case may be, was executed. This further proviso, therefore, has to be viewed and interpreted in the background of the provisions contained in Clause (i) of Sub-section (1) of Section 132B of the Act and the first proviso to the said clause. The further proviso, thus, requires that such assets or portion thereof referred to in the first proviso would be released within the prescribed time. Of course when this further proviso refers to any portion of the asset, as is referred to in the first proviso, it necessarily permits the Assessing Officer to apply the assets against the existing liability or even when not satisfied about the source of acquisition of the asset to refuse to release the same till the further liabilities which may arise upon completion of the assessment under Section 153A of the Act or the assessment of the year relevant to the previous year, in which, the asset was seized etc. are completed. To this extent, we fully accept the stand of the counsel for the revenue that the further proviso would have to be read in continuation of the first proviso and therefore would not override the provision





of the first proviso which requires the Assessing Officer to release the asset only upon being satisfied with the source of its acquisition. However, this further proviso puts a time limit, within which, such asset must be released. The question of not releasing the asset would arise only upon the decision on an application that may have been made by the person concerned is taken by the Assessing Officer. If no decision is taken, necessarily, the option of the Assessing Officer to adjust such seized asset would be confined to the existing liabilities. It is, in this context, in our opinion, the legislature required the Assessing Officer to follow the time limit scrupulously. In other words if the person concerned has made an application for release of the asset within the prescribed time, the authority can refuse such request on the ground of not being satisfied about the source of its acquisition. But if no such decision is taken within the time envisaged in the further proviso, releasing of the asset becomes imminent.”

“11. It can thus be seen that the Courts attach considerable importance to the time frame provided under Sections 132A and 132B of the Act when it comes to a question of retention of books of accounts or of seized assets. We cannot read the time limit provided in further proviso to Clause (i) of Sub-section (1) of Section 132B of the Act as being merely directory. Any such view would substantially water down the rigors of the statutory provisions and would give an unlimited authority to the Assessing Officer to retain the seized



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assets awaiting finalization of future possible liability for indefinite period without deciding the application of the person concerned who may be perfectly legitimately in a position to explain the source of the asset so seized.

12. Facts, noted above, are rather glaring. The application of the petitioner for the purpose of releasing of the seized asset, which was made on 17.04.2014, came to be decided only on 20.07.2015 i.e. over one year later. In the meantime, the petitioner had sent two reminders. Action of the Assessing Officer cannot be countenanced. Impugned order dated 20.07.2015 is set aside. The seized cash shall be released in favour of the petitioner alongwith interest as per the statute."

He also referred para 18 of the judgment delivered by Gujarat High Court in *Mitaben R. Shah Vs. Deputy Commissioner of Income-Tax*, reported in 2010 (2) TMI 684, which are reproduced thus:-

"18. Having heard the learned advocates appearing for the parties and having considered their rival submissions in light of the statutory provisions and facts and circumstances of the case, the Court is of the view that the impugned order passed by the respondent rejecting the petitioner's application for release of jewellery and gold ornaments is not tenable at law and hence the same deserves to be quashed and set aside. The provisions contained in Section-132B(1) are very clear and unambiguous. Section-132B deals with the



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assets seized under Section-132 or recognized under Section-132A of the Act. A detailed procedure is prescribed under Section-132B(1)(i) of the Act. Out of such seized assets, the amount of the existing liability or the amount of the liability determined on the completion of the regular assessment or reassessment including any penalty levied or interest payable in connection with such assessment or reassessment is required to be recovered. The first proviso of this Section enables the assessee to make an application within 30 days from the end of the month in which the asset was seized. For release of the assets the assessee is required to explain the nature and source of acquisition of such assets to the satisfaction of the Assessing Officer. On such satisfaction and with prior approval of the Chief Commissioner the Assessing Officer is empowered to release the asset to the person from whose custody the assets were seized. The second proviso to this Section makes it clear that the assets are required to be released within a period of 120 days from the date on which the last of the authorization for search under Section-132 or for requisition under Section-132A, as the case may be, was executed."

He further referred para 26 of the judgment delivered by Gujarat High Court in *Ashish Jayantilal Sanghavi (Prof. of M/s. VIR Impex) Vs. Income Tax Officer*, reported in 2022 (4) TMI 1285, which is reproduced thus:-



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"26. In view of the aforesaid, this writ application succeeds and is hereby allowed. The respondents are directed to hand over the seized asset (diamonds) to the writ applicant within a period of four weeks from the date of receipt of the writ of this order. It is needless to clarify that the assessment proceedings, if initiated against Parin N. Sheth with respect to the seized asset or even in the case of the writ applicant himself, may continue in accordance with law. Direct service is permitted."

He also referred paragraphs No.9, 13 and 16 of the judgment delivered by Delhi High Court in Gauri Shanker Vs. Union of India & anr. (Writ Petition (Civil) 3908 of 2008, decided on 10.12.2010, which are reproduced thus:-

"9. The panchnama dated 11th July 2005 recorded the fact that during the course of the search, one Tulsi Ram s/o Moolgi Bhai entered the premises and as a result of his personal search Indian currency in the sum of Rs. 5,50,000/- and documents in five loose sheets were recovered. This explains how a total sum of Rs. 6,99,000/- (i.e. Rs. 1,49,000/- seized from the Petitioner's business premises and Rs. 5,50,000/- seized from Mr. Tulsi Bhai) was handed over by the ED to the IT Department on 31st August 2009. As regards the business premises of the Petitioner, the presence of Shri Shankar Lal Goel as well as the Petitioner who happens to be his brother is shown. The Panchnama has been signed by Shri Shankar Lal Goel in the presence of the witnesses. The panchnama also shows the seizure of the



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six bars of gold and cash of Rs. 1,49,000/-. A copy of the letter dated 19th July 2006 written by the Petitioner Gauri Shankar to the Assistant Director, ED has been placed on record in which the Petitioner claims to have visited the office of the ED on 20th July 2005 with purchase documents relating to the seized gold. The Assistant Director, however, was stated to be out of station. The copy of the letter addressed to him was also not accepted in the office. It is claimed that the copy of the letter along with copies of purchase vouchers was also sent to the ED by speed post. In compliance with the summons issued by the ED, the Petitioner visited its office on 1st February 2006 and 15th February 2006. No communication was received thereafter. A reminder was sent on 21st August 2006. The Petitioner made a representation to the Secretary, Department of Revenue, Ministry of Finance on 26th September 2006 followed by a reminder dated 20th July 2007. “

“13. It is not understood how, despite not issuing any legal justification for detention of the Indian currency amounting to Rs. 1,49,000/- and 6 kgs of gold, it was retained by the ED till 28th August 2009 i.e. for over four years. The affidavit dated 19th November 2009 filed by the ED admitted that 6 kgs of gold as well as the seized Indian currency were handed over to the IT Department only on 28th August 2009. On its part the IT Department admitted to thereafter having received both the gold as well as the Indian currency and admitted having issued



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the warrant of authorization under Section 132A of the IT Act.

“16. A perusal of Section 37 of the FEMA reveals that it cannot be invoked to seize Indian currency. The ED had itself admitted before this Court that there was no basis for seizure by the ED of the 6 kgs of gold. As far as Section 132A of the IT Act is concerned, it does not permit indefinite detention of the seized items by the IT Department without even issuing show cause notice to explain the legal basis of detention of the seized item. “

16. Learned ASG appearing for the respondents submitted that the search and seizure was made on 16.02.2020 and because of Pandemic Covid, the authorities could not proceed to consider and decide the representation of the petitioners. He also referred the propositions laid down by the Hon'ble Apex Court in regard to extension of limitation because of Covid situations and stated that the respondents cannot be blamed for non disposal of the representation upto 31.03.2022. He also submitted that the respondent authorities being the law abiding Officers and having respect to the Court proceedings, refrained from disposing of the representation of the petitioners because of pendency of this petition. He also submitted that the petitioners who are gold smugglers, are not entitled for any relief from this Court. He further submitted that the statements of the employees of



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the petitioner firm recorded during the search operation also substantiate the allegations of gold smuggling against the petitioners.

17. The provisions of Section 37 of the FEMA read with Sections 132 and 132B of the Act of 1961 including its proviso clauses clearly speak 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 authorized officer shall make a note or inventory of such stock-in-trade of the business. Further, 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 certain authorities, as mentioned in the provisions, to the person from whose custody the asset was seized. The proviso clause further provides that such asset or any portion thereof 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 date of the authorizations for search





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under Section 132 or for requisition under Section 132A, as the may be, was executed.

18. Recently on 07.08.2023 in *D.B. Civil Writ Petition No.3040/2023 (Mangilal Agarwal vs. Deputy Director of Income Tax (Investigation-1)*, this Court considering the statement made by the counsel appearing for the respondents upon instructions from the respondent authorities submitted that no order has been passed by the competent authority under section 132B of the Income Tax Act. On the basis of such statement, the Court observed that the goods including gold bullion, which were taken in possession, have to be released and the respondents counsel therein informed that in case the petitioner approaches the competent authority for release of the Gold Bullion, the same shall be accordingly released. Finally the writ petition was disposed of as having become infructuous in view of the fact that the gold bullion was released to the petitioner therein. The judgments cited by the counsel for the petitioners as a whole speak that the respondent authorities are under an obligation to consider the representation of the petitioners including all the relevant documents submitted along-with the same explaining that the gold bullion seized during the search is stock in trade and are duly accounted in the books of accounts. The aforesaid inaction on the part of respondents in failing to consider and





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decide the representation of the petitioners in not releasing the seized gold bullion, is illegal and contrary to the provisions of Section 132(1) and 132B of the Act of 1961.

19. The provision of Section 132B of the Act of 1961 mandates the respondent authorities to take a call on the application/ representation submitted by a person and after consideration such asset or any portion thereof seized during the search of which nature and source of acquisition is explained, the same should have been released within one twenty days.

The respondent authorities are under an obligation to abide by the law in force but in the present case the respondent authorities have failed to act upon the representation submitted by the petitioners on 19.02.2020 which led to miscarriage of justice.

20. The respondent authorities in view of the mandate of Section 132B of the Act of 1961 were under an obligation to consider the application/ representation of the petitioners submitted on 19.02.2020 showing the credentials and explaining that the gold bullion seized during the search was stock-in-trade and are duly accounted in the books of accounts which were based on the documents enclosed along-with the representation which have been placed on record before this Court also. The



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respondent authorities have not cared to consider the representation and the documents submitted by the petitioners and to hold that the gold bullion seized during the search was not stock-in-trade. Therefore, this Court on consideration of the documents submitted along-with the petition without there being otherwise decision of the respondent authorities, does not hesitate to hold that the gold bullion seized during the search was stock-in-trade and are duly accounts in the books of accounts and accordingly the petitioners are entitled to retain the same.

21. In view of the discussion made above and being in agreement with the judgments cited by the counsel appearing for the petitioners, the writ petition deserves to be allowed and is therefore allowed. The respondent authorities are directed to return the gold bullion 3773.52 gm. seized by them in the course of search on 15/16.02.2020 forthwith to the petitioners after complying with the requirement provided i.e. making a note of inventory.

22. In view of the order passed in the main petition, the stay application and pending application(s), if any also stand disposed of.

(GANESH RAM MEENA),J

Sharma NK-Dy. Registrar