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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.715 OF 2000

Shri. Surendra M. Khandhar,
having his office at
Parshawa Chambers, Vadgadi,
Bombay 400 003. ... Appellant

Versus

1. The Asst. Commissioner of
Income Tax, Central Circle-14,
Bombay, having his office at 11th
Floor, C.G.O. Annexe, M.K. Road,
Bombay 400 020.

2. Commissioner of Income Tax,
Central-I, Bombay having his
office at 10th Floor, C.G.O.
Annexe, M.K. Road,
Bombay 400 020.

3.Union of India,
through Ministry of Finance,
North Block, Central
Secretariat, New Delhi. ... Respondents

Dr. K. Shivram with Mr. A.R. Singh for the Appellant.

Mr. Sureshkumar with Mr. P.S. Sahadevan for the Respondents.

CORAM: F.I. REBELLO, &
R.S. MOHITE, JJ.
DATED: JANUARY 27, 2009

ORAL JUDGMENT : (Per F.I. Rebello,J.)

. The appeal was admitted on 1.4.2004 on the following substantial question of law :

> "Whether the addition of Rs. 20 lacs. as an income tax advance said to have been made by the assessee to Mr. Bhupendra Chedda is based on legal evidence?"

2. In the course of search of the premises, following document was seized from the premises of the assessee.

. The contents of the document reads as under :

"1) Mr. Surendra Khandhar) 22nd Jan. 91
2) Mr. Mahenedra P.J. Shah) In the presence
3) Mr. Bhupen Chheda) of..

. On 22nd Jan'91 7.30 p.m. in the case of Surendra N. Khandhar Vs. Bhupen Chheda it is decided as under :

1) On or before 28th Feb'91, (Bhupen Chheda) myself will pay Rs.5,00,000/- (Rupees Five Lacks) towards the payment of loan out of twenty lakh rupees.

2) Balance amount will be paid by 50% of collection cheques and current account will be operated by Mahendra P. Shah. I hereby agree to deposit all cheques only in United Western Bank Mandvi Branch. However, I further confirm I will pay at least rupees five lakhs even though I cannot collect collection to that extent. I further confirm I will pay all loan amount on or before 31st May, 1991.

Signed & Delivered

Bhupen Chheda,

22nd Jan 1991.

I, Mahendra P. Shah,
stand guarantee for the
above matter."

3. The statement of the assessee was recorded under Section 132(4) on 19.12.1991. In the course of recording the statement, the following question was put :

> "Q.20: I am showing you page No. 82 of the loose paper file No. A-20 as per which Mr. Bhupendra Chedda was liable to pay Rs. 20 lakhs to you on the dates mentioned therein but this amount which is receivable by you has not been reflected in the account maintained by you?"

. The Assessing Officer based on the seized document made an addition of Rs. 20 lakhs in the income of the assessee under Section 69 as un-identified investment. Penalty proceedings were also initiated under Section 271(1)(c).

4. In the appeal memo filed before the Commissioner of Income Tax, in the Statement of facts the following is set out :

> "During the course of search of the

administrative office premises of Eshita Dye Chem Pvt. Ltd. a zerox copy (Page No. 82 of Annexure A-20) was seized. This paper is not in the handwriting of the Appellant. The Appellant explained to the AC that at the request of Shri.Bhupendra Chheda, a proposal was discussed whereby the Appellant agreed to advance Rs.20,00,000/- to him and the basis of a repayment to be made by him. However, as this proposal did not materialise no advance of Rs. 20,00,000/- was made by the Appellant. In the course of assessment proceeding, a letter was filed by Shri. Bhupendra Chheda before the A.C. that the paper seized related to a proposal which did not materialise. It was also explained to the A.C. that as per the paper seized, an account was to be opened with United Western Bank Limited, Vadgadi, Bombay which was to be operated by Shri. M.P. Shah. A certificate to this effect was filed by United Western Bank Limited. Shri. M.P. Shah also appeared before the A.C. and confirmed the facts as stated by Shri. Bhupendra Chheda. It was brought to the notice of the A.C. that no such account was opened and operated by Shri. M.P. Shah. The A.C. did not bring on record any independent evidence to show that the Appellant in fact advanced the sum of Rs.20,00,000/- on the basis that

Rs.20,00,000/- was advanced by the Appellant to Shri. Bhupenra Chheda."

. The Commissioner Appeals in his order noted that his predecessor had supplied the A.O. with the copy of the written statement dated 31.8.1994 and was directed to make available the copies of documents mentioned by the appellant and submit a speaking report after taking into consideration the explanation given by the appellant and after affording him reasonable opportunity of being heard. The Commissioner noted that inspite of this fresh opportunity given, the A.O. has failed to bring on record any material evidence in support of the case made out by him as is evident from the reply received vide letter dated 19.12.1994. The reply deals with the contentions by assessee, that during the appellate proceedings the assessee had taken the plea before the CIT (A) that letter filed by Shri. Mahendra P. Shah and United Western Bank should be given to him. The A.O. replied that there is no reference to the letter in the assessment order and it has not been used against the assessee. The Commissioner, Appeals was pleased to hold that the case made out by A.O. has no legs to stand and deleted the addition.

5. Both the Assessee as also the Revenue preferred appeals before the I.T.A.T. Dealing with this addition, the tribunal noted that CIT (A) accepted the contention of the assessee that the intended

transaction i.e. advance of Rs. 20 lacs. by the assessee to Bhupendra Chedda did not materialise and that the A.O. had not examined the issue properly and did not take any material evidence in support of his premise that the money in fact had passed hands in his case. After considering various contentions and judgements cited, the learned tribunal was of the view that the document was seized from the premises of M/s. Eshita Dye Chemicals Private Limited and that the assessee was in full control of M/s. Eshita Dye Chemicals Pvt.Ltd. The tribunal also recorded that the document was put to the assessee and he did not deny that the document was related to him nor did he deny the transaction. The only explanation given was that he had not received the amount of Rs. 5 lacs. The tribunal also noted that the document was not in the hand writing of the assessee was immaterial. The Tribunal considering the contentions of the seized document an the reply given by the assessee in his deposition dated 18.12.1991, was clearly of the view that the onus that amount had not been actually paid was on the assessee and this burden had not been discharged by the assessee. Considering various other contentions by a detailed order, the tribunal held that any evidence in favour of the assessee to the effect that the advance had not been made cannot prevail against the weight of the documentary evidence of the seized document supported by the implicit admission of the advance contained in the replies given by the assessee in his statement dated

18.12.1991. For the aforesaid reasons, the Tribunal held that the Assessing Officer was justified in bringing to tax the amount of Rs. 20 lacs. under the provisions of Section 69 of the Income Tax Act.

6. At the hearing of this appeal, on behalf of the Appellant, their learned counsel firstly submits that the appellant assessee was not given a fair opportunity. The submission is that the documents which were sought were not made available and consequently based on those documents adverse inference could not have been drawn against the assessee.

. Referring then to the presumption created under Section 132(4A), reliance is placed on the judgment of the Supreme Court in the case of P.R. Mitrani Vs. Commissioner of Income Tax, (2006) 287 ITR 209 (SC), to contend that the presumption firstly is rebuttable. Secondly it can only be used in the summary proceedings and not for the purpose of regular assessment. It is therefore, submitted that the A.O. in the proceedings for regular assessment had to pass the order, based on the material available as presumption under Section 132(4A) is available only with regard to the proceedings for search and seizure and for retaining Assets under Section 132(5) and their application under section 132B. Lastly it is submitted that for the purpose of section 69, the power conferred on the A.O. is that he may add such income but is not bound to do

the same.

7. On the other hand, on behalf of the Revenue, the learned counsel submits that the appellant was made available all the documents in their possession and which were relied upon. It is secondly submitted that subsequent to the judgment of the Supreme Court, in the case of Mitrani (supra), the Income Tax Act has been amended and Section 292(c) has been inserted by Finance Act, 2007 with effect from 1.10.1975. The effect of said amendment is that where the document is seized in the course of search under Section 132 or section 133, it can be used against the assessee subject to what has been set out in the section. Dealing with the last contention, it is submitted that the tribunal considering the material evidence on record has rightly arrived at the conclusion that Income Tax had tobe added in the case of the Assessee. This was permissible on the material available and therefore, no fault can be found in the decision of the tribunal.

8. We may firstly consider the second contention advanced on behalf of the assessee. The language of Section 132(4A) is similar to the language used in Section 292C. We may gainfully reproduce the relevant portion of Section 132 (4A) as also section 292C which read as under :

"132(4A) : Where any books of account,

other documents, money, bullion, jewellery or other value article or thing are or is found in the possession or control of any any person in the course of a search, it may be presumed -

(i) that such books of account other documents, money, bullion, jewellery or other value article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may be reasonably be assumed to have been signed by, or to be in the handwriting of any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

"292C. (1) Where any books of account, other documents, money, bullion jewellery or other valuable article or thing are or is

found in the possession or control of any person in the course of a search under section 132 (or survey under section 133A), it may, in any proceeding under this Act, be presumed -

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person’s handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

(2) Where any books of account, other documents or assets have been delivered to the requisitioning officer in accordance with the provisions of section 132A, then,

the provisions of sub section (1) shall apply as if such books of account, other documents or assets which had been taken into custody from the person referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub section (1) of section 132A, had been found in the possession or control of that person in the course of search under section 132."

9. From the material on record what emerges is as under :

. The document seized was a zerox copy. The appellant when question No. 20 was put to him, did not deny the said document. On the contrary, in the appeal memo and thereafter before the I.T.A.T. the stand taken was that it was an understanding which was not given effect to. The appellant also does not deny the existence of the two persons who have signed on the document namely Bhupendra Chedda and Mahendra Shaha. On the contrary the contention is that the statement and or application of the said persons were not considered. Considering the language of Section 292C, there is a presumption that the contents of the document are true, as the document was seized from the premises in control of the assessee and that the said document belongs to the assessee. A reading of the said document would make it clear that the document in fact is the document for return of money already advanced. The

language used is that on or before 28.2.1991, Chedda would pay Rs. 5 lacs. towards the payment of loan out of Rs. 20 lacs. Then there are other amounts. This would indicate two acts firstly that the amount of Rs. 20 lacs. had already been received and the document thereafter shows in what manner the amounts would be paid. The document is dated 22.1.1991. The first payment was to be effected on or before 28.2.1991 and the search was made on 19.1.1991. The presumption therefore, would be that the sum of Rs. 20 lacs. had already been received by the appellant. Though this document was put to the appellant, nowhere did he deny the payment of loan of Rs. 20 lacs. His only denial was that he had not received the sum of Rs. 5 lacs. In our opinion, considering this to be documentary evidence, though the presumption was rebuttable, in the instant case the appellant has not discharged that burden. As noted in the judgment in P.R. Mitrani (supra), the expression "may presume" leaves it to the discretion of the court to make a presumption based on the circumstances of the case. Though the presumption under sub section 132(4)(a) is a rebuttable presumption, the appellant herein has been unable to rebut that presumption. In our opinion, therefore, we can find no fault with the conclusion arrived at by the tribunal. We will subsequently discuss the effect of purported non-availability of the documents and the grounds raised as to violation of natural justice.

10. The learned counsel has placed reliance on the judgment of the Commissioner of Income Tax Vs. S.M. Aggarwal (2007) 293 ITR 43, to point out that the only person competent to give evidence on the truthfulness of the contents of the documents is the writer thereof. In the instant case, considering the language of Section 292C there is presumption as to the correctness of the contents of the documents. The presumption ought to have been rebutted by the Assessee. The assessee at the first available opportunity did not deny the existence of the document nor has the assessee at any subsequent stage of appeal or before this court denied the document. The only contention raised is that the transaction was not given effect to. The two signatures to the document are parties known to the assessee which inference can be drawn from the document itself. It was open to the assessee to have either led evidence or get an affidavit filed to rebut the presumption. Whether on such oral evidence, the contents of the document could be rebutted is another issue. That was also not done. The only contention advanced is that Bhupen Chheda's statement must have been recorded and he must have filed an affidavit and that must be made available. There was enough opportunity before the tribunals for the appellant to show that in fact statement of Bhupen Chedda was recorded. Similarly in so far as Mahendra Shah is concerned Mahendra Shah was the guarantor for the due repayment of the loan. Whether he opened a bank account or not is

immaterial as the seized document clearly shows that the sum of Rs.20 lacs. was paid as loan by the assessee which Chheda had agreed to pay and to which Mr.Shah was a signatory as guarantor. The learned counsel also sought to rely on the judgment of the Supreme Court in Kisanchand Chellaram Vs. Commissioner of Income Tax, 125 ITR 713 (1980). The ratio of that judgment would be that if evidence is to be used against the assessee that evidence in the form of a document ought to have been shown to the assessee. That is not the case here. The search was made and document recovered in terms of 132(4A). To the same effect would be the judgment of this court in Smt. Panna Devi Vs. Commissioner of Income Tax 208 ITR 849. Reliance also placed in the judgment in the case of Mansukhlal Vs. Commissioner of Income Tax, 251 ITR 341. There on the facts the court recorded a finding that the real nature of the seized paper has not been established as to whether they belonged to the Petitioner from where could the paper had been seized. That judgment would be clearly distinguishable as the Gujarat High Court had no occasion to consider Section 292C which was inserted by Finance Act, 2007 w.e.f. 1.10.1975..

. Similarly the judgment in C.I.T. Vs. Daya Chand Jain Vaidya, 98 ITR 280 is also not applicable.

11. That leaves us with the next contention as raised that even if the document was considered, it was still open to the Assessing Officer not to have

made additions and for that purpose reliance is placed in the judgment in the case of Commissioner of Income Tax Vs. Noorjaha 237 ITR 370. The Supreme Court in that case held that the word "may" under section 69 cannot be interpreted to mean "shall" and that the question whether the source of investment should be treated as income made under Section 69 has to be considered in the light of the facts of each case. It was therefore, for the Assessing Officer to consider on the facts whether considering section 69, the income could have been added in the hands of assessee. In our opinion, considering the evidence as discussed there was sufficient material before the A.O. to have made additions under Section 69. The learned I.T.A.T. by elaborate reasoning has also held that the presumption created by the document had not been rebutted nor had the assessee denied the loan amount. We agree with the said reasoning. In our opinion, therefore no infirmity could be found with the reasoning adopted by the tribunal.

12. That leaves us with the only other question whether there has been violation of principles of natural justice and fair play as was sought to be contended on behalf of the appellant herein.The main submission is that the statement and or affidavit of Bhupen Chheda as also on the letter written by Mr. Mahendra Shah was not made available to the assessee. Our attention is also invited to the order of this court dated 25.8.2008 where this court

directed that the file pertaining to the case of the appellant be produced and that in the event the record is not produced, the court may be compelled to draw an adverse inference. This court earlier on 17.12.2002 had passed an order to produce the file pertaining to the case of appellant including statement of Mr. Mahendra Shah and Bhupen Chheda as well as statement of any bank officer, if at all recorded in the matter. In other words, only in the event such statements were available. An affidavit has been filed by Mr. Menon, Commissioner of Income Tax pursuant to order of 25th August, 2008 setting out that the relevant original case records are not traceable in their office and that they are trying to locate the relevant records. In our opinion, even if the file is not available, there was nothing placed before the Commissioner (Appeals) or before the I.T.A.T. to contend that the statement of Mr. Chheda was recorded and/or that Mr. Mahendra Shah had written a letter. As pointed out earlier these were two persons who had signed the documents. There were the persons known to the appellant and if it was the appellant's case that they had denied the document, they ought to have been produced before the A.O. and or at least these affidavits filed and produced. This exercise was not done. In our opinion, the contention raised at the appellate stage and on 30.3.1994 a day before the order could be passed by the A.O., where merely an attempt to create doubts in the mind of the court and is not supported by any basic material including the

documents. In our opinion, once the document was seized in the premises under control of the appellant, the presumption under Section 292C followed as also section 132(4)(a) and it was for the appellant to rebut that presumption. That has not been done. In our opinion, there has been no violation of principle of natural justice and fair play and consequently that contention also must be rejected.

12. For the aforesaid reasons, we find no merit in the appeal which is accordingly dismissed.

(R.S. MOHITE, J.) **(F.I. REBELLO,J.)**