

Commissioner of Commercial Taxes and Others

Vs

Ramkishan Shrikishan Jhaver and Others. State of Kerala : Intervener

Civil Appeals Nos. 150 to 154 of 1967

(CJI K. N. Wanchoo, R. S. Bachawat, V. Ramaswami- I , M. Shelat, V. Bhargava, G. K. Mitter K. G. Hegde JJ)

09.08.1967

JUDGMENT

WANCHOO C.J. –

These five appeals on certificates granted by the Madras High Court raise common questions on law and will be dealt with together. We shall give brief facts in one of the appeals (No. 150 of 1967) arising out of Writ Petition No. 1321 of 1964 in order to understand the questions that fall to be decided in the present appeals. On August 19, 1964, at about 5.00 p.m., the officers of the Commercial Tax Department (hereinafter referred to as the Department) raided the premises of Zenith Lamps and Electricals Ltd. (hereinafter referred to as the company). It is said that the premises were searched and a suit-case was seized and forcibly removed by the officers who made the raid, in spite of the fact that they were informed that the box did not contain any papers or documents belonging to the company and its contents consisted merely of personal effects of one of the managing directors, namely, Shri Ramkishan Shrikishan Jhaver. The raid and search were made by the authorities concerned on information t

It is not necessary to refer to the facts in the other petitions which have resulted in the other appeals before this court because in those cases also there was search and seizure by the officers of the department and their action is being attacked on the same grounds. All the petitions were opposed on behalf of the State Government and its case was, firstly, that section 41 authorised search and seizure; secondly, that the State legislature was competent to enact section 41(4) under item 54 of List II of the Seventh Schedule to the Constitution; and thirdly, that the provisions in question did not offend article 19(1) (f) and (g) of the Constitution and were in any case protected by article 19(5) and (6).

The High Court held that section 41(2) did not allow search being made thereunder, as it only provided for inspection, and the search was a different thing altogether from inspection. The High Court further held that if section 41(2) provided for search it would be within the legislative competence of the State legislature. The High Court took the view that the power of seizure and confiscation of goods contained in sub-section (4) could not be said ancillary and incidental to power to tax sale or purchase of goods and therefore this provision was beyond the legislative competence of the State legislature. Finally, the High Court held that sub-section (2), (3) and (4) of section 41 were unconstitutional as they were unreasonable restrictions on the fundamental rights guaranteed under article 19(1) (f) and (g) of the constitution. Besides the above, the High Court also found with respect to one of the petitions that the search warrant issued for the search of the residential house by the Magistrate disclosed

The same three questions which were raised before the High Court have been raised before us on behalf of the appellant. Before, however, we deal with them we would briefly refer to the provisions of the Act which are material for our purposes. Section 3 is the main charging section which provides that "every dealer whose total turnover for a year is not less than Rs. 10,000... shall pay a tax for each year at the rate of 2 per cent. of his taxable turnover." the point at which tax has to be paid on single point taxable goods is indicated in the First Schedule to the Act and that will show that in a large majority of cases the tax has to be paid at the point of first sale, in the State, though in some cases it has to be paid at the point of first purchase or of last purchase in the State. Section 4 is another charging section in respect of declared goods and the Second Schedule to the Act deals with the point at which tax has to be paid in respect of such goods. That Schedule also shows that in a majority of

"(1) Any officer empowered by the Government in this behalf may, for the purposes of this Act, require any dealer to produce before him the accounts, registers, records and other documents and to furnish any other information relating to his business.

(2) All accounts, registers, records and other documents maintained by the dealer in the business, the goods in his possession and his offices, shops godowns, vessels or vehicles shall be open to inspection at all reasonable times by such officer :

Provided that no residential accommodation (not being a place of business-cum-residence) shall be entered into and searched by such officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area, and all searches under this sub-section shall so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898).

(3) If any such officer has reason to suspect that any dealer is attempting to evade the payment of any tax, fee or other amount due from him under this Act he may, for reason to be recorded in writing, seize such accounts, registers, records or other documents of the dealer as he may consider registers, records and documents so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceeding under this Act :

Provided that such accounts, registers, records and documents shall not be retained for more than thirty days at a time except with the permission of next higher authority.

(4) Any such officer shall have power to seize and confiscate any goods which are found in any office, shop, godown, vessel or vehicle, or any other place of business or any building or place of the dealer, but not accounted for by the dealer in his accounts, registers, records and other documents maintained in the course of his business :

Provided that before ordering the confiscation of goods under this sub-section, the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner :

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation -

(a) in case where the goods are taxable under this Act, in addition to the tax recoverable, sum of money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater; and

(b) in other cases, a sum of money not exceeding one thousand rupees.

Explanation. - It shall be open to the Government to empower different class of officers for the purpose of taking action under sub-section (1), (2), and (3)."

It will be seen from the above brief review of the provisions of the Act that it mainly deals with sales tax to be levied at point of first sale in the State, though there is also provision for purchase tax in certain cases. It is in this background that we have to consider the construction of the section 41 of the Act. So far as sub-section (1) is concerned there no difficulty. It empowers any officer, empowered by the Government in this behalf, to require any dealer to produce before him the accounts, registers, records and other documents and to furnish any other information relating to his business. It may be mentioned here that the Government has empowered all officers of the Department not lower in rank than the Assistant Commercial Tax Officer, of the Revenue Department not lower in rank than an Inspector and all officers of the Police Department not lower in rank than a Sub-Inspector, to act under section 41, sub-sections (2) to (4). Presumably, so far as sub-section (1) is concerned, only officers of

The main dispute centres round the interpretation of sub-section (2) of section 41. The connection on behalf of the respondents is that the provisions did not authorised search of premises but merely provided for inspection thereof at all reasonable times by the empowered officer. We shall first deal with the main part of sub-section (2) to see what it provides without reference to the proviso. Clearly sub-section (2) provides for three things, namely - (i) all accounts, registers, records and other documents maintained by a dealer in course of his business shall be open to inspection at all reasonable times, (ii) the goods in the possession of the dealer shall also be open to inspection, and (iii) the dealer's offices, shops, godowns, vessels or vehicles shall also be open to inspection. There is no doubt that there are no specific words in sub-section (2) giving power of search. But if we read the three powers conferred by sub-section (2) it should not be difficult to hold that search is included therein. I

Similarly, the officer has been given the power to inspect the goods in the possession of the dealer. He has also the power to enter the dealer's offices, etc., for the purpose of such inspection. Combining these two powers together it follows on the same reasoning that the officer the power to search for the goods also and to inspect them if found in the offices of the dealer. We have therefore no hesitation in coming to the conclusion that the power of search is implicit in sub-section (2) with reference both to the accounts, etc., maintained by the dealer and the goods in the possession of the dealer. It also seems to us that this power in sub-section (2) is confined to offices, shops, godowns, vessels and vehicles of the dealer and does not go beyond them. It is urged on behalf of the appellant that, as the officer is entitled to inspect all accounts, etc., maintained by the dealer, he can search for them even in the dealer's residential premises. But we do not agree with contention, for we have the power

Let us now see what light is thrown on the interpretation of sub section (2) by the proviso and whether we have put on the main part of sub section (2) is supported by the proviso. The proviso lays down that : (1) no purely residential accommodation shall be entered into and searched by such officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over

the area; and (2) that all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the code of Criminal procedure, 1898. The letter part of the proviso clearly shows that the main part of sub-section (2) contemplates searches, for it refer to all searches made under this sub-section. If the reference in the second part of the proviso was confirmed only to searches made under the first of the proviso, the word would have been "all searches under this proviso shall be made in accordance with the provisions of the code of Criminal Procedure." The proviso therefore bears out the co

Again in *Commissioner of Income-tax v. Nandlal Bhandari & Sons*, it was observed that "through ordinarily a proviso restricts rather than enlarge the meaning of the provision to which it is appended, at times the legislature embodies a substantive provision in a proviso. The question whether a proviso is by way of an exception or a condition to the substantive provision, or whether it is in itself a substantive provision, must be determined on the substance of the proviso and not its form."

Finally, in *State Of Rajasthan v. Leela Jain*, the question arose whether the proviso in the Act under consideration there was a limiting provision to the main provision or was a substantive provision in itself. This court observed that "so far as a general principal of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operation part." But it was further observed that the proviso in that particular case was really not proviso in the accepted sense but an independent legislative provision by which to a remedy which was prohibited by the main part of the section, an alternative was provided.

These three cases show that in exceptional circumstances a proviso may not be really a proviso in the accepted sense but may a substantive provision itself. It seems to us that the proviso under consideration now is of this exceptional nature. As we have already held, there is no provision in the main part of the sub-section for searching purely residential premises. Therefore when the proviso provides for such search it is providing for something independent of the main part of the sub-section. Further the second part of the proviso which talks of searches made under this sub-section shows that the power of inspection provided in the main part of the sub-section is tantamount to a power of search. We have already come to that conclusion independent of the proviso. All that we need here is that the proviso also shows that interpretation is correct. We may add that we are not precluded from looking at the proviso interpreting the main part of the sub-section. We may in this connection refer to the following p

"There is no rule that the first or enacting part is to be construed without reference to the proviso.

The proper course is to apply course is to apply the board general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.

The true principle undoubtedly is that the sound interpretation and meaning of the statute, on the view of the enacting clause, saving clause and proviso, taken and construed together is to prevail."

But as we have said already even without looking at the proviso, our conclusion is that the main part of the sub-section (2) provides for searches and the provision merely enforce that conclusion. We,

therefore, cannot agree with High Court that sub-section (2) does not provide for search of the business premises of a dealer, in the shape of officer, etc.

Then we come to sub-section (3). That provides for the seizure of accounts, etc., if the empowered officer has reason to suspect that any dealer is attempting to evade the payment of any tax, fee or other amount due from him under the Act. If he has such reason he may for reason to be recorded in writing, seize such accounts, etc. Now if sub section (2) gives power of search, sub-section (3) merely provide further power to seize the accounts, etc., found on such search. We have already held that sub-section (2) gives the power of search and in that case sub-section (3) is merely complementary to sub-section (2) and gives the empowered officer the power to seize the account found in certain circumstances. If any thing, sub-section (3) also bears out that sub-section (2) must include the power of search, for a seizure under sub-section (3) is not possible unless there is a search. Reading therefore sub-section (2), its proviso and sub-section (3) together we are of opinion that they provide for search and seizu

The next question relates to the legislative competence of the state legislature to enact sub-section (4). This sub-section provides for seizure and confiscation of any goods found in any office, etc., including purely residential accommodation, after search, if they are not accounted for in the accounts maintained in the course of the dealer's business. The sub-section thus completes the process which start with sub-section (1) and give authority to the empowered officer to seize and confiscate goods of the nature indicated therein. The contention on behalf of the respondents is that the power of confiscation provided by sub-section (4) was not within the competence of the state legislature under item 54, List 2, of the Seventh relating to tax on sales and purchase of goods. On the other, hand appellant justifies the power to seize and confiscate goods on the ground that it is ancillary and incidental to the power to tax, for it is necessary to have such power in order to check evasion make it unprofitable.

We do not propose in the present case to decide general question whether a power to confiscate goods which are found on search and which are not entered in the account books of the dealer is an ancillary power necessary for the purpose of stopping evasion of tax. Assuming that is so, we have still to see whether sub-section (4) of section 41 of the Act can be upheld read along with the second proviso thereof. It may be added that there is no such provision as the second provision 28 of the Andhra Pradesh General Sales Tax Act. We do not therefore propose to express any opinion as to the correctness of the above decision of the Andhra Pradesh High Court. Sub-section (4) of section 41, before it was amended the Madras General Sales Tax (second amendment) Act, from April 1, 1961, had only the first proviso with respect to giving an opportunity of being heard and making an enquiry in the matter before ordering confiscation. By the amendment of 1961, the second proviso was added. That provides that the officer or

It is next urged that in any case the second proviso is severable and therefore only this proviso would fall and not the main part of sub- section (4). We are however of opinion that clause (a) of the second proviso is not severable. We have already indicated that originally the second provision was not there in the Act. It was brought in by the amendment of 1961 and it compels the officer to give the opinion, and thus compels recovery of tax even in those cases where the tax is recoverable only at the first point of sale in the state which naturally has not occurred in cases of goods from the dealer himself. Considering the fact that the legislature added this compulsory proviso later, it is clear that the legislature intended that the main part of the section and second proviso should go together. It is difficult to hold therefore that after the introduction of the second proviso in 1961, the legislature could have intended that the main part of sub-section should stand by itself. We are

instruct that sub-s

Then we come to the question whether sub-section (2) and (3) of section 41 of the Act which have been struck down by High Court the ground that they are unreasonable restriction on the right to hold property and carry on trade have been correctly struck down. The main reason which impelled the High Court to strike down sub-section (2) was that there was no safeguard provided for search made thereunder. The High Court held that section 165 of the Code of Criminal Procedure did not apply to searches made under sub-section (2). It also held that the State Government was given the power to empower any officer to make a search under sub-section (2) and this meant that even an officer of low status could be empowered. Consequently, the High Court struck down sub-section (2) on the ground that it gave arbitrary power of search which could be made even by an officer of low status. It is true that search under this sub-section can be made by any officer empowered by the Government in this behalf; but we have no reason of the Revenue Department or a Sub-Inspector of the Police Department is not an officer of proper status to make searches under this provision.

We are also of opinion that though sub-section (2) itself provides no safeguards and might have been open to objection on that ground, there is a provision in the proviso to sub-section (2) which lays down that all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure. Therefore, the provisions of the Code of Criminal Procedure, so far as may be, apply to all searches made under sub-section (2). It appears that in the High Court, the parties as well as the court assumed that section 165 of the Code of Criminal Procedure would not apply to searches under-section (2). We cannot see any warrant for this assumption. The proviso clearly lays down that all searches made under this sub-section, so far as may be, shall be made in accordance with the provisions of the Code of Criminal Procedure. Thus, all the provisions contained in the Code of Criminal Procedure relating to searches would be applicable to searches under sub-section (2), s

Next we come to sub-section (3) which, as we have already stated, is complementary to sub-section (2). It provides, in addition to the safeguards which have to be complied with when a search is made under sub-section (2), that the officer may seize accounts, etc., if he reason to suspect that any dealer is attempting to evade the payments of any tax, etc., due from him under the Act. It also provides that the officer has to record his reasons in writing and we are of opinion that these reasons have to be recorded before the accounts are seized. It further provides that the dealer shall be given a receipt, and this means that the receipt must be given as and when the accounts, etc., are seized. Finally, it provides that these accounts, etc., shall be retained by such officer so long as may be necessary for their examination and for any enquiry or proceeding under the Act. These, in our opinion, are sufficient safeguards and the restriction, if any, on the right to hold property and the right to carry on trade

We now proceed to consider what order should be passed in the appeals in the view we have taken about the interpretation and validity of sub-section (2) and (3) of section 412 of the Act. We have already indicated that the High Court held that the warrant issued by the Magistrate for search of the residential accommodation was bad because it showed that the Magistrate had not applied his mind to the question of issuing it, inasmuch as there were portions which should have been struck out from the printed form and gaps which should have been filled in. But this was not done. That conclusion of the High Court has not been challenged before us. The High Court has further held that sub-section (4) falls in its entirety. It follows therefore that anything recovered from the search of the residential accommodation on the basis of this defective warrant must be returned. It also follows that anything confiscated must also be returned, as we have held that sub-section (4) must

fall. As to the accounts, etc., said to

Appeals dismissed.

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