(1968) 09 MAD CK 0012

In the Madras High Court

Case No : Writ Appeal No''s. 106 and 107 of 1968 and W.P. No. 1077 of 1968

K.P. Abdulla and Bros. and Another — APPELLANT

Vs

Check Post Officer, Kandaigoundanchavadi and Others — RESPONDENT

Date of Decision : 23-09-1968

Acts Referred:

Constitution of India, 1950 — Article 246
Tamil Nadu General Sales Tax Act, 1959 — Section 42(3)

Citation : AIR 1970 Mad 25 : (1968) 22 STC 552

Hon'ble Judges : Veeraswami, J;Alagiriswami, J

Bench : Division Bench

Advocate : K. Srinivasan, D. Meenakshisundaram, K.C. Rajappa and C.S. Chandrasekhara Sastri, for the Appellant; Asst. Government Pleader and D. Raju, for the Respondent

Final Decision : Allowed

Judgement

Veeraswami, J.—These appeals arise from an order of Ramakrishnan, J. dismissing two connected petitions, one to-quash a penalty of Rs.

1000 in lieu of confiscation of goods u/s 42 (3) (a) of the Madras General Sales Tax Act 1959, and the other for a direction to the respondents to

deliver to the appellant the goods which had been seized and confiscated while on transit as Kandaigoundan-chavadi check post which is the

border of Coimbatore Dt. in this state and Calicut in the Kerala State. The learned Judge declined to accept that the said provision is invalid, and

held that R. S. Jhaver v. Commissioner of Commercial taxes, 1965 16 STC 708 and The Commissioner of Commercial Taxes and Others etc.

Vs. R.S. Jhaver and Others etc., in which this Court held, the Supreme Court-agreeing with it, that Section 41 (4) was invalid, were

distinguishable.

2. The lorry K.L.R. 3919 was searched by the Check Post Officer and was found to carry at the time 85 bags of which 45 contained maida, 20

atta and 20 khandasari sugar. The lorry driver, however, carried with him a sale bill and delivery note, which covered only 85 bags of atta. On the

ground that the lorry attempted to transport without any sale bill of delivery not for the maida and khandasari sugar and on suspicion that there was

an attempt at evasion of tax, the Check Post Officer by an order dated 2-3-1965, confiscated the goods, but gave an option to the appellant to

pay a penalty of Rs. 1000 in lieu of confiscation of the goods. The Check Post Officer declined to accept the explanation of the appellant which

was that he had purchased in Madras 85 bags of atta, 45 bags of maida and in Nellore 20 bags of Khandasari sugar, he being of the view, as we

said, that there was really an attempt to suppress the sales of maida and khandasari sugar under the cloak of the sale bill and delivery note for atta

only.

3. Before Ramakrishnan, J. no attempt appears to have been made to challenge the validity of the penalty order on its merits and the learned Judge

proceeded on the basis that in the exercise of writ jurisdiction the finding of the Check post officer that the explanation of the appellant was not

acceptable could not be revised. No point about this has been made for the appellant before us. The appeals have, therefore, been confined to the

validity of Section 42 (3) (a) and the effect of 1965 16 STC 708 and The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver

and Others etc., on that question.

4. 1965 16 STC 708 decided bv a Division Bench of this Court, to which one of us was a party, held that the Madras General Sales Tax Act was

not a law of goods and a power to confiscate is not ancillary or incidental to a power to tax on sale or purchase of goods, though of course such

power to tax undoubtedly included the power to make due provisions to prevent or check evasion of tax and make it unprofitable. On that view

this Court struck down Section 41 (4) which provided for search and seizure, from the premises of a dealer, of goody unaccounted for and for

confiscation thereof. The section also provided for levy of penalty in lieu of such confiscation. The Supreme Court agreed with the conclusion of

this Court as to the invalidity of Section 41 (4). but on a different ground. Clause

(a) of the second proviso to Section 41 (4) which was

introduced, by a later amendment, stated that in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of

money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater, may be levied as penalty in lieu of

confiscation. The Supreme Court with reference to this provision, observed at Page 465 (of STC) = (at p. 65 of AIR):--

But under Clause (a) of the second proviso the tax is ordered to be recovered even before the sale, in addition to the penalty not exceeding Rs.

1000 or double the amount of tax recoverable whichever is greater.

5. Referring to the scheme of the Act, the Supreme Court considered that in a large majority of cases covered by the Act, the tax was payable at

the point of first sale in the State and that, therefore, Clause (a) of the second proviso was clearly repugnant to the general scheme of the Act. In

the words of the Supreme Court at page 466 (of STC) = (at p. 65 of AIR):

We are, therefore, of opinion that Clause (a) of the second proviso being repugnant to the entire scheme of the Act, in so far as it provides for

recovery of tax even before the first sale in this State, which is the point of time in a large majority of cases for recovery of tax, must fall on the

ground of repugnancy .... We therefore, agree with the High Court and strike down Sub-section (4) but for reasons different from those which

commended themselves to the High Court.

6. In so holding, the Supreme Court made it clear that it did not propose to decide the general question whether a power to confiscate goods

found on search and not accounted for in the books of account of the dealer was an ancillary power necessary for the purpose of stopping evasion

of tax.

7. Section 42 (3) of the Act, with which we are concerned in the appeals before us, is substantially in pari materia, if not identical with, Section 41

(4) the only difference being that unlike the latter, which provides for goods searched and seized in the premises of the dealer, which are not

accounted for, the former concerns itself with goods under transport by any vehicle or boat across the check post or barrier, and not covered by

the special documents. Except for this difference, which is quite inconsequential from the standpoint of the question of invalidity, Clause (a) of the second proviso to Section 42 (3) is word for word identical with Clause (a) of the second proviso to Section 41 (4). The separate and

independent reasoning on the basis of which this Court and the Supreme Court struck down Section 41 (4) as invalid seems, as we think, to apply

with equal force to the invalidity of Section 42 (3).

8. Ramakrishnan, J. however, felt that there was difference between Section 41 (4) and Section 42 (3) but he did not proceed to detail the

difference. As far as we are able to see, except the difference which we mentioned, there is no other existing between the language, scheme, object

and effect of the two provisions. The learned Judge having noticed the two decisions, one of this Court and the other of the Supreme Court, held

that the ratio or the principle of those decisions will not apply to the facts of the petitions before him, because in his opinion, it had been established

by the finding of the Check Post officer that the taxable event had occurred and the transactions became exigible to tax. In such a case, the learned

Judge was of the opinion that there might be room to hold that the power to seize and confiscate the goods was ancillary to the power to tax and

further the basis of the reasoning of the Supreme Court that a power to confiscate even before the taxable event occurred, that is to say, a sale or

purchase, was inconsistent with the scheme of the Act which was to charge first sales or purchases in the State, was not present here. In our

opinion, the factual position in this case has or can have no bearing on the legislative competence to enact Section 41 (4) or Section 42 (3) in their

present form, or the invalidity of the provisions, because they, as they exist at the moment, proceed to charge the goods to tax even before a sale

or purchase thereof has occurred which is repugnant to the scheme of the Act. Legislative competency to provide for confiscation of goods entirely

depends on whether such a power is ancillary or incidental to power to check evasion of tax or to make it unprofitable which is undoubtedly a part

of the power to tax on sale or purchase of goods. This court held that such a power was not ancillary or incidental to the power of taxation of sale

or purchase of goods. That conclusion rested entirely on the scope and ambit of entry 54 in List II of the Constitution, not on the factual position,

whether a sale or purchase had in a given case taken place. The learned Judge, as we have already mentioned was of opinion, that there might be room to hold that the power to seize and confiscate goods was ancillary to the power to tax sales, where a sale in a given case had taken place.

That, we are bound to point out, was directly in conflict with the view in 1965 16 STC 708 , which is binding on us as well as the learned Judge.

The view of this court was untouched by the Supreme Court as ex-pressly mentioned by it. Nor the fact that a sale or purchase had taken place in

a given case could make any difference to the invalidity of Section 42 (3), because that question depends on the . actual language employed by the

legislature. The vice according to the Supreme Court which invalidated Section 41 (4) lay in the fact that it charged goods to tax even before the

taxable event has occurred which is repugnant to the entire scheme of the Act. That repugnancy is not solved by stating that the Check Post officer

has found that there has been a sale or purchase in respect of the goods seized and confiscat-ed.

9. Apart from what we have said, we are also unable to appreciate how the finding of the Check Post officer that there had been a sale would at

all in the present context be relevant to Section 42 (3), Proviso 2 (a). The appellant is an out of State dealer. So far as his purchase of khandasari

sugar from Nellore is concerned, the transport by him has no reference to any sale or purchase, whether inter-State or intra-State, chargeable to

tax in this State. It does not also appear that the sales of goods in question are subject to single point of taxation. Even so, it is nobody''s case that

the first sales or any sales, for that matter, will have been effected by the appellant. In such circumstances, two things will follow; one is if there is

evasion of tax it is not on the part of the appellant. If he colluded, as the learned Judge apparently thought, that is not covered by the penal

provisions in Section 42 (3). Secondly, it is only where the goods are chargeable to tax, so to speak, with reference to Section 42 (3), proviso 2

(a), that any occasion for seizure and confiscation of the goods can arise. That event does not appear, on the facts, to have happened. It is not any

''taxable event, but it is only a taxable event which is exigible to tax at the hands of the assessee and is the subject-matter of evasion, that will come

within the purview of Section 42 (3). That is not the case here.

10. Before we leave this case, there is one other matter to which we would like to make a reference. The learned Judge referred to Papanna v.

Dy. Commercial Tax Officer, 1967 19 STC 506 . But this very case was noticed by the Supreme Court in The Commissioner of Commercial

Taxes and Others etc. Vs. R.S. Jhaver and Others etc., and it was pointed out that the Andhra Act did not contain a provision like Section 41 (4)

proviso 2 (a). That made all the difference as the Supreme Court itself pointed out, because the main body of sub-section (4) of Section 41, as

was held by the Supreme Court ought to be read as qualified by and in the sense of the two provisos to Section 41 (4).

11. We hold that Section 42 (3) is unconstitutional and invalid, and strike it down. The appeals are allowed with costs throughout. Counsel''s fee

Rs. 100 in each case.. We are informed that in obedience to an interlocutory order of this Court the relative bags of maida and atta have been

returned to the appellant, but 20 bags of kandasari sugar, the subject-matter of confiscation, had been sold by the department in open market. In

the circumstances, this will be taken note of and the respondents will pay the sale proceeds of the khandasari sugar to the appellant.

12. W. P. 1077 of 1968 -- This petition is not opposed by the State. This is allowed, but with no costs.