

(1967) 12 MAD CK 0027
In the Madras High Court

K.P. Abdulla and Bros.

APPELLANT

Vs

The Check-Post Officer, Kandai Goundan Chavadi and Another

RESPONDENT

Date of Decision : 21-12-1967

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1968) 2 MLJ 112

Hon'ble Judges : P.S. Ramakrishnan, J

Bench : Single Bench

Judgement

P.S. Ramakrishnan, J.—The petitioner in these two writ petitions K. P. Abdulla & Bros., by its partner is a general merchant at Court Road, Calicut. The Respondent is the Check-Post Officer, Kandai Goundan Chavadi, Coimbatore, which is on the border of Coimbatore District in the Madras State and Calicut in the Kerala State. The prayer in W.P. No. 1104 of 1965 is for the issue of a writ of certiorari under Article 226 of the Constitution quashing the order of the respondent, dated 2nd March 1965 levying on the petitioner a penalty of Rs. 1,000 in lieu of confiscation of goods passed u/s 42(3)(a) of the Madras General Sales Tax Act, 1959. The prayer in W.P. No. 1154 of 1965 is for the issue of a writ of mandamus to the respondent directing re-delivery of 45 bags of maida, 20 bags of atta and 20 bags of khandasari sugar belonging to the petitioner and which are in the possession of the respondent. The two writ petitions are connected, because the penalty, the subject matter of W.P. No. 1104 of 1965, was imposed in lieu of confiscation of the goods mentioned in W.P. No. 1154 of 1965.

2. The affidavit of the petitioner, reveals the following facts. The petitioner is as partnership firm carrying on business in foodgrains, wheat products etc., in Calicut. In the course of its business it purchased from firms at Madras 85 bags of atta and 45 bags of maida, and purchased from a dealer at Nellore 20 bags of khandasari sugar, the total amounting to 150 bags. It was proposed to transport them in a lorry of United Transport Service, Madras, from Madras State to the

petitioner's place of business at Calicut. But only 85 bags could be loaded in lorry KLR 3919 but the remaining 65 bags could not be loaded and despatched at the same time because the load was not sufficient for a full lorry. Unfortunately the delivery note and the sale bill, which were entrusted by the booking clerk of the lorry office to the driver of the lorry KLR 3919, related to the purchase of 85 bags of atta, while In fact what was loaded in the lorry was 45 bags of maida, 20 bags of atta and 20 bags of khandasari sugar. When the lorry reached the respondent's check-post on its way to Calicut, the Check-Post Officer, after check, became suspicious on account of the fact that the sale bill and the delivery note which the lorry carried mentioned only 85 bags of atta whereas the actual goods found in the lorry comprised of maida atta and khandasari sugar, without any sale bill or delivery note for the maida and khandasari sugar. There were also at the time some restrictions on the transport of sugar and maida, which made it necessary for obtaining a permit from the Civil Supplies Department before the said articles could be transported. But such a permit was not carried in the lorry. In the above circumstances, the respondent took possession of the goods and issued a notice to the petitioner to show cause against confiscation and pay a penalty of Rs. 1,000 in lieu of confiscation. The petitioner submitted that he had really obtained sale bills for the purchase of maida and sugar from the respective merchants, but by mistake only the sale bill and delivery note for atta were sent with the lorry driver without sending the sale bills for sugar and maida. He also pleaded that the maida purchased was in the open market and that khandasari sugar was purchased in Andhra Pradesh and therefore no permit from the Civil Supplies Department was necessary for their transport. But the respondent did not accept the explanation of the petitioner and passed the order mentioned above. He relied upon the circumstance that even though the driver might be ignorant of the real state of affairs, an employee of the petitioner, who was present in the lorry at the time of transport could have explained the alleged real position at the time of check at the check-post. But that was not done, and the respondent considered that the explanation subsequently furnished to the show cause memo was an afterthought and that what was really attempted was to suppress the sales of the maida and sugar under the cloak of the sale bill and delivery note for atta only.

3. The petitioner in these writ petitions has not disputed the correctness of the facts stated above, as to what happened at the check-post; nor can he press this Court while exercising writ jurisdiction for giving a decision that the finding of the Check-post Officer that the explanation submitted by the petitioner is not acceptable and should be reversed, because such a decision will fall within the jurisdiction of a tribunal of appeal. But the petitioner's learned Counsel relied upon a decision of a Bench of this Court reported in *R. S. Jhaver v. Commissioner of Commercial Taxes* (1965) 16 S.T.C. 708 where the Bench, dealing with Section 41 of the Madras General Sales Tax Act, held that Section 41(4) providing for seizure and confiscation of goods was illegal and ultra vires. Learned Counsel urged that the provisions for seizure and confiscation, in Section 42(3) of the Act

and the provision for levy of penalty in lieu of such confiscation in Section 42 (3) Second Proviso, are identical to similar provisions in Section 41(4) of the Act, and for the same reasons as were adopted by, the Bench of this Court in the decision cited above, the seizure and confiscation in the present case should be declared illegal and the goods directed to be restored to the petitioner and the penalty order annulled.

4. It appears to me that there are substantial differences between Section 42 and Section 41, and these differences have to be taken into account for dealing with the argument mentioned above. Section 41 (4), when it confers on the officers of the Commercial Taxes Department the power to search, seize and confiscate goods found in any office, shop, godown, vessel, vehicle or place of business of a dealer, but not accounted for by the dealer in his accounts, confers a wide power. There was room to entertain a serious doubt as to whether that power could be considered as ancillary to the power to levy tax on the sale or purchase of goods conferred on the State Legislature under Entry 54 of List II of the Seventh Schedule of the Constitution. If the presence of the goods in the premises etc., of a dealer without its being brought into the accounts, could lead to the legitimate inference that a sale or purchase had taken place in respect of the goods, without its being properly accounted, for, there may be room to hold that the power to seize and confiscate such goods is ancillary to the power to tax the sales. In that contingency, it can be viewed as a penal measure to discourage the dealers from suppressing such transactions and evading tax, and therefore within the ambit of Entry 54. Veeraswami, J., who delivered the judgment of the Bench in the decision above cited, however, took the view recorded at page 734 of the report:

A provision requiring maintenance of correct stock accounts of goods for purposes of Sales Tax is understandable. But we are unable to see how a power of seizure and confiscation of goods is or can be ancillary or incidental to the power to tax the sale or purchase of goods even from the standpoint of checking evasion or making evasion unprofitable. The Act is not a law on goods. No such law can be made under the guise of Entry 54, List II, of the Seventh Schedule.

The learned Judge thereafter held that Sub-section (4) of Section 41 in so far as it provided for such a power was not within the ambit of Entry 54 and was neither ancillary nor incidental thereto and was incompetent and invalid.

5. The Andhra Pradesh High Court, however, in a decision reported in *Papanna v. Deputy Commercial Tax Officer* (1967) 2 A.W.R. 71 : (1967) 19 S.T.C. 506 arrived at a diametrically opposite conclusion and held that the power to seize and confiscate goods is only by way of punishment or penalty which is intended to operate as the most effective deterrent against tax-evaders and it is therefore ancillary or incidental to the power to levy tax on the sale of goods and falls within the ambit of Entry 54 of List II of the Seventh Schedule. The Andhra Pradesh High Court purported to follow a Mysore High Court decision and differed from the decision of this Court. The point came before the Supreme Court in a

decision in *Commissioner of Commercial Taxes v. R.S. Jhaver* (1967) 20 S.T.C. 453, which was an appeal from the Madras High Court decision in *R. S. Jhaver v. Commissioner of Commercial Taxes* (1965) 16 S.T.C. 708 of the report, the Supreme Court, after referring to the conflicting views of the various High Courts, stated that they did not propose to decide the general question as to whether a power to confiscate goods which were found on search and which were not entered in the account books of the dealer was an ancillary power necessary for the purpose of stopping evasion of tax. They proceeded to deal with the matter before them, namely, the vires of Section 41(4) of the Act, from an altogether different point of view. Their approach was to treat the power to levy the tax payable, as well as a penalty in the Second Proviso of Section 41 (4), as inseparable from the power to seize and confiscate conferred under the main part of Section 41 (4). The Second Proviso of Section 41 (4) was worded thus "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...." In the view of their Lordships of the Supreme Court the above proviso implied that tax had to be ordered to be recovered even before a sale has taken place in addition to the levy of penalty. They remarked that in the majority of cases under the Act recovery of tax is provided at the point of first sale in the State, and that therefore, the provision for recovery of tax in addition to penalty contained in the Second Proviso to Section 41(4), was clearly repugnant to the general scheme of the Act. Since this Second Proviso and the power to seize and confiscate are not severable, from the rest of Sub-section (4), Sub-section (4) with the two provisos thereto must fall on the narrow ground stated above. The Supreme Court struck down Sub-section (4) of Section 41 for reasons different from those which commended themselves to this Court in *R. S. Jhaver v. Commissioner of Commercial Taxes* (1965) 16 S.T.C. 708.

6. What the learned Counsel for the petitioner urges before me is that the various, provisions of Section 42(3) including the two provisos thereto are in pari materia with Section 41(4) and its provisos, and that consequently the reasoning adopted by the Supreme Court should be applied to the power of seizure and confiscation conferred u/s 42 of the Act. But there is a sharp and clearly marked distinction between the two sections which can be illustrated if we take the circumstances of present case into consideration. Here even according to the case of the petitioner the maida and atta had been sold in Madras State and the sugar in the Andhra State, before the transport. The petitioner is a Calicut dealer and the goods when they were checked at the check-post after the aforesaid purchases were on their way to Calicut across the State borders. There is, therefore, no doubt that the taxable event had been completed in the case of these goods, whether at the point of first sale or at the point of a subsequent sale according to the nature of the goods. Therefore, there is no difficulty in the present case to levy the tax payable, as well as the penalty, because the tax had become exigible. Therefore the narrow ground on which the Supreme Court relied for striking down the corresponding provisions in Section 41 does not exist

in this case which arises u/s 42. Learned Counsel for the petitioner contends that since the Supreme Court has not held specifically that the reasons given in the decision of the Bench of this Court in *R.S. Jhaver v. Commissioner of Commercial Taxes* (1965) 16 S.T.C. 708, are not valid it will be open to this Court to adopt those reasons, wherever they apply. From this point of view also, I am of the opinion that the attack on Section 42 cannot be sustained since the facts indicate that a sale of the goods had taken place even according to the admission of the petitioner. It was open to the authorities to take the view that the clandestine features in the transport in this case, indicated a clear intention on the part of the petitioner to suppress information about the sales in collusion with the seller in Madras (or Nellore). In such circumstances it can be held that the power to seize and confiscate is ancillary to the power to levy tax, as it empowered the authorities to take reasonable steps to ensure that the tax is not evaded. Therefore, these writ petitions must fail and are dismissed. No order as to costs.