
(1968) 09 MAD CK 0003
In the Madras High Court

K.P. Abdulla and Brothers

APPELLANT

Vs

The Check-Post Officer, Kandaigoundan Chavadi and Another

RESPONDENT

Date of Decision : 23-09-1968

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 41, 41(4), 42(3), 42(3)(a)

Citation : (1969) ILR (Mad) 484 : (1969) 2 MLJ 144

Hon'ble Judges : K. Veeraswami, J

Bench : Single Bench

Judgement

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

Rs. 1,000 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 at Kandaigoundan Chavadi check-post,

which is the border of Coimbatore district 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 S.T.C. 708, and Commissioner of Commercial

Taxes v. R. S. Jhaver (1968) 1 S.C.J. 121 : (1967) 2 I.T.J. 919 : (1968) 1 A.W.R. 43 : (1968) 1 M.L.J 43 : (1967) 20 S.T.C. 453. 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 or delivery note 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 2nd March, 1965 confiscated the goods, but gave an option to the

appellant to pay a penalty of Rs. 1,000 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 the 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 R.S. Jhaver v. Commissioner of Commercial Taxes (1965) 16 S.T.C. 708 and Commissioner of

Commercial Taxes v. R. S. Jhaver (1968) 1 S.C.J. 121 : (1967) 2 I.T.J. 919 : (1968) 1 A.W.R. 43 : (1968) 1 M.L.J. 43 : (1968) 20 S.T.C. 453

on that question.

4. R.S. Jhaver v. Commissioner of Commercial Taxes (1965) 16 S.T.C. 708, decided by 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 goods 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 latter 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):

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.

1,000 or double the amount of tax recoverable whichever is greater.

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):

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.

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.

5. 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 specified 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).

6. 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,

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 become exigible to tax. In such a

case, the learned Judge was of 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 had 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 a 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 *R. S. Jhaver v.*

Commissioner of Commercial Taxes (1965) 16 S.T.C. 708, which is binding on us as well as the learned Judge. The view of this Court was

untouched by the Supreme Court as expressly 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 depended 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 confiscated.

7. 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 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

provision 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 even 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.

8. Before we leave this case, there is one other matter to which we would like to make reference. The learned Judge referred to *K.S. Papanna and*

Another Vs. Deputy Commercial Tax Officer and Others, . But this very case was

noticed by the Supreme Court in Commissioner of Commercial

Taxes v. R. S. Jhaver (1968) 1 S.C.J. 121 : (1967) 2 I.T.J. 919 : (1968) 1 A.W.R. 43 : (1968) 1 M.L.J. 43 : (1967) 20 S.T.C. 453, 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).

9. 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 khandasari 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.

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