

(1965) 12 KL CK 0024

In the High Court Of Kerala

Case No : Criminal Revision Petition No's. 230 and 231 of 1964

M.P. Kannan, Quilandy and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-12-1965

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(5), 19(6)

Criminal Procedure Code, 1898 (CrPC) — Section 439

Travancore-Cochin General Sales Tax Act, 1125 — Section 17(2A), 19

Citation : AIR 1966 Ker 143 : (1966) CriLJ 659 : (1966) 17 STC 543

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;S. Velu Pillai, J;Anna Chandy, J

Bench : Full Bench

Advocate : K.P. Radhakrishna Menon, for the Appellant; State Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Anna Chandy, J.—The two petitioners in those revision petitions are K. P. Kannan a grocerv dealer in Quilandy and his son M P. Balan They were convicted in two cases C C. 355 of 1962 and C. C 3 of 1962 on the file of the Additional First Class Magistrate. Quilandy. The two cases arose out of the same incident.

2. The facts so far as they are necessary tor the purposes of this case may be stated thus: P. W 1 the Intelligence Officer of the Agricultural Income Tax and Sales Tax, Kozln kode accompanied by two of his Inspectors went to inspect the first accused's shop on the evening of 5-10-1961. They entered the shop and introduced themselves as Sales Tax Officers visiting the shop for the purpose of inspecting the account books. The first accused produced some account books which were inspected by P W 1. In the course of the inspection P. W. 1 noticed some note-books and slips in an open rack and asked him to hand them over for inspection. The first accused placed them on the table. P. W. 1 and one of the inspectors P. W. 2 examined the note books and slips (purchase vouchers and indents about fifty in number) and was satisfied that they related to the first

accused's business and that some of the transactions referred to therein were not entered in the account books originally produced by the first accused. P. W 1 wanted to seize them for further scrutiny and verification. So he recorded in writing the reasons for the seizure (Ext. P-7). He also prepared the receipt Ext. P-8 (in original) with Ext. P-3 (carbon copy) and asked the first accused to sign it. The fact of seizure was also endorsed by him in the first accused's day book Ext. P-2. By this time the second accused came to the shop and asked the first accused not to sign the receipt. Thereupon P W 1 handed over the note books to P W 3 and asked him to take the books to the motor van in which they had come. P W 3 packed them and was about to take them. It was when the second accused went up to P W 3 and caught him by his shirt. The first accused then snatched the packet from P W 3 and passed it on to the second accused who handed it over to somebody in the crowd who escaped with it. P W. 1 proceeded immediately to the police station and reported the matter. The accused were charged separately for the offences under the Penal Code and the Sales Tax Act. In C. C. 355 of 1902 the two accused were convicted u/s 858, I. P. C. for using criminal force to deter a public servant from discharge of his duty and was sentenced to pay a fine of Rs. 250 each. In C C. 3 of 1902 they were convicted u/s 19(c) of the General Sales Tax Act, 1125 for having obstructed the inspection of account books by the officers and sentenced to pay a fine of Rs. 100 each. On appeal to the Sessions Court the conviction and sentence in both the cases were confirmed.

3. In both the cases P. Ws. 1 to 3 gave evidence in support of the incident and proved the relevant records. Both the accused practically admitted the fact that P. W. 1 had "taken into custody some of the records, though they would deny the use of criminal force on the officer or of having forcibly removed the books from his custody. The accused's case is that while the officers were inspecting the books they were asked not to pull out from the almyrah certain books and slips containing Ayurvedic Prescriptions as they were to be preserved. They took offence at this and wrote up something and asked the first accused to sign. He refused to do so as it was in English and was neither read out nor explained to him. Two witnesses were examined by them to support their version of the incident. The learned Magistrate as well as the appellate Judge accepted the prosecution evidence and found that the books and records taken for further scrutiny were forcibly removed by the accused from the custody of the officers,

4. These findings of fact arrived at by the two courts on a proper appreciation of the evidence cannot be challenged in revision and no attempt was made to do so. The main ground- on which the conviction was challenged is that Section 17(2A) of the General Sales Tax Act is ultra vires the Constitution as it offends Article 19(1)(f) and (g) of the Constitution. In C C 3 of 1962 it was urged in addition that since Section 19(c) penalises only prevention or obstruction of the inspection or entry by the officer and not seizure and as the prosecution has no case that any obstruction was offered either to the entry or to the inspection, the conviction is not sustainable.

5. As the latter objection is confined to Criminal R. P 231 of 1964 it may be disposed of first. We feel that the objection has to pro vail. Section 17(2A) was inserted by Section 11(i) of Act 18 of 1955 on 1-10-1955 and it would appear to be an omission on the part of the Legislature not to have introduced a corresponding change in Section 19(c) by penalising the obstruction to seizure as well. It may be noted in this connection that in the Kerala General Sales Tax Act. 1963 the necessary changes have been made in Section 46(2) (a) by penalising prevention or obstruction of inspection entry. search or seizure by an officer The learned State Prosecutor would contend that Section 19(c) will lake in a case of seizure as well because the seizure is implicit in the act of inspection and forms an integral part of it He has also an alternative contention that obstruction to seizure will come within the purview of Section 19(h) which penalises all acts in controaven-tion of any of the provisions of this Act In our opinion both these positions are untenable. If Section 17(2) as originally framed was intended to include taking into custody and removal of the account books for inspection, there was no occasion for the addition of Section 17(2A) to authorise the seizure of such are counts and registers and prescribing the news-sary procedure to be adopted in such a case We are also unable to agree that Section 19 C1 (h) would cover a case of obstruction to seizure as if envisages only acts done by a person in contravention of the provisions of the Act Section 17 (2A)) confers a power on the officer to act in are tain manner and no corresponding duty is in posed on the dealer so as to make his act one in contravention of the provisions of the Act, We accept the objection taken by the learned counsel that Section 19(c) in terms does not penalise obstruction to seizure u/s 17(2A) and set aside the conviction and sentence passed on the accused in C. C No 3 of 1962 Criminal R P No. 231 is allowed.

6. Now we have to deal with the main objection raised by the learned counsel regard ing the Constitutional validity of Section 17(2A) Article 10(1)(f) declares the right of a citizen to acquire, hold and dispose of properly and Article 19(1)(g) to practise any profession of to carry on any occupation, trade or business The limitations to the exercise of that right are contained in Clauses (5) and (6) which recognise the power of the State to make laws imposing reasonable restrictions on the exeros- of any right conferred by sub-clauses (f) and (g) in the interests of the general public Tin- objection taken by the defence is that the restrictions imposed by Section 17(2A) of the General Sales Tax Acl are not reasonable since on the one hand wide and unrestricted powers arc vested in the officers which the exigencies of levy of the tax do no) warrant or justify and on the other hand no safeguards are provided for controlling, regulating or guiding the actions of the officers The issue to be decided by the court is whether the restriction is in excess of the requirements and whether it was imposed in an arbitrary manner In doing so the court is to determine the constitutionality of the restriction imposed upon the exercise of the fundamental right both on the substantive and he procedural aspects

7. The general principles to be kept on view while testing the reasonableness of

the statute have been laid down by the Supreme Court in *State of Madras Vs. V.G. Row*, :

"The test of reasonableness, wherever proscribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition to the prevailing conditions at the time should all enter into the judicial verdict."

(8) It is now for us to examine Section 17 (2A) in the light of the above well-recognised canons. The section reads thus :

"If any officer not below the rank of assessing authority has reason to suspect that any dealer is attempting to evade the payment of any tax or fee due from him under this Act, he may, for reasons to be recorded in writing, seize such accounts, registers, or documents of the dealer as may be necessary, and shall grant a receipt for the same. The officer who seizes such accounts, registers or documents shall return them within ten days from the date of seizure unless they are required for a prosecution."

The nature of the right alleged to be infringed is the first factor which is to be considered. It is only a temporary deprivation of the right to possess the records and documents for a period of ten days unless they are required for prosecution in which case they have to be produced before a court of law. The next relevant consideration is the underlying purpose of the restriction imposed. The underlying purpose, as seen from the scheme of the Act, is to prevent evasion of payment of sales tax, a very legitimate one. Section 16 seeks to achieve this object by insisting on the maintenance of true and correct accounts and records by dealers and Section 17 provides the means to check whether Section 6 is properly complied with. Section 17(1) enables the officer to call upon the dealer to produce accounts for inspection and Section 17(2) insists that the books etc. shall be open to inspection at all reasonable times by the officers. Section 17(2A) is intended to provide for cases in which the officer thinks that a more intensive scrutiny of the accounts is necessary for inspection and for prosecution if need be. The extent and urgency of the evil sought to be remedied thereby is patent and needs no comment. The next consideration is the disproportion of the imposition and it is one of the specific grounds on which the constitutionality of the provision is attacked by the defence. In dealing with the question we have to see whether the limitation imposed has a proximate connection on a nexus with the purpose sought to be achieved. Here the limitation imposed, viz., temporary dispossession of the records and books has a proximate connection with the purpose sought to be achieved, viz. the prevention of evasion of tax by a thorough inspection of the accounts and records and if necessary by a prosecution. As for the prevailing condition of the times we may not be in error when we say from our experience that there is an ever increasing tendency for

the evasion of payment of tax of all kinds including sales tax. On the above mentioned hypothesis we can safely hold that the restriction has a rational relation to the object which the Legislature seeks to achieve and it is not greater than the mischief sought to be prevented.

9. Next we shall examine the reasonableness of the procedural aspect. Under this provision only an officer not below the rank of assessing authority is given jurisdiction to act and that only if he has reason to suspect that any dealer is attempting to evade payment of tax or fee due from him and before he takes action he has to follow the procedure laid down, viz., to record his reasons in writing and then grant receipts for the accounts and registers seized and also to return them within ten days unless they are required for prosecution. It is also relevant to note that only the registers, accounts or documents of the dealer himself and only such of them as may be necessary are to be seized. It is the inadequacy of the procedural safeguards that has been stressed by the defence. It is argued that the restriction is not procedurally reasonable as it empowers the executive to restrict the fundamental right without complying with the rules of natural justice, in so far as (1) the action is taken without notice to the dealer so as to afford him an opportunity to object to the proposed action (2) the decision taken by the officer and the propriety of the action taken by him are not made subject to appeal to a higher administrative authority or to the Government, (3) the necessity for a seizure of the records is made dependent solely on the subjective satisfaction of the officer and (4) no guarantee is afforded by insisting on the action being taken in the presence of independent witnesses and (5) the possibility of abuse of the power due to the failure to provide for the above-mentioned safeguards.

10. In dealing with the above-mentioned objections it has to be noted that the very purpose of the provision would be defeated if the party is given notice of the proposed action thereby affording him an opportunity to secret the relevant accounts, registers and records. The speed and promptness with which the action is to be taken if it is to be effective can also be taken as a justification for making the exercise of the power dependent on the subjective satisfaction of the officer, especially as an additional safeguard is provided by insisting on the reasons being recorded so as to be available for scrutiny if and when the propriety of the action is called in question. Again though the statute does not specifically provide for an appeal to a higher authority the possibility of the action being scrutinised by the superior officers in case of any possible complaint is always there. Moreover so long as the statute itself lays down the conditions which alone give jurisdiction for the exercise of the power and also specifies the manner in which the power is to be exercised there is always the possibility of the acts of the executive authority being open to the challenge of "ultra vires" for violation of the conditions and as such the exercise of the power cannot be said to be unfettered. Regarding the absence of the guarantee afforded by insisting on the action being taken in the presence of independent witnesses as in the case of searches under the Criminal Procedure Code it must be noted that such a

guarantee which is necessary in the case of searches relating to offences under the Penal Code and other similar statutes where the possession of incriminating articles by the accused and their recovery from his possession are by themselves either proof of the offence or a significant item of evidence in support of it, may not be essential in the case of seizure of the account books and registers under the Sales Tax Act, it is when the records themselves and the entries in the books which can-not normally be planted or fabricated and not the factum of recovery or the place of recovery that assumes importance such a safeguard need not be insisted. At best it can be considered as an additional safeguard though we are inclined to take the view that the safeguards that are provided in the act are themselves sufficient to serve the purpose. The mere possibility of the abuse of power is not to be taken into account for determining the reasonableness of the restriction imposed by the law itself but on the contrary it may be presumed that the public authority will act honestly and reasonably in the exercise of his statutory powers. As observed by the Supreme Court in *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, :

"The possibility of abuse of a statute otherwise valid does not impart to it any element of validity. ... The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid "

11. The learned counsel relied on the decision of the Madras High Court in *Shri Ramkishan Srikishan Jhaver and Others Vs. Commissioner of Commercial Taxes and Others*, in support of his contention that Section 17(2A) offends Article 19(1) (f) and (g). That decision struck down Sub-sections (2) to (4) of S 41 of the Madras Sales Tax Act, 1959 as in the opinion of the court they were not reasonable restrictions. Sub-section (2) of Section 41 of the Madras Act deals with the power of inspection, Sub-section (3) with the seizure of accounts, registers, records, corresponding to Section 17(2A) of the General Sales Tax Act and sub-section (4) relates to seizure and confiscation of goods. The explanation to the section authorises the Government to empower different classes of officers for the purpose of taking action under Sub-sections (1), (2) and (3) and the exercise of the powers under Subsection (4) and the Government by notification have invested all officers of the Commercial Taxes Department not lower in rank than the Assistant Commercial Tax Officer, all officers of the Revenue Department not lower in rank than a Revenue Inspector and all officers of the Police Department not lower in rank than a Sub Inspector with powers of inspection, seizure and confiscation under Sub-sections (2) to (4). Their Lordships were of the view that "the exigencies of tax collection do not justify such a general, unrestricted and direct investiture of the power of search on even the minor officials of the various departments, not confined to the lax authorities alone, without any higher official above them, having to examine in each case whether the interests of the State demand or the circumstances of tax collection require, that the power of search

should be exercised in particular and specific cases in the light of information and reasons they have for the purpose and thus exercise caution and eliminate arbitrary, harmful but sometimes futile exercise of the power". The provision made in sub-clause (3) for recording reasons for the necessity of the seizure was in the opinion of the court not a sufficient safeguard "as it is not stated whether the officer has to record his reasons before or after the search and he is not obliged to forward the same to the higher officer to ensure proper exercise of the power and no provision is made for seizure in the presence of Independent witnesses so also the provision for giving a receipt for the books seized" as it is not indicated when the receipt is to be given--at the completion of the search and seizure or long thereafter.

12. The investiture of power by the Government authorising in general all officers of the departments and even those unconnected with the tax department does not arise in the case of Section 17(2A) under which the investiture of power is by the legislature itself and that is confined to officers not below the rank of assessing authority. The notifications published by the Government in that behalf show that no officer below the rank of a Sales tax Officer has been invested with the powers of assessing authority. The officer empowered is one who is exercising a quasi-judicial function as the assessing authority and that assures his competency to take a proper decision as to the necessity of effecting a seizure with reference to the facts of each case. He is also an officer sufficiently high in the hierarchy of officers who could normally be presumed to act honestly and legally. We do not feel that the efficacy of the provision for recording the reasons with regard to seizure is affected by the failure to specify whether reasons have to be recorded before or after the search or of the provision to give a receipt for any amount as to whether it is to be given at the completion of the search or long thereafter. The provision that the officer may seize the account books for reasons to be recorded implies that the recording of reasons is a condition precedent to the search. So also the wording of the section leaves no room for doubt that the receipt has to be given sometime before the removal of the books. A provision for the seizure being effected in the presence of independent witnesses is no doubt an additional safeguard, but as indicated earlier, in the nature of the power exercised and the other conditions and limitations by which it is hedged in, it cannot be said that the absence of such an additional safeguard will justify the power being characterised as arbitrary, naked or unrestricted. As the above discussion should make the position sufficiently clear we do not feel it necessary to go into the other decisions cited in the Madras case. We overrule the objection that Section 17 (2A) of the General Sales Tax Act 1126 offends Article 19(1)(f) and (g) of the Constitution.

18. The Criminal Revision Petition No. 230 has only to be dismissed.