

(1973) 04 KL CK 0006
In the High Court Of Kerala
Case No : O.P. No. 5899 of 1970

Raja Rice and Flour Mills and Others

APPELLANT

Vs

Inspecting Assistant Commissioner, Agricultural Income Tax
and Sales Tax (Intelligence) and Another

RESPONDENT

Date of Decision : 03-04-1973

Acts Referred:

Constitution of India, 1950 — Article 14, 19

Citation : (1973) 32 STC 131

Hon'ble Judges : P. Govindan Nair, J;G. Viswanatha Iyer, J

Bench : Division Bench

Advocate : V. Rama Shenoi and R. Raya Shenoi, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

G. Viswanatha Iyer, J.

1.This original petition is filed by two firms and their partners and they seek a declaration that the provisions of Section 23(3)(a) authorising the officers of the sales tax department to retain the books, records and documents of dealers for a period of more than one month as unconstitutional and violative of Articles 14, 19(1)(f) and (g) of the Constitution. They also pray that a writ of mandamus may be issued to the 1st respondent to return the documents and records seized by him or produced before him and covered by his receipts [exhibits P1, P1 (a) and P3] within a time to be fixed by the court.

2. These two firms are carrying on the business of millers. The 1st petitioner-firm is carrying on the business of hulling of paddy and converting millets into powder. The 2nd petitioner-firm is also carrying on the business of crushing copra into coconut oil. The premises of both these firms are situated in the same compound. On 24th July, 1970, the Inspecting Assistant Commissioner, Agricultural Income Tax and Sales Tax (Intelligence), with his subordinates

visited the premises of the above firms and took into custody and removed certain books of account, letters and slips for which he issued two receipts of even date, copies of which are produced as exhibits P1 series. By notices dated 25th July, 1970, he called upon petitioners 1 and 2 to produce before him the day-book, ledger, purchase bills, sale bills of each of the petitioners for the years 1969-70 and 1970-71 with details of opening stock as on 1st April, 1970. The petitioners produced these records and the 1st respondent issued (exhibit P3) receipt to them. Though these records were required by the petitioners for their daily use and to submit returns before the Income Tax and sales tax authorities and the petitioners wanted them to be returned, the 1st respondent failed to return them for nearly two months and so the petitioners by a letter dated 25th September, 1970, requested the 1st respondent to return the documents in question. In that letter the petitioners 1 and 2 undertook to produce these records before the 1st. respondent whenever required by him subject to reasonable notice. They also pointed out that if the 1st respondent wanted copies of these records for any purpose he was free to take photographic or other true copies at his cost and the petitioners will certify them as true copies. They also stated that the 1st respondent may seal every page of the records before they are returned to the petitioners 1 and 2. Copy of that letter is produced in this case as exhibit P4. By notice dated 31st August, 1970, but signed on 1st September, 1970 and posted on 26th September, 1970, the 1st respondent informed the petitioners that they have suppressed the turnover, have failed to maintain true and correct accounts and called upon them to show cause why prosecution should not be instituted against them for the offence of failure to maintain true and correct accounts and knowingly filing untrue returns. Copies of these notices are produced as exhibits P6 series. To answer these charges; in these notices the petitioners stated that they required a thorough study of the books and records with the assistance of their lawyer and, therefore, by their letters dated 1st October, 1970, they again requested the 1st respondent to return the books retained by them. They also requested that they may be given sufficient time to file their objections after return of the books and records. By letter dated 6th October, 1970, the 1st respondent refused to return the books and records covered by exhibits P1 series and exhibit P3 stating that they are retained for the purpose of prosecution. In that letter he asked the petitioners to take the required copies thereof at his camp on 13th October, 1970, for the purpose mentioned in their letters. Copy of this reply is produced in this case as exhibit P9.

3. The petitioners contend that the books and other records taken from their custody pursuant to the receipts evidenced by exhibits P1 series and P3 are the properties of the petitioners and they are entitled to be in possession of them and to have the use of them for purposes of carrying on their business and matters incidental thereto, that the 1st respondent is entitled to retain them only for the purpose of collecting materials necessary for assessment of the petitioners to sales tax and to check them for purpose of seeing whether there is

any evasion. Even if he requires them for evidence in any proceeding he is not entitled to retain them for an indefinite and unlimited period. That will amount to a deprivation of their use to the petitioners. Apparently, the 1st respondent is retaining them beyond a period of one month relying on the last sentence in Section 28(3) of the Kerala General Sales Tax Act, 1963, which reads as follows :

The officer who seizes such accounts, registers or documents shall return them within 30 days from the date of seizure unless they are required for a prosecution.

4. Even so, the 1st respondent is not entitled to rely upon that provision for the purpose of retaining the books and other records produced by the petitioners on 20th August, 1970, as per exhibit P3 receipt. The petitioners contend that the provisions of Section 28(3)(a) extracted above does not authorise the 1st respondent to retain the books covered by exhibit P1 series for whatever period that suits him even for the purpose of prosecution. This retention amounts to violation of the fundamental rights of the petitioners under Article 19(1)(f) and (g). It is further contended that the refusal of the 1st respondent to return the books is without any good faith and in order to harass the petitioners and to cause them unlawful loss. If this provision allows the 1st respondent to retain them for an indefinite period, this provision is arbitrary, irrational and unreasonable and offends the guarantee of equality of law and equal protection of the laws enshrined in Article 14 Of the Constitution and, therefore, it is invalid. In these circumstances, they have filed this petition with the prayers mentioned above.

5. The 1st respondent has filed a counter-affidavit in which he admitted the seizure of the records mentioned in exhibit P1 and also the receipt of records produced by the petitioners mentioned in exhibit P3. According to him, on a verification of these records he had reasonable grounds to think that the firms were not maintaining correct and complete accounts of their business. Hence a further enquiry is necessary regarding the liability of the firms. These records are material evidence in the prosecution against the dealers and if they are returned without completing the enquiries it will result in the records being kept away by the petitioners and placing them beyond his reach and it will be impossible for him to produce the material evidence in the prosecution proceedings. He has reasonable apprehension that the petitioners may even tamper with the records. If any information from these records are necessary for the petitioners, for the purpose of either filing the incometax returns or for other matters, they can peruse them and can apply for certified copies. On a verification of the slips and other records seized as per exhibit P1 and compared with the books produced by them as per exhibit P3, the 1st respondent has reasonable ground to suspect suppression of turnover to the extent of 17 and odd lakhs during 1969-70 and more than one lakh during 1970-71. Therefore, the 1st respondent has reasonable grounds to think that the petitioners have not kept true and complete accounts deliberately and have knowingly submitted untrue returns. In these

circumstances, he justified the retention of these records until the prosecution proceedings are over. He admitted that he issued a notice calling upon the petitioners to show cause why prosecution steps should not be launched against them. To answer this charge he gave them every facility to look into the accounts and if necessary to take copies and so their complaint before this court that they were not able to make a thorough study of the accounts for filing objections is unsustainable. He has filed two complaints on 16th November, 1970 and 19th November, 1970, before the District Magistrate, Tellicherry, against the petitioners for offence punishable u/s 46 of the Kerala General Sales Tax Act and those proceedings are pending. These records have been produced along with the complaint before the court of the District Magistrate (Judicial), Tellicherry. The contention that the latter part of Section 28(3)(a) of the General Sales Tax Act, 1963, is invalid and violates Article 14 or 19(1)(f) and (g) is denied. This provision only imposes a reasonable restriction in the exercise of the fundamental right to hold property and to carry on trade and it is submitted that these restrictions are protected by Clauses (5) and (6) of Article 19. On these averments the 1st respondent opposed the original petition.

6. The first question that has to be considered is about the constitutional validity of Section 28(3)(a), especially the last portion of the last sentence in that clause. That sentence reads as follows:

The officer who seizes such accounts, registers or documents shall return them within 30 days from the date of seizure unless they are required for a prosecution.

7. This provision is attacked on the basis that it gives a vague and wide power to the Sales Tax Officer to keep the account books on the pretext that they are required for prosecution. According to the petitioners, this provision giving, as it does, unguided power to retain the books for the purpose of prosecution is liable to be misused and hence is unconstitutional. The section does not give any guideline to the officer to follow. If the copies of the account books are sufficient or an undertaking is given by the dealer that he will produce the account books as and when, required by the Sales Tax Officer for production in court or if the Sales Tax Officer initials and seals the relevant entries in the records which he may require for prosecution, normally the purpose of prosecution can be satisfied. But, the Sales Tax Act or the Rules do not provide for the return of the account books after arranging for one or the other of the safeguards referred to above. This, according to the petitioners, is a conferment of an unguided power to the Sales Tax Officer to retain these account books on the pretext that they are required for prosecution. If a law does not provide for such, safeguards, according to the petitioners, the power is liable to "be abused and, therefore, the provision violates Article 14 of the Constitution. In support of this contention reliance is placed on the decision of the Supreme Court in K.A. Abbas Vs. The Union of India (UOI) and Another, at 496, para 48, which reads as follows :

Where however the law admits of no such construction and the persons applying

it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act AIR 1961 SC 293 This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual.

8. On behalf of the State it is contended that a similar provision under the General Sales Tax Act, 1125, namely, Section 17(2A) has been upheld by this court in *M.P. Kannan, Quilandy and Another Vs. State of Kerala and Others*, A similar provision of the Madras Act was upheld by the Supreme Court in *Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others*, The Allahabad High Court also construed a similar section of the U.P. Act and upheld it as valid in *Agrawal Engineering Stores v. State of Uttar Pradesh* [1971] 28 STC 507 UP Similar provisions exist in the Sales Tax Acts of other States. In West Bengal, Punjab, Madhya Pradesh, Orissa, Gujarat and Maharashtra, the provision is to the effect that these records seized may be retained so long as they are necessary for proceedings under the Act for prosecution. In Andhra, Mysore and Madras the provision is to the effect that the permission of the higher authorities must be obtained for retention beyond 30 days of the records seized. In Bihar, Rajasthan and Uttar Pradesh the provision is that the account books must be returned within 90 days of the date of seizure.

9. If the provision is capable of a construction that would make it valid that is the manner in which the section should be understood. This is clear from the decision in the case already referred to, namely, *K.A. Abbas Vs. The Union of India (UOI) and Another*, . In all these decisions referred to earlier it was held that this provision is only in the nature of a reasonable restriction and does not violate the fundamental rights guaranteed under the Constitution. A provision which will enable the State, in the interest of the public, to safeguard the interest of the State in the matter of collection of tax and for the prosecution of those who are believed to have committed offences under the Act will not in any way be said to be an invalid provision. We believe there must be a power for the State to seize and retain the account books if they are necessary for the collection of the tax or for prosecution under the Sales Tax Act. It cannot be said that the provision is invalid because in particular cases they might have been misused. Therefore, in the light of the decisions already referred to, where similar provisions in the Sales Tax Act of other States have been upheld, the provision of Section 28(3)(a) reasonably construed, which we will hereafter mention, is valid and we uphold the same.

10. The question then is what is the scope and ambit of the power u/s 28(3)(a) of the Sales Tax Act. The section does not give power to retain the documents for a length of time. The omission to mention in the section a specific period for which the documents could be retained cannot be interpreted to mean that they can be retained for any length of time. The section only enables the safeguarding of the interests of the State in the collection of tax and for the prosecution of

those who are believed to have committed offences under the Act. This is in the interest of the general public. This interest must not wipe out the personal rights and interests of the person from whom the documents are taken. The two must be reconciled. If the production, when wanted, of these records in courts can be ensured without retaining them with the Sales Tax Officer or if certified copies of these records will satisfy the purpose, it must be understood that these records are not necessary for the purpose of prosecution. The records can be retained or can be said to be required for the purpose of prosecution only if the prosecution proceedings could not be continued or proceeded with without these records being retained by the Sales Tax Officer. That may happen if the ownership of the records and handwriting of the entries is a matter in dispute. It is difficult to exhaust the list of cases of this nature. It is reasonable to hold that if the requirement of prosecution can be met without these records being retained by the Sales Tax Officer, the section can be understood as only conferring such power in the Sales Tax Officer. In this connection, the decision of the Court of Appeal in England in *Ghani v. Jones* [1969] 3 A.E.R. 1700 may be usefully referred to. In that case the retention of a passport by the police was challenged. Lord Denning, M.R., held that the public interest in assisting the administration of justice by production of the relevant records must be balanced with the private right of the individuals as regards the records belonging to them and a course of action which will cause the least prejudice to the citizen must be adopted by the police. In so balancing the two interests, Lord Denning, M. R., laid down certain criteria to be followed by the police in the matter of seizing and retaining the articles belonging to the accused. The 4th criterion, which he has stated, reads as follows :

The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

11. Adopting this criterion in that case, the learned Judge directed the return of the passports seized by the police. In the same manner the latter part of Section 28(3)(a) of the Sales Tax Act should be understood to mean only that the retention of the original records is necessary if they are to be used as material objects to prove the commission of the offence or where the authenticity or the handwriting of the entries will be a matter which will have to be gone into in the prosecution proceedings. If the genuineness of the books seized are not matters in dispute and the dealer agrees to certify that the records seized belong to him and authenticated copies are sufficient to enable the prosecution to proceed with the criminal proceedings, normally that alone will be deemed necessary and such copies must be taken by the authorities and the originals returned to the dealers on their certifying the copies as true copies of the originals. The power u/s 28(3) (a) can only be understood in this way.

12. In this case, the authorities have already initiated criminal proceedings and have produced the records, which were seized by the Sales Tax Officer, before the District Magistrate's Court (Judicial), Tellicherry and Sales Tax Cases 31, 32 and 33 of 1970 are pending before that court. It may not be proper on our part to make any direction regarding return of the books in these circumstances, without that court dealing with the question as regards the necessity for retaining them. It will be open to the petitioners to move that court for return of these books and papers if they are required by the petitioners before the termination of the criminal proceedings and we are sure that the matter will be carefully considered and appropriate orders passed by that court in the light of the observations made above. That court will also expedite the hearing of that case.

13. In the result, with the above observations, we dismiss the original petition. But in the circumstances, we make no order as to costs.