
(1976) 09 CAL CK 0011
In the Calcutta High Court
Case No : A.O.D. No. 997 of 1973

State of West Bengal and Others

APPELLANT

Vs

Sarda and Sons

RESPONDENT

Date of Decision : 07-09-1976

Acts Referred:

Constitution of India, 1950 — Article 166, 226
Income Tax Act, 1961 — Section 127

Citation : 81 CWN 312 : (1977) 40 STC 419

Hon'ble Judges : M.N. Roy, J;A.K. Sen, J

Bench : Division Bench

Advocate : G.N. Roy, for the Appellant;R.N. Dutta and Manisha Sil, for the Respondent

Final Decision : Dismissed

Judgement

M.N. Roy, J.—This appeal under Clause 15 of the Letters Patent is directed against the determination by Debiprosad Pal, J., made in Civil Rule No. 1519(W) of 1973 on 13th September, 1973. By the said determination, the rule in question was made absolute following the determination of the said learned Judge in the case of A.S. Narayana v. State of West Bengal 78 C.W.N. 295. The respondents in this appeal, M/s. Sarda & Sons, is a partnership firm (hereinafter referred to as the said firm) registered under the Indian Partnership Act, 1932 and at the material time it carried on business of dealing in iron and steel materials and was also the manufacturer of various iron goods. The said firm came into existence by virtue of a partnership deed dated 5th April, 1965 and previous to such incorporation, the business in question was a proprietary concern of one Ram Chandra Sarda having 10 annas share and Ghanashyam Sarda having a share of 6 annas. There is also no dispute that the said firm is a dealer within the meaning of Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the said Act), having registration certificate No. JK/2658-A. Apart from the said registration the said firm is also registered under the Central Sales Tax Act, 1956, having registration certificate No. 233-A(JK)(C).

2. From a reference to the statements in the petition, it appears that the said firm was an assessee under the Acts as mentioned hereinbefore and was not a defaulter. It has been alleged that on or about 10th January, 1973, three persons introducing themselves as Inspectors of the Bureau of Investigation, respondents Nos. 1, 2 and 3 (hereinafter referred to as the said respondents), entered the premises of the said firm and wanted to search its office. It also appears that even in spite of the request made by the manager of the said firm, the search in question was conducted and in pursuance thereof the said respondents seized and took away various books of account, declaration forms, sale bills, challans, bank statements and other documents or papers. The said firm has alleged such search and seizure to be illegal, unauthorised, void apart from being baseless and mala fide.

3. Thereafter, on or about 5th April, 1973, a notice dated 4th April, 1973 (annexure D), issued u/s 14(1) of the said Act was received by the said firm asking it thereby to appear on 31st May, 1973, before the Commercial Tax Officer-cum-Investigating Officer, Bureau of Investigation, with all the books of account and connected documents relating to the concerned period and also to furnish necessary explanations of the said books, records and documents, if necessary, which were seized on 10th January, 1973. The seizure report and the list is at annexure C to the petition. It has been alleged by the said firm that in issuing the notice in question, respondent No. 4 did not apply his mind at all, inasmuch as no period was mentioned for the production of accounts and connected documents and, as such, the said notice was also termed to be illegal, void and without jurisdiction. It has also been alleged by the said firm that in the course of assessment or in connection with any assessment proceedings, there were no allegations at all to the effect that the said firm had attempted or is attempting to evade payment of any tax. In fact, it has been stated that no tax is due and payable by the said firm to the authorities concerned. The said firm has also contended that respondent No. 4 had no competence, authority or jurisdiction to issue the said notice u/s 14(1) of the said Act, as he was not the assessing Commercial Tax Officer for assessing it and, as such, the said respondent also acted illegally, arbitrarily and against all principles of natural justice, not only in issuing the said notice but also in not disclosing the reasons for issuing the same u/s 14(1). The said firm has contended that on receipt of the notice, they asked for time on the ground of the absence of their accountant, who, at the relevant time had left for his native place on account of a marriage in his family. But the said letter was not replied to by the respondents. It has also been stated by the said firm that there was or is absolutely no material before the said respondents, on the basis of which the alleged reasons to suspect in the case of the said firm could be formed and, more particularly, for the formation of the belief that the said firm was attempting to evade payment of any tax under the said Act. The said firm has further contended that the said respondents at all material times had no and still they have no power under the said Act to enter and search the business premises and to seize the records as mentioned

hereinbefore and, in that view of the matter, the purported search and seizure made on 10th January, 1973 and all proceedings taken therein were and are illegal, invalid and without or in excess of jurisdiction. Relying on the provisions of Section 14 of the said Act and the sub-sections thereunder, it was also contended that the period for retention of the books of account and other documents so seized could not, in any event, be beyond 21 days, if the seizure was made by the Inspector or Commercial Tax Officer and, in fact, such period had expired on 1st February, 1973 and, furthermore, the seized books of account and other documents, etc., could not also be retained more than 42 days by the Inspecting Officer, as such period had already expired on 22nd February, 1973. Thus it was stated that on the expiry of the said periods, the respondents had no competence, authority or jurisdiction to retain the seized books of account and documents in contravention of Rule 70 of the Rules as framed under the said Act, for unlimited period. There is also no dispute that those records as seized are still lying with the said respondents. It has further been contended by the said firm that on the expiry of the said period of 21 days and/or 42 days, i.e., on and from 1st February, 1973, or on 22nd February, 1973, the said firm had acquired the right to have the said books of account, documents or papers, etc., returned to them under Rule 70 of the said Rules read with Section 14 of the said Act and the respondents had no lawful authority or jurisdiction to continue to retain or detain them. It has also been stated that it was incumbent upon the respondents to forthwith release and return those documents to the said firm but they have failed to do so and thus to perform their legal obligations. In view of the above, it was contended that the respondents at all material times were and still are in wrongful and unauthorised possession of the said books of account, documents and papers. The said firm has further contended that after the expiry of the period of 21 days or 42 days, as the case may be, the respondents were and are, as stated hereinbefore, in wrongful and unauthorised possession of the records seized on 10th January, 1973, from their business premises, inasmuch as no written sanction or reasons for retaining and/or detaining them have been recorded by the Assistant Commercial Tax Officer or the Commissioner of Commercial Taxes and, as such, the entire action was unauthorised, without jurisdiction and illegal. In any event, it was submitted that the detention of the documents in question, without giving the said firm any opportunity of being heard, was also improper, irregular and void.

4. It appears from the records of this proceeding that there is or has been no return of this rule and on 13th September, 1973, when the matter was taken up for hearing, the learned Judge in the trial court, as mentioned hereinbefore, following the determination in the case of *A.S. Narayana v. State of West Bengal* 78 CWN. 295, wherein it has been held considering the provisions of the said Act that,

(i) the State Government was entitled to set up the Bureau in the exercise of its executive power; it is not necessary that the executive Government must obtain prior legislative sanction for the exercise of its executive power; the mere fact

that there was no law for constituting the Bureau did not by itself affect the validity of the constitution of the Bureau, (ii) that the officials concerned having been released from the Commercial Tax Directorate and having been appointed to new posts under the Bureau had ceased to be the designated officers under the Commercial Tax Directorate and were not entitled to exercise any of the powers of such officers under the said Act and (iii) that even assuming that the said officers could exercise the power under the said Act, the order sanctioning the seizure of the books beyond 21 days of the seizure not having been communicated to the petitioner, the retention of the books beyond 21 days was illegal and without jurisdiction,

5. has made the rule absolute holding that the officers of the Bureau in the instant case ceased to be the officers under the said Act by reason of their appointment in the Bureau and the order of seizure made by respondent No. 2 as such was illegal and without jurisdiction. It has further been held that, in any event, the books having been retained after the expiry of the period of 21 days from the date of seizure and sanctions, the entire action was vitiated.

6. The said judgment of the learned Judge in the trial court in A.S. Narayanans case 78 C.W.N. 295, in respect of the determinations other than the determination on the question of return of the documents, has been set aside by a Bench decision of this Court reported in State of West Bengal v. Narayana 80 C.W.N. 901. In that decision it has been held on the construction of the relevant notifications and the Ordinance, that the Bureau so constituted has been a statutory authority and is an integral part of the organisation of the Commercial Tax Directorate constituted under the said Act and/or for the purposes for which the said Act was enacted. It has also been observed that the officers posted in the Bureau are within the Tax Directorate and have been duly conferred with the powers of search and seizure and, as such, the search and seizure made by the officers concerned in that case were found to be valid and warranted by law and there was no illegality at any stage of the proceedings. Those apart, it has also been observed that the relevant provisions clearly indicate that the Bureau has been made a part and parcel of the organisation of the Directorate with the Commissioner as the principal authority for carrying out the purposes of the said Act and it has been held that the amendment made by the Ordinance and continued thereafter by the Amendment Act of 1974 changed the law with retrospective effect and was a proper legislative Act although it might have the effect of nullifying the judgment of Pal, J. From a reference to the judgment, as mentioned hereinbefore, it appears that no determination on the question of return of the documents as seized or the powers and competence of the authorities concerned to retain them after the expiry of the statutory periods as mentioned hereinbefore, has been made in view of the admitted facts that the documents so seized in that case were already returned.

7. In this case, the documents as seized have neither been released nor returned to the assessee but they have, in terms of an order made by this court, been

retained by the respondents. The documents and records in the instant case were admittedly seized on 10th January, 1973, pursuant to a seizure receipt (annexure C) u/s 14(3) of the said Act and as they were retained after the statutory period of 21 days from the date of such seizure, the question is the extent of power of the respondents under the provisions of Section 14 of the said Act, to retain the documents and records so seized, beyond the time as prescribed and the effect of non-communication of the sanction to retain beyond the statutory period of limitation and not on the other point, as the same has been duly determined by the Bench decision as mentioned hereinbefore and Mr. Dutta appearing for the respondents, in his usual fairness, has conceded that no such determination by us is required to be made on the point of the constitution, authority and competence of the Bureau as and so established.

8. In support of the appeal, Mr. Roy, appearing for the appellants, contended that the retention of the documents beyond 21 days in the instant case was legal and valid and in any event appropriate sanction for such retention beyond the statutory period was duly given in this case. He also submitted that considering the provisions of the said Act and the Rules framed thereunder it should have been held by the learned Judge in the trial court that such retention of the documents beyond 21 days in the instant case was not only proper but the said action could not, in any event, become improper, because of the fact that the assessee was not given the intimation of the sanction by which extension was granted. In any event, it was submitted that at present the period of retention of the books and documents so seized has been extended from 21 days to 1 year by way of an amendment in 1974 by the incorporation of Section 14(3A) by Section 2(ii) of the Bengal Finance (Sales Tax) (Third Amendment) Act, 1974 (West Bengal Act 7 of 1974) and the deletion of Rule 70 with effect from 5th November, 1973, by the West Bengal Government, Finance Department Notification No. 3837-F.T. and such incorporation being retrospective, the action to retain the documents, in the instant case was not irregular. It must also be recorded that even taking the submissions of Mr. Roy to be correct and valid, viz., the limitation in the instant case was one year, the action was also barred and there was or has been no communication of the extension as has been alleged to be sanctioned. The assessee on the other hand submitted that in terms of the provisions of Section 14(1) of the said Act, the said firm had acquired the right of having the books of account, documents and papers, etc., so seized, returned to it and it was incumbent on the respondents to forthwith release and return them to the said firm. It was contended that the said respondents have in fact failed to do so and the retention of the documents beyond the statutory period was thus unauthorised. It was also contended by the said firm that no reason, to its knowledge have been recorded in writing in the instant case by the Commissioner for the purpose of retaining or detaining the documents in question for the purported examination. From a reference to the decision under appeal, it also appears that at the time of the hearing of the case before the learned Judge in the trial court no such reasons could be found out

from the records. In this appeal, the relevant records incorporating the sanction or the reasons recorded in writing have not also been produced. Mr. Roy submitted that the recording of reasons under the provisions of the said Act and the sanction as given are administrative acts and, as such, they are not required to be informed or communicated to the assessee and in the event of refusal or failure to give such information, there will be no cause for any violation of the principles of natural justice, which incidentally was made the main plank of the arguments of the said firm in the rule. In support of his contentions, Mr. Roy submitted that the learned Judge in the trial court was wrong in his interpretation and application of the principles as enunciated in the decisions of the Supreme Court in the cases of Bachhittar Singh Vs. The State of Punjab, and Bidya Deb Barma Etc. Vs. District Magistrate, Tripura, Agartala, . In the case of Bachhittar Singh Vs. The State of Punjab, , the appellant was appointed as a qanungo in the former State of Pepsu in the year 1950. On 1st December, 1953, he was appointed Assistant Consolidation Officer. Certain complaints having been received regarding tampering with official records, he was suspended and an enquiry was held against him by the Revenue Secretary of Pepsu Government. As a result of that enquiry, the Revenue Secretary dismissed him by order dated 30th August, 1956, on the ground that the appellant was not above board and was not fit to be retained in service. This order was duly communicated to the appellant. Thereupon, the appellant preferred an appeal before the State Government. It further appears that an advance copy of his appeal to the Revenue Minister of Pepsu was sent, who called for the records of the case immediately. After perusing them, he wrote on the file that the charges against the appellant were serious and that they were proved. He also observed that it was necessary to stop the evil with a strong hand. He, however, expressed the opinion that as the appellant was a refugee and had a large family to support, his dismissal would be too hard and that instead of dismissing him outright, he should be reverted to the original post of qanungo and warned that if he did not behave properly in future, he would be dealt with severely. On the next day, the State of Pepsu merged in the State of Punjab. The appellant contended that the said remarks amounted to an order of the State Government and that they were orally communicated to him by the Revenue Minister. This fact was, of course, denied by the State. It is, however, common ground that the said remarks or order, whatever may be, were never communicated officially to the appellant. After the merger of Pepsu with the State of Punjab, the file was put up before the Revenue Minister, Punjab. On December 1/4, 1956, the said Revenue Minister remarked on the file "serious charges have been proved by the Revenue Secretary and Shri Bachhittar Singh was dismissed. I would like the Secretary I/c to discuss the case personally on 5th December, 1956". Then on April 2/8, 1957, the Minister noted on the file "C. M. may kindly advice". With this remark, the file went up before the Chief Minister, Punjab, who on April 16/18, 1957, passed an order, the concluding portion of which reads thus:

Having regard to the gravity of the charges proved against this official, I am

definitely of the opinion that his dismissal from service is a correct punishment and no leniency should be shown to him merely on the ground of his being a displaced person or having a large family to support. In the circumstances, the order of dismissal should stand.

9. This order was communicated to the appellant on 1st May, 1957. Thereafter, he preferred a petition under Article 226 of the Constitution of India, which, as already stated, was dismissed by the Punjab High Court.

10. The validity of the order of the Revenue Secretary dismissing the appellant was not challenged in the Supreme Court. The point which was urged was that the order of the Revenue Minister of Pepsu having reduced the punishment from dismissal to reversion, the Chief Minister of Punjab could not sit in review over that order and set it aside. Two grounds were urged in support of the point. The first was that the order of the Revenue Minister of Pepsu was the order of the State Government and was not open to review. The second ground was that in any case it was not within the competence of the Chief Minister of Punjab to deal with the matter inasmuch as it pertained to the portfolio of the Revenue Minister.

11. It has been observed by the Supreme Court on consideration of the relevant facts of the case that before something amounts to an order of the State Government, two things are necessary, viz., the order has to be expressed in the name of the Governor as required by Clause (1) of Article 166 of the Constitution and then it has to be communicated. The Constitution requires that the action must be taken by the authority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor, whatever the Minister or the Council of Ministers may say in regard to a particular matter, does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage, a Minister of the Council of Ministers may express a quite different opinion, one which may be completely opposed to the earlier opinion. Therefore, to make the opinion amount to a decision of the Government, it must be communicated to the person concerned. It is of the essence that the order has to be communicated to the person who will be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication, the order cannot be regarded as anything more than provisional in character.

12. In the other case of Bidya Deb Barma v. District Magistrate, Tripura AIR 1969 S.C. 323, which incidentally was a case under the provisions of Preventive Detention Act, 1950, it has been observed that;

A detention under the Preventive Detention Act is not illegal merely because the approval of the State Government to the detention is not communicated to the detenu. Section 3(3) of the Preventive Detention Act does not specify that the order of approval is anything more than an administrative approval by the State Government. Hence, the necessity of communication of the approval does not arise with that strictness as does the decision under Rule 30A(8) of the Defence of India Rules. The scheme of the Preventive Detention Act is merely to approve the original detention by the District Magistrate and the continued detention after 12 days is not under any fresh order but the same old order with the added approval and what the detenu can question, if he be so minded, is the original detention and not the approval thereof.

13. Mr. Roy further submitted that if the reasons for the search and seizure and the necessary sanction are recorded in the file that would mean enough or at least substantial compliance with the provisions of the said Act and no communication of those reasons or the sanction would be necessary and required.

14. It has been submitted on behalf of the said firm that under the provisions of the said Act, reasons for the search and seizure were not only required to be recorded but they were also required to be communicated to them and so also the subsequent sanction to any extension for retaining the records beyond the period of limitation and such submissions were made on the analogy of the decision of the Supreme Court in the case of *Ajantha Industries v. Central Board of Direct Taxes* [1976] 102 ITR 281 (S.C.). The said case was one u/s 127(1) of the Income Tax Act, 1961. The appellants in that case were assesseees under the Income Tax Act, whose assessments were completed for a number of years in the usual course at Nellore. On 23rd January, 1973, the Central Board of Direct Taxes sent a notice to them u/s 127 of the Act, proposing to transfer their case files "for facility of investigation" from the respective Income Tax Officer at Nellore to the Income Tax Officer, B Ward, Special Circle II, Hyderabad. By that notice they were also asked to submit in writing if they had any objection to such transfer within 15 days of receipt of the notice. In spite of filing of such objection, the transfer of the file in the manner as mentioned above was effected and the Supreme Court while determining the point has held that the non-communication of the reasons in the order passed u/s 127(1) of the Income Tax Act, 1961, was a serious infirmity. Such determination was made as it was observed that:

The requirement of recording reasons u/s 127(1) of the Income Tax Act, 1961, for the transfer of a case from one Income Tax Officer to another, is a mandatory direction under the law and noncommunication thereof to the assessee is not saved by showing that the reasons exist in the file although not communicated to the assessee. Recording of reasons and disclosure thereof are not a mere idle formality. When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the

principles of natural justice on account of omission to communicate the reasons is not expiated.

15. In support of its contentions that retention of the records beyond the period as prescribed was improper and irregular, the said firm also relied on the determination of the Kerala High Court in the case of Mubarak Stores Vs. The Intelligence Officer, Agricultural Income Tax and Sales Tax and Another, , where on the relevant provisions of the Kerala General Sales Tax Act, 1963 and, more particularly, in view of the language of Section 28(3)(a), it has been observed that the words "required for a prosecution" as used therein, can mean only "required for an existing prosecution". It may include a prosecution existing at the time of the seizure and also one which the authority may institute within the period of 30 days for which he is entitled to retain the records. But the retention of the records after the period of 30 days from the date of their seizure in anticipation of a prosecution or a contemplated prosecution is not warranted by the said section of the Act.

16. Mr. Roy sought to distinguish the determination in the case of Bachhittar Singh Vs. The State of Punjab, on the facts of the present case and also contended relying on the language of Section 127(1) of the Income Tax Act, 1961 and that of Section 14(1) of the said Act, that the determination as made in the case of Ajantha Industries and Others Vs. Central Board of Direct Taxes, New Delhi and Others, would not hold good in the instant case. He submitted that since in Section 14(1) of the said Act there is no mention about any communication of the order or the sanction for extension of the time to retain the documents as seized thereunder, so the determination by the Supreme Court in the case as mentioned hereinbefore and the more so on the basis of the specific requirements of Section 127(1) of the Income Tax Act, would have no application. Mr. Roy, on the other hand, relying on the determination in Bidya Deb Barma Etc. Vs. District Magistrate, Tripura, Agartala, , submitted that since the order made u/s 14(1) of the said Act or the sanction to extend the time to retain the documents, were administrative actions or orders, so they were not required to be communicated. We are unable to accept such a contention of Mr. Roy. The order u/s 14(1) of the said Act or the subsequent sanction to extend the time for retention of the documents or records thereunder admittedly deals with or abridges the rights of an assessee under the said Act and irrespective of whether such orders are administrative in nature or not such orders prejudicially affects men in business by detaining their books of account. Mr. Roy had to concede that even such orders were appealable under the statute itself apart from other rights of the assessee to challenge such orders in other forums. Hence the assessee can reasonably ask for or require the communication thereof as they have a right to challenge the same and, more particularly, when their right as guaranteed under the said Act is being interfered with or jeopardised. We are also of the view in terms of the determination of the Supreme Court in the case of Ajantha Industries and Others Vs. Central Board of Direct Taxes, New Delhi and Others, , that recording of reasons and disclosure of

the sanction made thereon in the facts and circumstances of this case and on the provisions of the said Act are not a mere formality and they are also needed and their communication is required, as such action may affect prejudicially the interest of the assessee, viz., the said firm in this case. We are also of the view that the provisions of Section 14 and its sub-sections are mandatory in nature. Thus, in the admitted facts of the case, it must be held that non-communication as aforesaid was fatal and that itself would be enough to dispose of the appeal, upholding the conclusions on the point of the learned Judge in the trial court in favour of the said firm and against the contention of the revenue as, admittedly, the order of extension, if any, was not communicated to the said firm far less the reasons therefore. Thus the retention of the documents in the instant case beyond the original period of 21 days or the subsequent amended period of one year was improper, unauthorised, illegal and without jurisdiction. Apart from this, according to us, there is no basis, justification or validity of the contention as made on behalf of the revenue, since not only the said period of 21 days but the amended period of one year had also expired and no valid sanction to extend the period of time for the retention of the documents has been produced and perhaps such order had not been made. In fact we expected that during the course of the hearing of the appeal, the revenue would produce their records showing the sanction as recorded, but nothing was done. In that view of the matter, we uphold the determination of the learned Judge in the trial court that the documents and records having been retained beyond the period as specified, was illegal, unauthorised and without jurisdiction and, as such, this appeal should fail. As stated hereinbefore, we further hold that the provisions of Section 14(3A) of the said Act are mandatory and noncompliance with them or the provisions thereunder would be fatal and, in fact, such inaction on the part of the revenue has made the proceedings in the instant case unauthorised, void, illegal and irregular.

17. Mr. Roy thereafter submitted that the said Act being a complete code itself as the same affords complete and adequate relief by way of appeal, revision and review in Section 20, no interference in the writ jurisdiction by this court should have been made. Mr. Roy also submitted that the said firm was not at all diligent and the writ application should not have been entertained because of the delay, wilful laches and negligent conduct of the same. Mr. Dutta, appearing for the said firm, submitted that in fact there has been no wilful laches or any neglect on the part of the said firm as the application for a rule was duly moved on 11th June, 1973. He submitted that the said firm was never intimated or informed about the purported sanction extending the period for retaining the documents or records so seized. He also submitted, relying on Section 19 of the said Act, which operates as a bar to certain proceedings, that, in view of the facts of the case and, more particularly, in view of the admitted non-compliance with the provisions of Section 14 of the said Act and the mandatory provisions therein, the entire action was without jurisdiction and authority and, as such, the application in question was maintainable and the same was duly entertained and

no order contrary to the determination as made by the learned Judge in the trial court should be made. Since we have already held that the impugned order was unauthorised, void and without jurisdiction, the submissions made on behalf of the revenue have also no force and the more so when the right of appeal under the statute was frustrated by non-communication of the relevant order. In the facts and circumstances, the said firm had every right and competence to ask for a writ as in the instant case and, as such, the application in question was rightly entertained.

18. In view of the above, all the arguments of Mr. Roy fail and, as such, the appeal should be dismissed and we order accordingly. There will however be no order for costs. All interim orders are vacated.

Anil Kumar Sen, J.

19. I agree.