

**Binny Limited and Vs. Assistant Commercial Tax Officer (intelligence)-lr, South Zone, Bangalore**

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**Court :** Karnataka

**Decided On :** Jun-02-1988

**Reported in :** [1988]71STC240(Kar)

**Judge :** S.A. Hakeem and ;S. Rajendra Babu, JJ.

**Acts :** Karnataka Sales Tax Act - Sections 28, 28(2) and 28(3); Madras General Sales Tax Act - Sections 41; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 165

**Appeal No. :** Writ Appeal Nos. 104 and 467 of 1988

**Appellant :** Binny Limited and ;p. Ramachandrasetty

**Respondent :** Assistant Commercial Tax Officer (intelligence)-lr, South Zone, Bangalore

**Advocate for Def. :** R.H. Chandangoudar, Government Adv.

**Advocate for Pet/Ap. :** K. Srinivasan and ;B.P. Gandhi, Adv.

**Judgement :**

**S. Rajendra Babu, J.**

1. These two appeals involve common questions of law and facts. They are heard together and disposed of by this judgment.

2. There is a delay of 3 days in filing Writ Appeal No. 467 of 1988. We have heard the learned counsel for the appellant and respondent in this case and we are satisfied that the appellant has shown sufficient cause in the affidavit filed in support of the application for condoning the delay and we allow the same.

3. The respondent and a team of officers under him entered on 13th March, 1987 the business premises of the appellant in W.A. No. 467 of 1988 and seized several documents and books. The case of the respondent is that they had information that the appellant is effecting stock transfers of goods, such as silk fabrics, to its various show rooms outside the State of Karnataka. In order to verify the correctness of such transactions and also to verify whether the dealer is complying with the provisions of the Karnataka Sales Tax Act, the inspection of the office was taken up and at that time, an officer of the appellant-company was present who made available the required books of accounts and other documents. A preliminary verification of the relevant documents revealed certain discrepancies. Thereafter the said officer in exercise of his power under section 28(3) of the Karnataka Sales Tax Act seized the documents from the said officer of the appellant as listed below :

Exhibit A-1 One box file containing stock transfer invoices October, 1983 to July, 1984. Exhibit A-2 One box file containing stock transfer invoices July, 1984 to September, 1984. Exhibit A-3 One box file containing stock transfer invoices December, 1984 to September, 1984. Exhibit A-4 One box file containing stock transfer invoices for June, 1986 onwards. Exhibit A-5 One box file containing stock transfer invoices 30th September, 1985 to May, 1986. Exhibit B-1 One indent book 16th February, 1985 to 22nd December, 1985.

4. A perusal of the seizure order discloses that the said officer of the appellant had made available certain books of accounts and other records for scrutiny by the respondent. But it is not clear whether books and documents seized were the same, as were made available by the officer of the appellant.

5. The facts in Writ Appeal No. 104 of 1988 are also similar. The respondent visited the business premises of the appellant on 20th November, 1986 and the proprietor of the concerns made available certain documents for his scrutiny. On examination he found certain discrepancies, and seized a large number of books and documents as detailed in the order relating to 'Balaji Agencies' and 'PEE ORR Agencies' Consisting of files relating to several Customers, purchase registers, stock registers, godown registers; in all 13 files, 16 registers and 2 bill files, which clearly indicates that there must have been a lot of probing before seizure was made. It is not clear from the seizure order whether the proprietor himself made available the seized books and documents or not.

6. These two orders were challenged on the ground that the seizure was preceded by a search and not inspection without following the mandatory requirement of the law as provided in the proviso to section 28(3) of the Karnataka Sales Tax Act (hereinafter referred to as the 'Act') in two separate writ petitions, on several grounds.

7. The learned single Judge on examining the facts of the case held that the seizure of books and documents impugned in each of the writ petitions was a result of inspection and not one made after search and does not suffer from any illegality, and hence dismissed the said petitions.

8. Aggrieved by the decision of the learned single Judge, these writ appeals have been filed.

9. Provisions under section 28 of the Act are in pari materia with section 41 of the Madras General Sales Tax Act. The Supreme Court in Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver [1967] 20 STC 453 while examining the provisions of section 41 of the Madras Act noticed the distinction between the 'inspection' and 'search'. In the case of G. M. Agadi & Bros. v. Commercial Tax Officer, Belgaum [1973] 32 STC 243 this Court further elaborated the matter that there could be seizure of books and documents either as a result of inspection or as a result of search. Their Lordships also set out certain circumstances as to whether in a particular case the seizure can be said to be one as a result of 'inspection' or 'search' and observed :

'All searches are inspections, but all inspections are not searches. A search is a thorough inspection of a man's house, building or premises or of his person, with the object of discovering some material which would furnish evidence of guilt for some offence with which he is charged. It implies a prying into hidden places for that which is concealed. If the object sought for is always in plain sight, then there is no search. If the private account books had been kept in the counter openly at all times and they could have been found on inspection at any time of the day, then the seizure of such account books cannot be said to have been made after a search.'

10. Thus though there is distinction between 'search' and 'inspection' as noticed by the Supreme Court and this Court in the aforesaid decisions, it is only in *Harikisandas Gulabdas & Sons v. State of Mysore* [1971] 27 STC 434 this Court considered the scope of 'inspection' and observed as follows :

'If his intention was to inspect and verify the accounts of the petitioner, he would have called for the required accounts and other registers. He did not even inform the petitioner that he would be visiting its premises. He gave a surprise visit along with his staff, and there he searched and seized some accounts and other documents without following the procedure prescribed under the Code of Criminal Procedure. If his intention was only to verify the accounts, it was unnecessary for him to go to the premises of the petitioner. We have no doubt that he went and searched the business premises of the petitioner and illegally seized the accounts and other documents, but made it appear that they were voluntarily given to him.'

11. However the learned single Judge took the view that the observations made by the Division Bench in the said case that inspection could be only after issue of notice or information, was obiter and should be confined to the facts of the case.

12. His Lordship observed that in view of the distinction noticed in *R. S. Jhaver's case* : [1967] 66 ITR 664 (SC) and the observation in *Krishna Chettiar v. State of Madras* [1968] 21 STC 258 (SC) that surprise inspection was permissible and in such a case the question of notice did not arise and relied upon a judgment of the Patna High Court in [1974] 34 STC 9 (*Jib Narain Sao v. State of Bihar*). In [1968] 21 STC 258 (SC) (*Krishna Chettiar v. State of Madras*), when the officers went for

inspection at the business premises of the dealer, some papers were produced for inspection before the officers, but the accountant was found putting the account books in a gunny bag and running away by the back door of the premises and in those circumstances observed that the question of giving reasons for the purpose of seizure would not arise and it was in that context that their Lordships observed :

'They had first to get hold of the books and could record their reasons in writing later when the actual seizure was to be made. When the account books never came into the possession of the Sales Tax Officers because they were taken away from them and removed, no question of recording of reasons in the case at all arose'

13. and further stated as follows :

'Now it is quite true that if the Code of Criminal Procedure governed the search, then as required under section 165, which is applicable, the reasons for the search have to be recorded in writing before the search is carried out. But this condition does not obtain when the officer only wishes to inspect the accounts, registers or other documents under the first and the second sub-sections of section 41. There is no requirement of recording of reasons at that stage, because all that the officer has to do is to go and ask the dealer to produce his account books for his inspection.'

14. It is in those circumstances the observation quoted by his Lordship in his judgment was made by the Supreme Court, which is not the position here. In our view the said observations are wholly inapplicable to the facts of the case. The passage quoted, explains the scope and ambit of inspection and seizure of the documents and books and does not deal with a situation and circumstances in which what started as an inspection may become a search. Therefore with great respect to the learned Judge, we cannot agree that the observations in the decision of *Harikisandas Gulabdas and Sons* [1971] 27 STC 434 (Mys) are only obiter and must be confined to the facts of the case. Indeed the facts and circumstances of that case are fully apposite to the cases on hand. Surprise inspection though permissible as held in *Chandrika Sao v. State of Bihar* [1963] 14 STC 398 by the Supreme Court, the facts and circumstances of these cases do

not lead to the inference of surprise inspection and seizure as a result of it. Moreover even on the basis of the test laid down in Agadi's case [1973] 32 STC 243 (Mys) the seizure of the documents in the instant cases has to be held as resulting from 'search' and not 'inspection'.

15. The seizure order in W.A. No. 467 of 1988 does not spell out as to who produced the documents referred as exhibits A-1 to A-5 and exhibit B-1. What was produced was only sample documents referred to in the earlier part of the seizure order and perused by the respondent. Therefore as observed in Gulabdas's case [1971] 27 STC 434 (Mys), the search is carried out in the guise of inspection without following the mandatory requirement of section 28, and hence the searches and seizures are invalid. In W.A. No. 104 of 1988 large number of books, documents and files are seized, whereas what were voluntarily produced were only five documents relating to PEE ORR Agencies and 5 documents relating to Balaji. Therefore the seizure of documents must be held to be as a result of search. Seizure in both cases are invalid having been made without following the mandatory provisions of section 28 of the Act.

16. The question that arises now for consideration is as to what relief should be given to the appellants in these cases. This Court has in a large number of cases taken the view that even if the search or seizure is held to be invalid the documents, files and books belonging to the dealer, which are seized and ordered to be returned; but in such an event the extracts and notes, of the documents made by the department are allowed to be retained by the department as has been held by this Court in W.A. No. 513 of 1980 (Commercial Tax Officer v. Habib and Sons) following : ILR 1985 KAR594 and Universal Investments Co. v. Assistant Commercial Tax Officer v. (Intelligence), South Zone, Bangalore ([1985] 59 STC 252). However, Sri Gandhi, learned counsel for the appellant, referred to a judgment of this Court in W.A. No. 56 of 1978 in Commissioner of Commercial Taxes v. S. Y. Modagekar & Sons, disposed of on 17th of March, 1978, in which this Court has observed as follows :

'It was strenuously contended for the appellants that the direction in regard to return of the copies or notes that had been made was erroneous. We do not find

any substance in this contention either. The matter has been the subject of rulings of the Supreme Court as well as this Court. The Supreme Court, in *Commissioner of Commercial Taxes v. R. S. Jhaver* : [1968]1SCR148 , upheld the order of the High Court of Madras in regard to such a direction that had been made. The matter was considered by this Court in *Harikisandas Gulabdas & Sons v. State of Mysore* [1971] 27 STC 434 and a Bench of this Court rejected such a contention that had been urged by the department. In that case, this Court made pointed reference to the decision of the Madras High Court which had been upheld by the Supreme Court in : [1968]1SCR148 (*Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver*). We are not disposed to take a different view. However, the learned counsel for the appellant urged that the department was entitled to make use of the materials even though they might have been got illegally and referred to the observations of the Supreme Court in *Pooran Mal v. Director of Inspection* AIR 1974 SC 348. That principle is in no way effected or attracted in the instant case. If the department had made use of such material and passed an assessment order, possibly the assessee could not contend that the assessment is illegal merely on that ground. No such contingency arises in the instant case.'

17. It was contended that these observations in W, A. No. 56 of 1978 (*Commissioner of Commercial Taxes v. S. Y. Modagekar & Sons*) are in conflict with the views expressed in W.A. No. 513 of 1980 (*Commercial Tax Officer v. Habib and Sons*) and both being decisions of the Division Benches of this Court the matter needed to be referred to a Full Bench. However, in our opinion the matters have been settled by the Supreme Court in the case of *Dr. Partap Singh v. Director of Enforcement, Foreign Exchange Regulation Act* : 1986 CriLJ824 . In the said decision the Supreme Court relying on *Pooran Mal v. Director of Inspection (Investigation) of Income-tax* : [1974]93ITR505(SC) rejected the contention and observed as follows :

'If the search is shown to be illegal, anything seized during such illegal search will have to be returned to the person from whose premises the same was seized.'

'It would tantamount to saying that evidence collected during illegal search must be excluded on that ground alone. This was in terms negated by the Constitution Bench.'

'It has often been held that the illegality in the method, manner or initiation of search does not necessarily mean that anything seized during the search has to be returned.

After all in the course of search, things or documents have to be seized and such things and documents may seized may furnish evidence. Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the court or the authority before which such material or evidence seized during the search shows to be illegal, is placed has to be cautious and circumspect in dealing with such evidence or material.'

18. Therefore, the observations of this Court in W.A. No. 56 of 1978 (Commissioner of Commercial Taxes v. S. Y. Modagekar & Sons) in view of the pronouncement of the Supreme Court in Dr. Partap Singh v. Director of Enforcement, Foreign Exchange Regulation Act : 1986 CriLJ824 on the basis of Pooran Mal's case : [1974]93ITR505(SC) are no longer good law. Therefore, following the decision of this Court in W.A. No. 513 of 1980 (Commercial Tax Officer v. Habib and Sons) we have to direct that the respondents will have to return the documents and books seized. Of course there shall be no order for the return of extracts and notes as claimed by the appellant in W.A. No. 104 of 1988. Therefore we allow the appeals as indicated above. Consequently, writ petitions stand allowed in the manner indicated above. However, the learned Government Advocate seeks four weeks time from today for return of the documents. Time granted accordingly.

19. Appeals allowed.