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Court : Karnataka

Decided On : Mar-25-1983

Reported in : 1983(2)KarLJ433; [1984]55STC225(Kar)

Judge : K.S. Puttaswamy, J.

Acts : Karnataka Sales Tax Act, 1957 - Sections 28(2) and 28(3)

Appeal No. : W.P. No. 42181 of 1982

Appellant : Hastimal Kothari

Respondent : Commercial Tax Officer, Intelligence-i, South Zone, Bangalore

Advocate for Def. : S.V. Narasimhan, High Court Government Pleader

Advocate for Pet/Ap. : B.P. Gandhi, Adv.

Judgement :

Puttaswamy, J.

1. A partnership firm called 'Vaishali Traders' engaged in the business of dealing in electrical goods, consisting of the petitioner as one of its partners, is a registered dealer on the file of the Commercial Tax Officer, IV Circle, Bangalore, under the

Karnataka Sales Tax Act, 1957 (hereinafter referred to as 'the Act'). The petitioner has his residence at No. 76/3, Mariswamy Mutt Lane, Cottonpet Cross, Bangalore-53.

2. On 10th November, 1982, one Sri P. S. Chengappa, working as the C.T.O. (Intelligence) I, Bangalore (hereinafter referred to as 'the C.T.O.'), made an application in C. Miscellaneous No. 193 of 1982 before the Metropolitan Magistrate, Second Court, Bangalore, under section 93 of the Criminal Procedure Code and section 28(2) of the Act, to issue a search warrant to search the residential premises of the petitioner and to seize the incriminating documents found therein relating to the firm. On an examination of that application, the learned Magistrate made an order on the same day in these terms :

'Perused the application and I am satisfied with reasons. Hence issue search warrant to search the premises No. 76/3 (Old No. 108) belonging to Hastimal of Mariswamy Matadagalli, Binny Mill, Bangalore, for the purposes stated in the application.

Report by 1st December, 1982.'

Hastimal referred to in the order of the learned Magistrate is the petitioner in the case.

3. In pursuance of the aforesaid order, the learned Magistrate issued a search warrant addressed to the C.T.O. on that day which reads thus :

'WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE

(See section 93)

To

Commercial Tax Officer I, Bangalore City (Intelligence) (Name and designation of the Police Officer or other person or persons who is or are to execute the warrant).

Commercial Tax Officer (Intelligence) I, South Zone, Bangalore.

Whereas information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of (mention of the offence concisely)

Under section 93, Cr. P.C.

and it has been made to appear to me that the production of (specify the thing clearly)

Residential premises of Hastimal is essential to the inquiry now being made (or about to be made) into the said offence (or suspected offence).

This is to authorise and require you to search for the said (the thing specified residential premises of Hastimal) in the (describe the house or place or part thereof to which the search is to be confined) Hastimal, No. 76/3 (Old No. 108) Mariswamy Matadagalli, Binny Mill Road, Bangalore City, for the purpose stated in the application, and if found to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it immediately upon its execution. Dated this 11th day of November, 1982. Sd/- Metropolitan Magistrate, II Court, Bangalore City.'

4. Armed with the search warrant issued by the Magistrate, the C.T.O. accompained by six other officers of the department, searched the residential premises of the petitioner on 11th November, 1982, from about 10.15 A.M. to 11.30 A.M. and seized certain account books and documents detailed in a mahazar drawn up thereto (annexure C) on that day. Ever since then, the C.T.O. has retained the seized account books and documents obtaining permission from his superior officer for the same. In this petition under article 226 of the Constitution presented on 9th December, 1982, the petitioner has challenged the search warrant issued by the Magistrate (annexure A), the order of seizure made by the C.T.O. (annexure B) and has sought for a writ in the nature of mandamus to the C.T.O. to forthwith return the books and documents to him.

5. The petitioner has challenged the search and seizure on a number of grounds, which will be noticed and dealt in due course.

6. In his return, the respondent has justified the order of seizure made by the magistrate, and the search and seizure effected by him. He has asserted that his action was bona fide and was for the purpose of achieving the object of the Act.

7. Before examining the various contentions urged by Sri B. P. Gandhi, the learned counsel for the petitioner, it is necessary to examine whether it is open to examine the validity of the search warrant as the order made for search has not been challenged.

8. Sri Gandhi relying on the ruling of the Supreme Court case in Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver : [1968]1SCR148 and various other rulings that have followed the same, contends that a challenge to the order of search was not necessary and that in its absence also, it was open to this Court to examine the validity of the search warrant and the search made thereto by the C.T.O.

9. Earlier I have set out the nature of the application made by the C.T.O. and the order made thereto by the learned Magistrate. The search warrant and the seizure effected thereto derive their authority and efficacy to the order for search made by the Magistrate. The search warrant issued, though important, is a ministerial act performed in pursuance of an earlier judicial order in that behalf. The primary order is the order for search and the challenge must be primarily to that, though in such challenge it is open to challenge the search warrant and other acts that emanate from the order for search.

10. When the petitioner does not challenge the order for search made by the Magistrate, that being the primary order, it would be proper for this Court to decline to examine the order challenged on that short ground alone.

11. An order for search made by a Magistrate under the Criminal Procedure Code is also revisable by this Court or the Sessions Court under that Code either suo motu or at the instance of the aggrieved person. On this ground also, it would not be proper to examine the same, that too in the absence of a challenge to the same in the writ petition.

12. In Jhaver's case : [1967]66ITR664(SC) the challenge was primarily to the vires of the section and the consequent search under the Madras Sales Tax Act and therefore the primary question that came to be decided was on the validity of the provision. Hence, Jhaver's case : [1967]66ITR664(SC) is not an authority for the proposition that a challenge to the order for search is not necessary.

13. In cases where a search and seizure is effected by the very authority, that too in cases commencing with an inspection as it generally happens, the position is different and that is not the position in the present case.

14. On the above discussion, it follows that it would be proper to decline to exercise the power conferred by article 226 solely on the ground that there is no challenge by the petitioner to the order for search made by the learned Magistrate. But, I do not propose to do so for more than one reason. Firstly the records of the learned Magistrate are before this Court. Secondly, article 227 of the Constitution also enables this Court to suo motu examine the validity of the proceedings of the learned Magistrate. Thirdly, both parties have addressed their elaborate arguments on the validity of search and seizure without taking any technical objection on the failure of the petitioner to challenge the order of the learned Magistrate. Lastly, my order itself is subject to appeal before this Court. Hence, I now proceed to examine all other contentions urged before me.

15. The account books and documents were seized by the C.T.O. on 11th November, 1982, and have been retained by him thereafter also. The proviso to section 28(3) of the Act enables the authority that seizes the documents, to retain them for a period of 60 days in the first instance and thereafter only with the permission of the next higher authority and not otherwise.

16. On 4th January, 1983, the C.T.O. requested the Deputy Commissioner, Commercial Taxes (Intelligence), (South Zone) (hereinafter referred to as the D.C.), who is his immediate superior officer or next higher authority to permit him to retain the documents from 10th January, 1983, to 7th March, 1983. The reason he gave was that he was not able to complete the proceedings due to the non-appearance of the petitioner. On an examination of that request, the D.C. on 4th January, 1983, granted that request of the C.T.O. Before the expiry of the time

granted on 4th January, 1983, the C.T.O. requested the D.C. to permit him to retain the books and documents from 7th March, 1983, to 6th May, 1983. The reason he gave was that the matter was seized by this Court and therefore, he has not been able to complete the proceedings. On an examination of that request of the C.T.O., the D.C. on 7th March, 1983, has granted that request.

17. With the permission so granted on 4th January, 1983, and 7th March, 1983, the C.T.O. has retained the books and documents. Those orders made by the D.C. have not been communicated to the petitioner is apparent from the records produced before this Court and that fact is not also disputed by Smt. M. R. Vanaja, the learned High Court Government Pleader, appearing for the respondent.

18. Sri Gandhi contends that the power exercised by the D.C. was quasi-judicial and was not administrative and therefore, he was bound to make that order with notice to the petitioner and after affording him an opportunity of hearing and considering the objections that may be urged against the same. In support of his contention, Sri Gandhi strongly relies on the ruling of the Supreme Court in Assistant Collector of Customs and Superintendent, Preventive Service Customs, Calcutta v. Charan Das Malhotra : 1973ECR1(SC) .

19. Smt. Vanaja contends that the power exercised by the authority under the proviso to section 28(3) of the Act was purely administrative and that before making an order under that provision, the authority was not required to notify, hear the petitioner and make a speaking order. In support of her contention, Smt. Vanaja strongly relies on the Division Bench rulings of the High Court of Allahabad in Pratap Narain Agarwal v. Union of India 1973 Tax LR 2168 and the High Court of Gujarat in Karsandas Popatlal Dhinoja v. Union of India 1981 ELT 268.

20. Proviso to section 28(3) of the Act that authorises the next higher authority to permit the retention of documents beyond 60 days, on the construction of which the question requires to be decided reads thus :

'Provided that such accounts, registers, records and documents shall not be retained for more than sixty days at a time except with the permission of the next higher authority.'

The proviso does not direct the next higher authority to notify the person from whom the books and documents have been seized, afford him an opportunity of hearing and communicate the same to that person. On the language of the proviso and reading the proviso in the context in which it occurs, the nature of power conferred on the authority appears to be purely administrative and not quasi-judicial. If the power conferred was administrative, the authority was not required to notify the petitioner, afford him an opportunity of hearing, consider his objections and make a speaking order.

21. In Charan Das Malhotra's case : 1973ECR1(SC) , the Supreme Court dealt with the proviso to section 110(2) of the Customs Act that permitted the retention of documents beyond 180 days 'only on sufficient cause being shown'. It is on this language of the section, the Supreme Court held that the nature of power exercised was quasi-judicial and the person affected by the same had a right to oppose and to be heard. But, the language of the proviso to section 28(3) of the Act unlike section 110(2) of the Customs Act does not employ the terms 'on sufficient cause being shown'. Hence, the principles enunciated in Charan Das's case : 1973ECR1(SC) do not bear on the point.

22. In Agarwal's case 1973 Tax LR 2168, a Division Bench of the Allahabad High Court dealing with an analogous provision occurring in the Gold Control Act referring to Charan Das Malhotra's case : 1973ECR1(SC) has also taken a similar view as the one expressed by me earlier. In Karsandas' case 1981 ELT 268, a Division Bench of the Gujarat High Court, speaking through Thakkar, J. (as he then was), expressing concurrence with the view taken by the Allahabad High Court in Agarwal's case 1973 Tax LR 2168 has also taken a similar view. I am in respectful agreement with the views expressed in these cases.

23. Sri Gandhi next contends that the orders made by the D.C., even if they are administrative, result in civil consequences to the petitioner and therefore, he was bound to notify and afford him an opportunity of hearing. In support of his contention, Sri Gandhi strongly relies on the ruling of the Supreme Court in State of Orissa v. Dr. (Miss) Binapani Dei : (1967)IILLJ266SC and a ruling rendered by Malimath, J., in M. K. Kumaraswamy v. State of Mysore (1973) 2 Mys LJ 533.

24. The dividing line between an administrative and quasi-judicial order is very thin. But, still there is a distinction between the two.

25. By permitting the retention of documents, it is difficult to hold that the same results in serious civil consequences to the petitioner. The retention cannot be divorced from seizure. In this view, it is difficult to hold that the petitioner was entitled to notice and an opportunity of hearing and therefore, the ratio in Binapani's case : (1967)IILLJ266SC and Kumaraswamy's case (1973) 2 Mys LJ 533 does not assist the petitioner.

26. The C.T.O. gave reasons for the retention of the documents with which the D.C. was satisfied and granted extensions. An order granting extensions cannot be examined by this Court as if it is an appeal and a different view taken on the same. In this view also, there are hardly any grounds to interfere with the order of the D.C.

27. From the above, it follows that the challenge of the petitioner to the orders of the D.C. has no merit. I therefore reject the same.

28. Sri Gandhi contends that even if the order made by the D.C. was an administrative order, in such an event also, he was under a legal obligation to communicate them to the petitioner and such non-communication by itself vitiates the retention orders made by him. In support of his contention, Sri Gandhi strongly relies on a Division Bench ruling of the Calcutta High Court in Commissioner of Income-tax, West Bengal III v. Mahabir Prasad Poddar : [1974]93ITR215(Cal) .

29. Earlier I have found that the proviso to section 28(3) does not cast a legal obligation on the authority to communicate his order granting extension and that the nature of power exercised was administrative and not quasi-judicial. On this conclusion alone, it is difficult to uphold the contention of Sri Gandhi.

30. The object of conferring power on next higher authority or superior officer with better knowledge and experience was to ensure that the subordinate officer does not unnecessarily retain the documents and inconvenience the person from whom they have been seized.

31. An order made by the competent officer under the proviso to section 28(3) of the Act will not cease to be an order by the non-communication only. Even in law also, the validity of an order does not depend on its communication or non-communication. Any such enunciation to the contrary would create very strange and dangerous results also. For these reasons, I have no hesitation in rejecting this contention of Sri Gandhi.

32. In Mahabir Prasad Poddar's case : [1974]93ITR215(Cal) , the Calcutta High Court was dealing with an order for retention made under the Income-tax Act, 1961, and the effect of its non-communication. On the language of that Act that empowered the person from whom the documents had been seized to challenge the same before the Central Board of Revenue, the Court came to the conclusion that non-communication vitiates the order for retention. But that is not the position in the Act and therefore the ratio does not squarely governs the question.

33. In ruling that non-communication vitiates the order for retention itself, Mitra, J., speaking for the Bench derived support from the rulings of the Supreme Court in Bachhittar Singh v. State of Punjab : AIR 1963 SC395 and State of Punjab v. Amar Singh Harika : (1966)IILLJ188SC . But those rulings of the Supreme Court dealing with the efficacy of the orders made by the Government with reference to the requirements of article 166 of the Constitution and the rules of business to be framed by the Governor do not support the conclusion that an order made under a statute is vitiated by its non-communication. For these reasons, with respect, I regret my inability to concur with the views expressed in Mahabir Prasad's case : [1974]93ITR215(Cal) and an earlier ruling of the same court in Nripendra N. Majumdar v. N. M. Bardhan : AIR1959 Cal219 . From this, it follows that there is no merit in this contention of Sri Gandhi. I therefore reject the same.

34. But, the earlier conclusion reached by me cannot be understood as holding that the authorities would be committing an illegality if they were to communicate their orders to the persons from whom the books and documents are seized. By communicating their orders, the authorities would not be committing an illegality but would only be acting in furtherance of the object of the Act.

35. On the desirability of communicating the orders, there cannot be any two opinion. I do hope that the authorities will communicate their orders instead of keeping the parties in dark and avoid even a possible and plausible contention.

36. Sri Gandhi next contends that the two panch witnesses were not members of the locality and that being in contravention of section 100, Cr. P.C., vitiates the search and seizure made by the C.T.O.

37. Smt. Vanaja contends that the two panch witnesses were also members of the locality and even if they were not members of the locality, the search and seizure was only irregular and not illegal. In support of her contention Smt. Vanaja strongly relies on the ruling of the Supreme Court in State of Maharashtra v. P. K. Pathak : 1980 CriLJ923 and a ruling of Chandrakantaraj Urs, J., in Hanuman Traders v. Commercial Tax Officer (Int. II), Bangalore [1982] 51 STC 76.

38. The residence of the petitioner is situated at Mariswamy Mutt Lane, Cottonpet Cross, Bangalore City. But the two panch witnesses are not residents of Mariswamy Mutt Lane or even Cottonpet.

39. The word 'locality' occurring in section 100 of Cr. P.C. in contradistinction to a city, town or village is a limited, narrow and localised area. Section 100, Cr. P.C., requires the officer to call upon the local inhabitants, whom he considers to be respectable and independent to be panch witnesses. Without any doubt, the two panch witnesses are not members of the locality and there was contravention of section 100 Cr. P.C. But, the question is whether the same vitiates the search and seizure.

40. In Hanuman Traders' case [1982] 51 STC 76, Chandrakantaraj Urs, J., relying on a ruling of the Supreme Court has rejected a similar contention on almost similar facts under the Act inter alia holding that the same was only a curable irregularity and not an illegality that vitiates the search and seizure. But, Sri Gandhi contends that this decision which is in appeal is erroneous and has wrongly applied the ruling of the Supreme Court in Radha Kishan's case : (1963)IILLJ667SC .

41. As the very order is in appeal, I do not consider it necessary to examine whether the same has been correctly decided or not. But, till that ruling is upset by a Division Bench of this Court or by the Supreme Court, the same is binding on me. For the very reasons stated in Hanuman Traders' case [1982] 51 STC 76, I reject the contention of Sri Gandhi. But at the same time, it is necessary to point out that the officers should make an honest and sincere attempt to avoid such lapses.

42. Sri Gandhi urged that the search warrant that did not contain the name of the officer that was authorised to search, improper filling, non-filling or non-omission of various columns vitiates the same and the consequent search and seizure also. In support of his contention, Sri Gandhi strongly relies on the observations of the Supreme Court in Ramkishan Shrikishan Jhaver's case : [1967]66ITR664(SC) .

43. Earlier I have noticed that the application had been made by the C.T.O. before the Magistrate giving his full name, designation and address setting out the circumstances for granting the same. But the fact that in the search warrant, the name of the applicant in certain columns had not been filled or omitted does not vitiate the search warrant or the consequent search and seizure. At the highest they are all curable irregularities and illegalities.

44. Sri Gandhi lastly contends that the C.T.O. has indiscriminately seized documents without even prima facie satisfying that they related to the time.

45. An examination of the order of seizure discloses that the officer being satisfied that these documents were necessary for the nature of the enquiry to be held under the Act has seized them. Before seizing documents, it is neither possible nor desirable to scrutinise each document with meticulous care.

46. On an examination of the order of seizure I find it difficult to hold that the officer had acted whimsically or had seized the documents indiscriminately.

47. In my view, Jhaver's case : [1967]66ITR664(SC) is not an authority for either of the last two contentions urged by Sri Gandhi.

48. As all the contentions urged for the petitioner fail, this writ petition is liable to be rejected. I, therefore, reject this writ petition with costs. Advocate's fee Rs. 100.

49. Smt. M. R. Vanaja, learned High Court Government Pleader, is permitted to file her memo of appearance for the respondent within 15 days from this day.

50. Let a carbon copy of this order certified by the Court Officer be furnished to the learned High Court Government Pleader.

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