

M/s Molu Mal Baru Jain, and others v. The Excise and Taxation 193
Commissioner and others (S. S. Sodhi, J.)

in not according the approval, to the appointment of the petitioner,—*vide* its letter dated May 24, 1990 cannot be sustained. The petitioner has been continuing in service. In case the University feels that her continuance in service is not legal, it would serve a notice on the petitioner giving all the reasons so that the petitioner has an

effective opportunity to put-forth her view point.

(9) Accordingly, the order dated May 24, 1990 passed by the University and the order dated March 25, 1991 passed by the College are set aside. In the circumstances of the case, the parties are left to bear their own costs.

J.S.T.

Before : Hon'ble S. S. Sodhi & Ashok Bhan, JJ.

M/S MOLU MAL BARU JAIN AND OTHERS.—Petitioners.

versus

THE EXCISE & TAXATION COMMISSIONER AND OTHERS,
Respondents.

Civil Writ Petition No. 2054 of 1990

September 12, 1991.

Constitution of India, 1950—Art. 226—S. 14 & 19(1) (f) & (g)—Haryana General Sales Tax Act 1973 Section 36(3) & (4)—Search and seizure—Power of the Income Tax Officer under this section violative of Article 14 & 19(1) & (f) & (g) of the Constitution—No applicability of provisions of 165 Cr.P.C. for seizure—Validity of section 36(3) & (4) of the 'Act' challenged—Held that section 36(3) & (4) of the Act intra vires & valid.

Held, that a complete answer to the contentions raised is, however, provided by the judgement of the Full Bench of the High Court of Allahabad in *Aggarwal Engineering Stores and others v. The State of Uttar Pradesh and others*, 28 S.T.C. 507 where the constitutional validity of precisely similar provisions in the U.P. Sales Tax Act, 1948 namely Section 13(3), came up for consideration and the challenge thereto was on the same ground as here.

(Para 4)

Held, further that it will be seen that specific conditions and circumstances have been prescribed before powers under sub-sections (3) and (4) to Section 36 of the Act can be exercised and these clearly provide adequate safeguards to denude this power of arbitrariness. What is more, it is obvious that the occasion to exercise such power

would arise only when the relevant account books and other documents cannot be obtained otherwise, at the time and in the manner requisite to ensure against evasion of liability under the Act.

(Para 6)

Held, that such thus being the settled position in law and respectfully agreeing with the judicial precedent provided by *Aggarwal Engineering's case* (supra) we hereby hold sub-section (3) and (4) of section 36 of the Act to be *intra vires* and valid.

(Para 8)

PETITION under Article 226 of the Constitution of India praying that the following reliefs be granted :—

- (a) *the provisions of Section 36 of the Act be declared ultra-vires Articles 14 and 19 of the Constitution of India;*
- (b) *the search and seizure by respondents Nos. 2 and 3 on the business premises of the petitioners be declared to be wholly illegal and void;*
- (c) *a writ in the nature of writ of mandamus be issued, directing the respondents to return all the books, registers, documents and cash seized by the respondents from the business premises of the petitioners, forthwith and the respondents be restrained from using any such book, account, document or register against the petitioners, in any proceedings;*
- (d) *an ad-interim order be issued, restraining the respondents from taking any consequential proceedings against the petitioners or their partners, on the basis of the search and seizure carried on in the absence of the petitioners in their premises, on 14th February, 1990;*
- (e) *any other suitable writ, direction or order that this Hon'ble Court may deem fit in the circumstances of this case be issued;*
- (f) *costs of the petition be also allowed to the petitioners;*
- (g) *service of advance copies of writ petition and filing of certified copies of Annexures P/1 to P/2 be exempted.*

R. S. Mittal, Senior Advocate with R. S. Surjewala, Advocate,
for the petitioners.

Mani Ram, Advocate, for the Respondent (State).

JUDGMENT

S. S. Sodhi, J.

(1) The constitutional validity of the provisions pertaining to search and seizure, as contained in sub-sections (3) and (4) of Section 36 of the Haryana General Sales Tax Act, 1973, is what is sought to be challenged here.

The relevant statutory provisions read as under :—

“36. *Production of Inspection of books, documents and accounts :*

xx xx xx xx

(3) If any officer referred to in sub-section (1) has reasonable grounds for believing that any dealer is trying to evade liability for tax or other dues under Act, and that anything necessary for the purpose of an investigation into his liability may be found in any book, account, register or document, he may seize such book, account, register or document as may be necessary. The Officer seizing the book, account, register or document shall forthwith grant a receipt for the same and shall—

(a) in the case of book, account, register or document which was being used at the time of seizing, within a period of ten days from the date of seizure;

(b) in any other case, within a period of sixty days from the date of seizing;

return it to the dealer or the person from whose custody it was seized after examination or after having such copies or extracts taken therefrom as may be considered necessary; provided the dealer or the aforesaid person gives a receipt in writing for the book, account, register or document returned to him. Such officer, may before returning the book account, register or document, affix his signatures and his official seal at one or more places thereon, and in such case the dealer or the aforesaid person will be required to mention in the receipt given by him the number of places where the

signatures and seal of such officer have been affixed on each book, account, register or document : Provided that the seized book account, register or document may be retained for a longer period if so required. Provided further that of the seized book, account, register or document is retained by any authority other than the Commissioner for more than the aforesaid period, the reasons for doing so shall be recorded in writing and the approval of the Commissioner obtained by the authority so retaining them.

- (4) For the purposes of sub-section (2) or sub-section (3), the officer, referred to in sub-section (1), assisted by such persons as he may consider necessary, may enter and search any office, shop, godown, goods carrier or any other place of business of the dealer or any building, dwelling house or place where such officer, has reasons to believe that the dealer keeps, or is, for the time being keeping any books, accounts, registers, documents or goods relating to his business : Provided that no entry of such in a dwelling house shall be made :—

- (i) after sun-set and before sun-rise;
- (ii) by an officer below the rank of an Excise and Taxation Officer;
- (iii) without obtaining the sanction of the Deputy Commissioner or sub-Divisional Officer (Civil) within whose jurisdiction such house is situated.”

(2) A plain reading of these provisions would show that seizure of accounts is permissible only if there are reasonable grounds for believing that the dealer is trying to evade liability for tax or other dues under the Act. Further, there is a time limit in the period for which any books of account, can be retained namely 10 days in the case of any book, account, register or document which is in use at the time of seizure and sixty days in any other case. If, however, books are to be retained for a longer period by any authority other than the Commissioner, reasons for it have to be recorded in writing and the approval of the Commissioner obtained. A receipt has also to be given for any books or documents taken.

(3) Further it is provided that no officer below the rank of Excise and Taxation Officer shall make an entry for search in a

dwelling house and that too after obtaining sanction of the Deputy Commissioner or Sub Divisional Officer within whose jurisdiction such house is situated.

(4) It was the contention of Mr. R. S. Mittal, Senior Advocate for the petitioners, that the provisions of sub-sections (3) and (4) of Section 36 of the Act confer unguided power of search and seizure rendering it violative of Articles 14 and 19(1) (f) and (g) of the Constitution of India, in as much as no reasons for suspecting evasion of tax liability are required to be recorded in writing before the officer concerned embarks upon search and seizure of account books. Great stress was, in this behalf, laid upon the omission of the applicability of the provisions of Section 165 of the Code of Criminal Procedure for search. The other point urged being that no requirement had been prescribed calling upon the officer concerned embarking upon search and seizure to do so only after recording his reasons in writing to show that the account books could not have been obtained, otherwise than in pursuance of the power conferred under sub-sections (3) and (4) of Section 36 of the Act. The main reliance of the Counsel for the petitioners being upon the judgment of Supreme Court in *Commissioner of Commercial Taxes, Board of Revenue Madras and another v. Ram Krishan Shrikishan Jhaver etc.* (1), wherein holding the provisions relating to search and seizure, as contained in sub-sections (2) and (3) of Section 41 of the Madras General Sales Tax Act, 1959 to be valid, one of the reasons relied upon was the applicability of the provisions of Section 165 of the Code of Criminal Procedure, to searches made under the Act. Great stress was laid by the Counsel for the petitioners upon the non-applicability of these provisions to searches under sub-section (4) of Section 36 of the Act. (A complete answer to the contentions raised is, however, provided by the judgment of the Full Bench of the High Court of Allahabad in *Aggarwal Engineering Stores and others v. The State of Uttar Pradesh and others* (2), where the constitutional validity of precisely similar provisions in the U.P. Sales Tax Act, 1948 namely Section 13(3), came up for consideration and the challenge thereto was on the same grounds as here). Section 13(3) of the U.P. Sales Tax Act, 1948, reads as under :—

“If any officer authorised under sub-section (2) has reasonable grounds for believing that any dealer is trying to evade

(1) A.I.R. 1968 S.C. 59.

(2) 28 S.T.C. 507.

liability for tax or other dues under this Act, and that anything necessary for the purpose of an investigation into his liability may be found in any account, register or document, he may seize such account, register or document as may be necessary. The officer seizing the account, register or document shall forthwith grant a receipt for the same, and shall be bound to return them to the dealer or the person from whose custody they were seized, within a period of ninety days from the date of such seizure, after having such copies or extracts taken therefrom as may be considered necessary, provided the dealer or the aforesaid person gives a receipt in writing for the account, register or document returned to him. The officer may, before returning the account, register or document, affix his signature and his official seal at one or more places thereon, and in such case the dealer or the aforesaid person will be required to mention in the receipt given by him the number of places where the signature and seal of such officer has been affixed on each account, register or document."

(5) Various reasons were put forth for the contentions that sub section (3) of Section 13 of the Act conferred unguided and arbitrary power, one amongst them being that the officer searching and seizing the account papers was required to record the reasons for his belief nor were the provisions of Section 165 of the Code of Criminal Procedure regulating the procedure for search and seizure made applicable. It was held "Article 19(5) of the Constitution of India does not force the "reasonable" into a procrustean bed. It is a part of an instrument which is designed to keep the wheels of the Government in motion, of necessity, it is not flexless." The Bench further went on to observe :—

"The power of seizure is also severely limited in several other ways. Firstly, the power may be exercised only when the authorised officer has "reasonable grounds for believing (1) that any dealer is trying to evade liability for tax" and (2) that anything necessary for the purpose of an investigation into his liability may be found in any account, register or documents. Reasonable grounds for believing both these things should co-exist prior to the making of search and seizure. Reasonable grounds should exist objectively and can be tested in a Court. Where the Court finds that they did not exist, the search and seizure will be illegal

Emperor V. Vimalbai Deshpande, Barium Chemicals Ltd. v. Company Law Board, Kohtas Industries Ltd., v. S. D. Aggarwal. That the law does not oblige the authorised officer to record the reasonable grounds for his belief is accordingly a weakness of meagre weight.”

(6) Further, it will be seen that specific conditions and circumstances have been prescribed before powers under sub-sections (3) and (4) to Section 36 of the Act can be exercised and these clearly provide adequate safeguards to denude this power of arbitrariness. What is more, it is obvious that the occasion to exercise such power would arise only when the relevant accounts books and other documents cannot be obtained, otherwise, at the time and in the manner requisite to ensure against evasion of liability under the Act.

(7) It is also worthy of note that such power of search and seizure is also available under Sections 132 and 132-A of the Income Tax Act and Rules 112 and 112-A thereof, which has been upheld by the Supreme Court in *Pooran Mal v. Director of Inspection (Investigation) of Income Tax, New Delhi and others* (3). It was specifically held there that this power was neither discriminatory under Article 14 nor violative of Article 19(1)(f) and (g) of the Constitution of India.

(8) Such thus being the settled position in law and respectfully agreeing with the judicial precedent provided by *Aggarwal Engineering's case* (supra), we hereby hold sub-sections (3) and (4) of Section 36 of the Act to be *intra vires* and valid).

(9) The matter is now remitted to the learned Single Judge for disposal of the writ petition on merits.

J.S.T.
