

In the Supreme Court of Pakistan
(Appellate Jurisdiction)

Present

Mr. Justice Umar Ata Bandial
Mr. Justice Ijaz ul Ahsan
Mr. Justice Munib Akhtar

CIVIL APPEALS NO. 2440-2441 of 2016

(On appeal from the order dated 26.02.2015 passed by the Peshawar High Court, Peshawar in C.R.No.79-P & C.M.36 of 2010 & F.E.R.No.80/2010)

**The Chief Commissioner Inland
Revenue Regional (RTO) Peshawar.**
(in both cases)

...Appellant (s)

VS

**Paper World (Pvt.) Ltd. Amangarh,
Nowshera.** (in both cases)

...Respondent (s)

For the Appellant (s) : Mr. Ghulam Shoaib Jally, ASC.
(in both cases) Syed Rifaqat Hussain Shah, AOR

For the Respondent (s) : Mr. Tariq Khan Hoti, ASC

Date of hearing : 01.10.2019

JUDGMENT

Munib Akhtar, J.- After learned counsel for the parties were heard, the two appeals were disposed off by means of a short order announced in Court. The following are the reasons for that order.

2. The case of the appellant (for convenience, herein after referred to as "the Department") was that certain secret information was received against the respondent company, that it was engaged in the evasion of sales tax and central excise duty (the matter relating to 2004) by the clandestine removal of goods, and for such purpose was maintaining much of the relevant record at certain premises outside the licensed area. To seize such record, the Department organized and conducted a raid and search under

s. 40A of the Sales Tax Act, 1990 ("1990 Act"). As will presently become clear, the question before us was essentially whether this provision was lawfully invoked. It may be noted that the section was omitted from the 1990 Act in 2006. At the relevant time, the section (as presently relevant) provided as follows:

"40A. Search without warrant.- (1) Notwithstanding the provisions of Section 40, where any officer of Sales Tax not below the rank of an Assistant Collector of Sales Tax has reasons to believe that any documents or things which, in his opinion, may be useful for, or relevant to, any proceeding under this Act are concealed or kept in any place and that there is a danger that they be removed before a search can be effected under section 40, he may, after preparing a statement in writing of the grounds of his belief for which search is to be made, search or cause search to be made for such documents or things in that place.

(2) Any officer or person who makes a search or causes a search to be made under sub-section (1) shall leave a signed copy of the statement referred to in that section in or about the place searched and shall, at the time the search is made or as soon as is practicable thereafter, deliver a signed copy of such statement to the occupier of the place at his last known address."

3. The Department's case was that incriminating material and record was indeed recovered as a result of the raid and search. Based, inter alia, on the same a show cause notice was issued to the respondent dated 16.03.2004 in which it was alleged that there had been evasion and non-payment of dues, totaling Rs. 61,103,660/-. The respondent filed its reply contesting the show cause notice. An order-in-original was made against the respondent dated 12.10.2005. The respondent challenged the same in departmental proceedings (including before the learned Appellate Tribunal), which were dismissed. The respondent filed tax references before the learned High Court, which were also dismissed, by judgment dated 27.03.2008. The matter then came before this Court, which (by order dated 11.06.2008) remanded the matter to the learned Tribunal for decision afresh. The learned Tribunal so considered the matter and this time, by order dated 07.04.2010, allowed the respondent's appeals. It was, inter alia, held that the raid and search conducted in terms of s. 40A was

illegal. Reliance was placed on a decision of this Court reported as *Collector of Sales Tax and Central Excise and another v. Mega Tech (Pvt) Ltd.* 2005 SCMR 1166, 2005 PTD 1933 (a leave refusing order; herein after "*Mega Tech*"). Being aggrieved by the decision of the learned Tribunal, the Department filed tax references before the learned High Court. These were dismissed by means of the impugned judgment dated 26.02.2015. The learned High Court also relied on the *Mega Tech* case. The Department petitioned this Court for leave to appeal, which was granted vide order dated 08.11.2016 to consider whether the *Mega Tech* case was applicable in the facts and circumstances of the case.

4. Learned counsel for the Department submitted that the entire controversy, as presently relevant, turned on whether s. 40A had been properly invoked and applied in the facts and circumstances of the present case. Learned counsel explained that two appeals arose in the matter because the show cause notice related to both sales tax and excise duty. On a query from the Court, learned counsel submitted that the Central Excise Act, 1944 (which was still in force in 2004) did not contain any provision equivalent, or similar, to s. 40A of the 1990 Act. It was fairly (and quite properly) accepted by learned counsel that to the extent of excise duty the action taken by the Department was not sustainable in law. He therefore did not press the appeal relating to excise duty, being CA 2441/2016, which stood dismissed accordingly. Learned counsel is to be commended for the fair and proper manner in which conducted the matter.

5. Turning to the surviving appeal which related to sales tax, CA 2440/2016, learned counsel submitted that s. 40A was properly invoked in the facts and circumstances of the case. It was submitted that the record and material were seized from premises that were not the business premises of the respondent and there was, at the relevant time, a clear and present danger and apprehension that the same may be removed. As to the nature of the said premises, learned counsel referred to the respondent's

own stand taken in its reply to the show cause notice, where it was stated as follows:

"That respondent company specifically denies any connection with any documents allegedly recovered from the premises quoted in the show cause notice and without prejudice to the best of the respondent's knowledge it was an abandoned and vacant premises and most importantly has been located out of licenced premises."

Learned counsel submitted that the foregoing amounted to a clear admission that the record was being kept at a location other than the business or manufacturing premises or registered office of the respondent, which fully justified the raid and search in terms of s. 40A. Learned counsel submitted that the statement required in terms of subsection (1) was also duly prepared. This was in the following terms:

"Whereas based upon an authentic information received from the informer that M/s Paper World (Pvt) Ltd. GT Road, Aman Garh, Nowshera, having Registration No.03-04-4819-001-19 is engaged in clandestine removal of goods without payment of sales tax and only a small quantity of supplies are being shown in the sales tax records and whereas the said registered person is also showing value of supply less than the actual value. Both acts on part of the registered person fall within the purview of tax fraud. It has also been informed that the record revealing actual value of supply has been kept in Bangalow No.A-6, situated in the colony of the registered person and not being used for residential purpose.

Now therefore in exercise of powers conferred in me under section 40-A of the Sales Tax Act, 1999 I carry out search of the aforesaid premises as there is every likelihood that the record which is relevant and useful for future proceedings under tax fraud case may be removed. The said record if found shall be taken into custody under Section 38(1) of the Sales Tax Act, 1990 for inquiry and investigation in the tax fraud case.

This written statement is being tendered to search the above stated premises without warrant under section 40-A of the Sales Tax Act, 1990."

Thus, learned counsel contended, all the legal requirements and formalities were duly complied with. The respondent had no case on the merits and the Department's action had been set aside only on the ground on non-compliance with the requirements of s. 40A, which was not the case. It was respectfully submitted that *Mega Tech* had no application in the facts and circumstances of the present case. It was prayed that the appeal be allowed.

6. Learned counsel for the respondent strongly defended the impugned judgment, and the order of the learned Tribunal sustained by it. It was submitted that the respondent had nothing whatsoever to do with the premises from which the putative record and material, allegedly that of the respondent, was supposed to have been recovered. There had been a gross violation of s. 40A. That was the correct conclusion on the facts and circumstances of the case, and rightly reached by the learned High Court and the learned Tribunal. It was prayed that the appeal be dismissed.

7. After having heard learned counsel as above, and considered the record with their assistance, we concluded that CA 2440/2016 ought to be allowed, and so announced at the conclusion of the hearing. The learned High Court dismissed the Department's case in the following terms (emphasis in original):

"4. The language of the above quoted section of law [i.e., s. 40A] seems to us to contemplate that undoubtedly it enables the Authority to conduct search where it apprehends that record would be removed by the respondent, however, the said official was bound to record grounds justifying the apprehension of danger of removal of goods. On perusal of the statement of Seizing Officer, it appears that neither it contains the date, on which it was recorded nor any serial number or office order is mentioned thereupon, besides, the name of informer has not been disclosed at any stage of proceedings. The record further discloses that the petitioner received the said information on 19.01.2014 while the raid was conducted on 20.01.2014, which shows that there was sufficient time with the petitioner to get proper permission from the Magistrate

concerned as per provisions of Criminal Procedure Code. The petitioner for no valid reason bypassed Section 40 and resorted to Section 40-A of the Act, which in the circumstances was not warranted under the law. Reliance is placed on **2005 SCMR 1166.**"

These were substantially the same reasons as had found favor with the learned Tribunal.

8. Having considered the matter, we were, with respect, unable to agree with either the conclusions or reasoning of the learned High Court. In our view, the statement (the genuineness of which was not in dispute) recorded for purposes of subsection (1) of s. 40A was in substantial compliance with the requirements thereof. The matters that the learned High Court felt were required to be set out in the statement (such as serial number or office order, or name of informer) were not, as such, required by the provision to be set out therein. The fact that the raid was conducted within one day of the receipt of information serves only to show that there was urgency in the matter, and not as (with respect) wrongly concluded by the learned High Court that there was sufficient time to obtain a warrant from the concerned Magistrate in terms of s. 40. Most important of all there can be no doubt that the record recovered from the raid was indeed that of the respondent, and related to its business matters and was supportive of the case sought to be made against it, i.e., of clandestine removal of goods and evasion of tax. Why such record was to be found at premises that the respondent itself claimed were "abandoned and vacant", i.e., at other than its place of business or manufacture or registered office, or any other place where it could be reasonably expected or plausibly explained that the record could be maintained, was never explained. In such circumstances, where the Department was operating on the basis of a secret tip-off, the concerned officer could reasonably conclude that the record and material might be removed at any moment. Hence, the ingredients for invoking s. 40A existed in the facts and circumstances of the present case and, with respect, both the learned High Court and the learned Tribunal erred materially in concluding otherwise.

9. Insofar as the case of *Mega Tech* is concerned, we are in agreement with learned counsel for the Department that in the facts and circumstances of the present case it was incorrectly relied upon by the learned High Court and the learned Tribunal. This is clear when the facts involved in that matter are considered (as set out in para 2, pg. 1170; emphasis supplied):

"2. Respondent Messrs Mega Tech (Pvt.) Ltd. is a company registered with the Sales Tax Department under section 14 of the Sales Tax Act, 1990 (hereinafter referred to as the Act, 1990) as service providers/stevedores. *On 21-9-2004, upon receipt of anonymous complaint disclosing evasion in the payment of sales tax against respondent, authorised officer of the Sales Tax Department along with his subordinate officials visited the premises of respondent on 23-9-2004 and purportedly desired the officials of the Company to submit for his inspection various records reflecting their commercial activities, which was allegedly refused. Accordingly, Dr. Mubashir Baig, Deputy Collector Sales Tax prepared a statement in terms of section 40-A of the Act. He handed over a copy thereof to an officer of the Company and proceeded to secure a large number of box files, bank statements, annual statement files etc. A resumption memo. to this effect was prepared under the signature of Mr. Irfanul Haq Siddiqui, Inspector Sales Tax and Central Excise (Enforcement) in presence of two witnesses, a copy whereof was also delivered to a representative of the Company. It further appears that on the next day i.e. 24-9-2004 various documents, computers, diskettes CDs etc. were impounded from the godown of the Company situated at West Wharf, Karachi. As the entire action was taken by the Sales Tax Department without any prior notice and obtaining any search warrant from a Magistrate, respondent assailed the action as being arbitrary, illegal, mala fide and in utter violation of law before the High Court.*"

It will be seen from the foregoing that the raids and searches putatively carried out under s. 40A were at the business and manufacturing premises of the taxpayer. In such circumstances, this Court had little difficulty, on a reading of ss. 38, 40 and 40A, in concluding that the latter section was wrongly invoked. The facts and circumstances before us are quite different. The place where the raid and search was conducted was materially different. The case of *Mega Tech* was distinguishable on the facts and ought

not to have been applied to the case at hand, as erroneously done by the learned High Court and the learned Tribunal.

10. For all of the foregoing reasons, at the conclusion of the hearing it was announced as a short order that CA 2440/2016 stood allowed, whereas CA 2441/2016 stood dismissed as not pressed.

Judge

Judge

Judge

B.III
Islamabad,
October 1, 2019
Not approved for reporting.
Saeed Aslam/*