

Supreme Court of India

The Commissioner Of Commercial ... vs R. S. Jhaver And Others Etc on 9 August, 1967

Equivalent citations: 1968 AIR 59, 1968 SCR (1) 148

Author: K Wanchoo

Bench: Wanchoo, K.N. (Cj), Bachawat, R.S., Ramaswami, V., Mitter, G.K., Hegde, K.S.

PETITIONER:

THE COMMISSIONER OF COMMERCIAL TAXES AND A OTHERS ETC.

Vs.

RESPONDENT:

R. S. JHAVER AND OTHERS ETC.

DATE OF JUDGMENT:

09/08/1967

BENCH:

WANCHOO, K.N. (CJ)

BENCH:

WANCHOO, K.N. (CJ)

BACHAWAT, R.S.

RAMASWAMI, V.

MITTER, G.K.

HEGDE, K.S.

CITATION:

1968 AIR 59 1968 SCR (1) 148

CITATOR INFO :

D	1971 SC 792	(5)
F	1971 SC1170	(25)
RF	1972 SC 787	(7)
R	1974 SC 348	(10)
E&R	1978 SC 851	(89)
R	1985 SC 582	(39)
D	1985 SC 989	(11)

ACT:

Madras General Sales Tax Act, 1 of 1959, s. 41--scope of--subsec. (2) granting power to inspect--Whether includes power of search--sub-section (4) giving power to officer confiscating to give dealer an option to pay tax Plus an additional amount before stage of first sale when tax ordinarily becomes due--Whether repugnant to scheme of Act and invalid--Sub-sec. (3) authorising seizure and sub-section (4) authorising confiscation--Whether unreasonable restrictions and violative of Art. 19 (1) (f) and (g) of the Constitution.

HEADNOTE:

On August 19, 1964, officers belonging to the Department of the appellant raided and searched the premises of a company and forcibly removed certain accounts and goods. The respondents challenged the department's action by writ petitions filed in the High Court under Art. 226 of the Constitution praying that the articles seized should be returned. It was contended by the petitioners that on a proper construction of section 41 of the Madras General Sales Tax Act, No. 1 of 1959, the officers of the Department had no authority to search the premises and seize any account books or goods found there; that if section 41(4) authorised seizure and confiscation of goods, it was beyond the legislative competence of the State Legislature, for it was not covered by item 54 of List II of the Seventh Schedule to the Constitution relating to "taxes on the sale or purchase of goods"; and that if various provisions in S. 41 were capable of being construed as authorising search and seizure, they were violative of Art. 19(1)(f) and (g) of the Constitution.

The High Court allowed the Petitions holding, inter alia, that s. 41 (2) did not permit a search being made and only provided for inspection; the power of seizure or confiscation in s. 41(4) was beyond the legislative competence of the State Legislature; and that subsections (2), (3) and (4) of s. 41 contained unreasonable restrictions and were violative of Art. 19(1) (f) and (g). The High Court also found with respect to one of the petitions that the search warrant had been issued without the application of Mind by the magistrate and was bad. On appeal to this Court;

Held: dismissing the appeal,

(i) Anything recovered during the search must be returned to the petitioners for the safeguards provided by s. 165 of the Code of Criminal Procedure were not followed and in one case the finding of the High Court that the search warrant issued by the magistrate was bad on various grounds was not challenged; furthermore anything confiscated must also be returned as sub-section (4) of s. 41 must fall. [163 B-D].

Clause (a) of the second proviso to sub-section (4) gives power to the officer ordering confiscation to give the person affected an option to pay in lieu of confiscation, in cases where the goods are taxable under the Act, the tax recoverable and an additional amount and thus provides for recovery of tax even before the first sale in

149

the State which is the point of time in a large majority of cases for recovery of tax. As such it was repugnant to the entire scheme of the Act and sub-section (4) must therefore be struck down. As Clause (a) compels the officer to give the option and thus compels recovery of tax before the first point of sale, which cannot have occurred in cases of goods seized from the dealer himself, it is clearly intended by the legislature to go together

with the main part of the Section and is not therefore severable. [159F-160D].

(ii) Although generally speaking the power to inspect does not give power to search, where, as in the case of s. 41 (2) the power has been given to inspect not merely accounts registers, records, goods, etc., but also to inspect the offices, shops etc., these two powers together amount to giving the concerned officer the power to enter and search the offices etc. and if he finds any accounts or goods in the offices, shops, etc., to respect them. The High Court was therefore wrong in holding that there was no power of search whatsoever under sub-section (2). [154H-155E].

The proviso to sub-section (2) in providing that all searches under "this sub-section" shall be made in accordance with the provisions of the Code of Criminal Procedure, bears out the construction that the main part of sub-section (2) contemplates searches. Similarly it is clear from sub-section (3) which gives power to seize accounts etc., in certain circumstances, that sub-section (2) must include the power of search for a seizure under sub-section (3) is not possible unless there is a search. [156D-E. 158B-C].

The contention that as the main part of sub-section (2) does not provide for search of a purely residential accommodation and therefore the proviso is otiose must be rejected. Although generally a provision is an exception to the main part of the section, it is recognised that in exceptional cases, as in the present case, the provision may be a substantive provision itself. [156D-F].

Bhonda Urban District Council v. Taff Vale Railway Co., L. R. [1909] A.C. 253; Commissioner of Income-tax v. Nandlal Bhandari & Sons (1963) 47 I.T.R. 803, and State of Rajasthan v. Leela Jain. [1965] 1 S.C.R. 276, referred to.

(ii) Sub-sections (2) and (3) of S. 41 are not violative of Art. 19 as they are protected by clauses (5) and (6) of Art. 19 of the Constitution. [162F-G].

The High Court had wrongly assumed that the provisions of the Criminal Procedure Code did not apply to a search under s. 41(2). In view of the safeguards provided in s. 165 Cr. P.C. and in Chapter VII of that Code, it cannot be said that the power to search provided in sub-section (2) is not a reasonable restriction keeping in view the object of the search, namely, prevention of evasion of tax. [161EG].

The mere fact that the Act gives power to Government to empower any officer to conduct the search is no reason to strike down the provision for it cannot be assumed that Government will not empower officers of proper status to make searches. [160-H],

To, exercise the power of seizure under sub-section (3) the officer concerned has to record his reasons in writing, has to give a receipt for the accounts seized, and can only retain the items seized beyond a period of 30 days with the permission of the next higher officer. These are sufficient

safeguards and the restriction, if any, on

150

the right to hold property and the right to carry on trade by sub-section (3) must therefore be held to be a reasonable restriction. [162-D-G].

While the court held that the Legislature has power to provide for search and seizure in connection with taxation law in order that evasion may be checked, it did not decide the general question whether a power to confiscate goods which are found on search and which are not entered in account books of the dealer is an ancillary power necessary for the purpose of stopping evasion of tax. [159C-D].

K.S. Papanna and another v. Deputy Commercial Tax Officer, Gunkakal, (1967) XIX S.T.C. 506; referred to.

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 150--154 of 1967.

Appeals from the judgment and order dated February 26, 1965 of the Madras High Court in Writ Petitions Nos. 1321, 1495, 1496 and 1553 of 1964.

S.V. Gupta, Silicitor--General, V. Ramaswamy and A. Rangam, for the appellant (in C.As. Nos. 150, 153 of 1967). K. N. Mudaliyar, Advocate-General, Madras, V. Raniyaswain and A. V. Rangajn, for the appellant (in C.A. No. 154 of 1967).

N.C. Chatterjee and R. Ganapathy Iyer, for the respondents (in C.As. Nos. 150, 151 and 154 of 1967). A. G. Pudissery, for the intervener.

The Judgment of the Court was delivered by Wanchoo, C. J.--These five appeals on certificates granted by the Madras High Court raise common questions of law and will be dealt with to-ether. We shall give brief facts in one of the appeals (No. 150 of 1967) arising out of writ petition No. 1321 of 1964 in order to understand the questions that fall to be decided in the present appeals. On August 19, 1964, at about 5.00 p.m, the officers of the Commercial Tax Department (hereinafter referred to as the Department) raided the premises of Zenith Lamps and Electricals Ltd., (hereinafter referred to as the Company). It is said that the premises were searched and a Suit-case was seized and forcibly removed by the officers who made the raid, in spite of the fact that they were informed that the box did not contain any papers or documents belonging to the Company and its contents consisted merely of personal effects of one of the Managing Directors, namely, Shri Ramkishan Srikishan. Jhaver. The raid and search were made by the authorities concerned on information that Shri Geonka, one of the Directors of the Company, had removed a box containing secret accounts relating to it. The main contention of the petitioner in support of his prayer that the articles seized should be returned to him was under three heads. It was first contended that on a proper construction of section 41 of the Madras General Sales Tax Act, No. 1. of 1959 (hereinafter

referred to as the Act), the officers of the Department had no authority to search the premises and seize either the account books or the goods found therein. Secondly, it was contended that if section 41(4) authorised seizure and confiscation of goods, it was beyond the legislative competence of the State Legislature, for it could not be covered by item 54 of list II of the Seventh Schedule to the Constitution relating to "taxes on the sale or purchase of goods." Lastly, it was contended that if various provisions in s.41 were capable of being construed as authorising search and seizure, the provisions contained therein were unconstitutional in view of Art. 19(1) (f) and (g) of the Constitution.

It is not necessary to refer to the facts in the other petitions which have resulted in the other appeals before this Court because in those cases also there was search and seizure by the officers of the Department and their action is being attacked on the same grounds. All the petitions were opposed on behalf of the State Government and its case was--firstly, that s.41 authorised search and seizure; secondly, that the State Legislature was competent to enact s.41(4) under item 54 of list 11 of the Seventh Schedule to the Constitution; and thirdly, that the provisions in question did not offend Art. 19(1) (f) and (g) of the Constitution and were in any case protected by Art. 19(5) and (6).

The High Court held that s. 41(2) did not allow search being made thereunder, as it only provided for inspection, and that search was a different thing altogether from inspection. The High Court further held that if s.41 (2) provided for search it would be within the legislative competence of the State Legislature. The High Court took the view that the power of seizure and confiscation of goods contained in sub-section (4) could not be said to be ancillary and incidental to the power to tax sale or purchase of goods and therefore this provision was beyond the legislative competence of the State Legislature. Finally, the High Court held that sub-sections (2), (3) and (4) of section 41 were unconstitutional as they were unreasonable restrictions on the fundamental rights guaranteed under Art. 19(1) (f) and (g) of the Constitution. Besides the above, the High Court also found with respect to one of the petitions that the search warrant issued for the search of the residential house by the magistrate disclosed that the magistrate had not applied his mind at all to the necessity of the search of the residential house, for columns in the printed search warrant which should have been struck out were not so struck out. Further the gaps in the printed form which should have been filled in before the warrant was issued had not been filled in. From these two circumstances the High Court concluded that the search warrant for the residential house had been issued without the application of mind by the magistrate to the necessity of the search of the residential house. The High Court further found that s.41(4) was not complied with strictly before confiscation was ordered and no pro-

per opportunity was given to the dealer to show that the goods seized and confiscated were not accounted for in his accounts. In the result therefore the High Court allowed all the petitions and directed that the documents, things and goods covered by the petitions should be returned to the petitioners along with photographs, negatives, translations and notes made by the Department from the accounts etc. The State of Madras then applied for and obtained certificates from the High Court to appeal to this Court and that is how the matter has come before us.

The same three questions which were raised, before the High Court have been raised before us on behalf of the appellant. Before, however, we deal with them we would briefly refer to the provisions of the Act which are material for our purposes.-Section 3 is the main charging section which provides that "every dealer whose total turnover for a year is not less than Rs. 10,000..... shall pay a tax for each year at the rate of 2 per cent of his taxable turnover." The point at which tax has to be paid on single point taxable goods is indicated in the First Schedule to the Act and that will show that in a large majority of cases the tax has to be paid at the point of first sale in the State, though in some cases it has to be paid at the point of first purchase or of last purchase in the State. Section 4 is another charging section in respect of declared goods and the Second Schedule to the Act deals with the point at which tax has to be paid in respect of such goods. That Schedule also shows that in a majority of cases the tax had to be paid at the point of first sale in the State, though in some cases it has to be paid at the point of first purchase in the State or the last purchase in the State. Certain goods are exempt from the tax under the Act as provided in the Third Schedule and do not thus form part of the taxable turnover, though they will be a part of the turnover for purposes of calculating the total turnover per year. The Act provides for registration of firms and of dealers, for appointment of officers, for collection of tax, for the levy of penalty, and for appeals and revisions. It also casts a duty on dealers to maintain a true and correct account. Then comes section 41 with which we are particularly concerned. It is in these terms:

- "(1) Any officer empowered by the Government in this behalf may, for the purpose of this Act. require any dealer to produce before him the accounts, registers, records and other documents and to furnish any other information relating to his business.  
(2) All accounts, registers, records and other documents maintained by a dealer in the course of his business. the goods in his possession and his offices, shops, godowns, vessels or vehicles shall be open to inspection at all reasonable times by such officer:

Provided that no residential accommodation (not being a place of business-cum-residence) shall be entered into and searched by such officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area, and all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1898 (Central Act V of 1898). (3) If any such officer has reason to suspect that any dealer is attempting to evade the payment of any tax, fee or other amount due from him under this Act he may, for reasons to be recorded in writing, seize such accounts, registers, records or other documents of the dealer as he may consider necessary, and shall give the dealer a receipt for the same. The accounts, registers, records and documents, so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceeding under this Act. Provided that such accounts, registers and documents shall not be retained for more than thirty days at a time except with the permission of the next higher authority. (4) Any such officer shall have power to seize and confiscate any goods which are found in any office, shop, godown, vessel, vehicle, or any other place of business or any building or place of the dealer, but not accounted for by the dealer in his accounts registers records and other documents maintained in the course of his business.

Provided that before ordering the confiscation of goods under this Sub-section the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner:

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation-

(a) in cases where the goods are taxable under this Act, in addition to the tax recoverable a sum of money not exceeding one thousand rupees or double the amount of tax recoverable, whichever is greater; and

(b) in other cases, a sum of money not exceeding one thousand rupees.

Explanation-It shall be open to the Government to empower different classes of officers for the purpose of asking action under sub- sections (1). (2) and (3)".

It will be seen from the above brief review of the provisions of the Act that it mainly deals with sales tax to be levied at the point of first sale in the State. though there is also provision for purchase tax in certain cases. It is in this background that we have to consider the construction of s.41 of the Act. So far as sub-s(1) is concerned, there is no difficulty. It empowers any officer, empowered by the Government in this behalf, to require any dealer to produce before him the accounts registers, records and other documents and to furnish any other information relating to his business. It may be mentioned here that the Government has empowered all officers of the Department not lower in rank than the Assistant Commercial Tax Officer, all officers of the Revenue Department not lower in rank than an Inspector and all officers of the Police Department not lower in rank than a Sub-Inspector. to act under s.41. sub- ss. (2) to (4). Presumably, so far as sub-s. (1) is concerned, only officers of the Department can act under the provision. However, there is no dispute with respect to that sub-section as the power has to be exercised for the purpose of the Act i.e., with reference to assessment proceedings at all stages including recovery of tax and prosecution for offences. It is not disputed that the power under sub-s. (1) can only be exercised to require a dealer to produce accounts etc. relating to his business and not that of any body else.

The main dispute centres round the interpretation of sub- s.(2) of s.41. The contention on behalf of the respondents is that that provision did not authorise search of premises but merely provided for inspection thereof at all reasonable times by the empowered officer. We shall first deal with, the main part of sub-s. (2) to see what it provides without reference to the proviso. Clearly Sub-s(2) provides for three things, namely--(i) all accounts, registers, records and other documents maintained by a dealer in the course of his business ',hall be open to inspection at all reasonable times, (ii) the goods in the possession of the dealer shall also be open to inspection, and (iii) the dealer's offices, shops, godowns, vessels or vehicles shall also be open to inspection. There is no doubt that there are no specific words in sub-s. (2) giving power of search. But if we read the three powers conferred by sub-s.(2) it should not be difficult to hold that search is included therein. In sub- s.(1) the dealer is required to produce his accounts etc. and to furnish other information relating to his business and it is left to the dealer to produce what accounts he may say he has. The

legislature was however cognizant of the fact that a dealer may not produce all accounts or furnish all information even though required to do so, under sub-s.(1). Therefore, sub-s.(2) provides that all accounts etc. of the dealer shall be open to inspection. It also provides that the dealer's offices, shops, godowns, vessels or vehicles shall be open to inspection. It is true that generally speaking a power to inspect does not necessarily give power to search. But where, as in this case, the power has been given to inspect not merely accounts, registers, records and other documents maintained by a dealer but also to inspect his offices, shops, godowns, vessels or vehicles, it follows that the empowered officer would have the right to enter the offices etc. for purposes of inspection. Naturally his inspection will be for purposes of the Act i.e., for the purpose of seeing that there is no evasion of tax. If therefore during his inspection of offices etc. the empowered officer finds any accounts, registers, records or other documents in the shop, those accounts etc. will also be open to inspection. Reading therefore these two provisions together, it is clear that the empowered officer has the right to; enter the offices etc. and to inspect them, and if on such inspection he finds accounts etc. he has also the power to inspect them. Lind to see if they relate to the business. These two powers taken together in our opinion mean that the empowered officer has the power to search the office etc. and inspect accounts etc found therein. Though therefore the word "search" has not been used in sub-s.(2) these two powers of entering the offices etc. for inspection and of inspecting every kind of account maintained by a dealer with respect to his business together amount to giving the officer concerned the power to enter and search the offices etc. and if he finds any account in the offices, shops etc. to inspect them. Otherwise we can see no sense in the legislature giving power to the empowered officer to enter the offices etc. for the purpose of inspection as the officer concerned would only do so for the purpose of finding out all accounts etc. maintained by the dealer and if necessary to inspect them for the purposes of the Act. We cannot therefore agree with the High Court that there is no power of search whatsoever in sub-s(2) because the subsection in terms does not provide for search. goods in the possession of the dealer. He has also the power to enter the dealer's offices etc. for the purpose of such inspection, Combining these two powers together it follows on the same reasoning that the officer has the power to search for the goods also and to inspect them if found in the offices etc. of the dealer. We have therefore no hesitation in coming to the conclusion that the power of search is implicit in sub-s.(2) with reference accounts etc. maintained by the dealer and the goods in the possession of the dealer. It also seems to us that this power in Sub- s. (2) is confined to offices, shops, godowns, vessels and vehicles of the dealer and does not go beyond them. It is urged on behalf of the appellant that as the officer is entitled to inspect all accounts etc. maintained by the dealer he can search for them even in the dealer's residential premises. But we do not agree with this contention. for we have found the power of search by reading the power of inspection of offices etc. with the power of inspection of accounts etc. and the power of inspection of goods. Sub-s. (2) does not give any power of inspecting the residential, accommodation of the dealer and therefore it cannot be read as giving the power of search of the residential house for purposes of the Act. But whether it is a case of business-cum-residence, the power of search will be there, for under sub-s.(2) all offices, shops, godowns, vessels or vehicles of the dealer are open to inspection.

Let us now see what light is thrown on the interpretation of sub-s.(2) by the proviso and whether the interpretation we have put on the main part of sub-s.(2) is supported by the proviso. The proviso lays down that (i) no purely residential accommodation shall be entered into and searched by such



officer except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area and

(ii) that all searches under this sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1898. The latter part of the proviso clearly shows that the main part of sub-s.(2) contemplates searches, for it refers to all searches made under this sub-section. If the reference in the second part of the proviso was confined only to searches made under the first part of the proviso, the words would have been "all searches under this proviso shall be made in accordance with the provisions of the Code of Criminal Procedure." The proviso therefore bears out the construction that we have put on the main part of sub-s.(2). But it is urged that a proviso carves out something which is already contained in the main provision and the main provision at any rate does not provide for search of a purely residential accommodation. Therefore the proviso is otiose. That is what the High Court also seems to have held. Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself. We may in this connection refer to *Bhonda Urban District Council v. Taff Vale Railway Co.*(1), where s.51 of the Act there under consideration was framed as a proviso to preceding sections. The Lord Chancellor however pointed out that "though s.51 was framed as a proviso upon preceding sections, but it is true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before.". Again in *Commissioner of Income-Tax v. Nandlal Bhandari & Sons*(2) it was observed that 'though ordinarily a proviso restricts rather than enlarges the meaning of the provision to which it is appended, at times the legislature embodies a substantive provision in a proviso. The question whether a proviso is by way of an exception or a condition to the substantive provision, or whether it is in itself a substantive provision, must be determined on the substance of the proviso and not its form.'. (1) L. R. [1909] A.C. 253.

(2) [1963]47 I. T. R. 803.

Finally in *State of Rajasthan v. Leela Jain*(1) the question arose whether the proviso in the Act under consideration there was a limiting provision to the main provision or was a substantive provision in itself. This Court observed that "so far as general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part." But it was further observed that the proviso in that particular case was really not a proviso in the accepted sense but an independent legislative provision by which to a remedy which was prohibited by the main part of the section, an alternative was provided. These three cases show that in exceptional circumstances a proviso may not be really a proviso in the accepted sense but may be a substantive provision itself. It seems to us that the proviso under consideration now is of this exceptional nature. As we have already held, there is no provision in the main part of the sub-section for searching purely residential premises. Therefore when the proviso provides for such search it is providing for something independent of the main part of the sub-section. Further the second part of the proviso which talks of searches made under this sub-section shows that the power of inspection provided in the main part of the sub-section is tantamount to a power of search. We have already come to that conclusion independent of the proviso. All that we need say here is that the

proviso also shows that that interpretation is correct. We may add that we are not precluded from looking at the proviso in interpreting the main part of the sub-section. We may in this connection refer to the following passage in Maxwell on Interpretation of Statutes, Eleventh Edition, at p.155 where it is observed-

"There is no rule that the first or enacting part is to, be construed without reference to the proviso. 'The proper course is to apply the broad general rule of construction, which is that a section or enactment must be 'construed as a whole, each portion throwing light, if need be, on the rest'.

"The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together is to prevail."

But as we have said already even without looking at the proviso, our conclusion is that the main part of sub-s.(2) provides for searches and the proviso merely enforces that conclusion. We therefore cannot agree with the High Court that subsection(2) does not provide for search of the business premises of a dealer, in the shape of offices etc. (1) [1965] 1 B.C. R. 276 Then we come to sub-section(3). That provides for the seizure of accounts etc., if the empowered officer has reason to suspect that any dealer is attempting to evade the payment of any tax. fee or other amount due from him under the Act. If he has such reason he may for reasons to be recorded in writing seize such accounts etc. Now if sub- s.(2) gives power of search, sub-s.(3) merely provides further power to seize the accounts etc. found on such search. We have already held that sub-s.(2) gives the power of search and in that case sub-s.(3) is merely complementary to sub-s.(2) and gives the ,empowered officer the power to seize the accounts found in certain circumstances. If anything, sub-s.(3) also bears out that sub-s.(2) must include the power of search for a seizure under sub-s.(3) is not possible unless there is a search. Reading therefore sub-s (2), its proviso and sub-s.(3) together we are of opinion that they provide for search and seizure without warrant except that if the place searched is a purely residential accomodation it cannot be searched without a search warrant from a Magistrate. It naturally follows that if it cannot be searched without a search warrant it is not open to the empowered officer to seize anything from a residential accommodation for he cannot enter and search it unless he has a warrant from a Magistrate to do so. The next question relates to the legislative competence of the State, legislature to enact sub-s.(4). This subsection provides for seizure and confiscation of any goods found in any office etc.. including purely residential accommodation after search if they are not accounted for in the accounts maintained in the course of the dealer's business. The sub- section thus completes the process which starts with sub- section (1) and gives authority to the empowered officer to seize and confiscate goods of the nature indicated therein. The contention on behalf of the respondents is that the power of confiscation provided by sub-s.(4) was not within the competence of the State Legislature under item 54, List II. of the Seventh Schedule relating to tax on sales and purchase of goods. On the other hand. the appellant justifies the power to seize and confiscate goods on the round that it is ancillary and incidental to the power to tax, for it is necessary to have such power in order to check evasion of tax and make it unprofitable. The High Court held that the Act was not a law on goods and that a provision for confiscation of goods found on search was neither incidental nor ancillary to the power

to tax contained in item 54. List II of the Seventh Schedule. Now it has not been and cannot be disputed that the entries in the various Lists of the Seventh Schedule must be given the widest possible interpretation. It is also not in doubt that while making a law under any entry in the Schedule it is competent to the legislature to make all such incidental and ancillary provisions as may be necessary to effectuate the law; particularly it cannot be disputed that in the case of a taxing statute it is open to the legislature to enact provisions which would check evasion of tax. It is under this power to check- evasion that provision for search and seizure is made in many taxing statutes. It must therefore be held that the legislature has power to provide for search and seizure in connection with taxation laws in order that evasion may be checked. It is further urged on behalf of the appellant that confiscation of goods which are not entered in accounts is merely a provision of ancillary nature to check evasion of tax by making it unprofitable for dealers to secrete goods in which they are dealing. Reliance in this connection is placed on K. S. Papantna and another v. Deputy Commercial Tax Officer, Guntakal,(1) where the Andhra Pradesh High Court upheld an analogous provision in the Andhra Pradesh General Sales Tax Act, (No. 6 of 1957). in s.28 (6).

We do not propose in the present case to decide the general question whether a power to confiscate goods which are found on search and which are not entered in account books of the dealer is an ancillary power necessary for the purpose of stopping evasion of tax. Assuming that is so, we have still to see whether sub-s.(4) of the Act can be upheld read along with the second proviso thereof. It may be added that there is no such provision as the second proviso in s.28 of the Andhra Pradesh General Sales Tax Act. We do not therefore propose to express any opinion as to the correctness of the above decision of the Andhra Pradesh High Court. Sub-s(4) of s.41, before it was amended by the Madras General Sales Tax (Second Amendment) Act. from April 1, 1961, had only the first proviso with respect to giving an opportunity of being heard and making an enquiry in the matter before ordering confiscation. By the amendment of 1961, the second proviso was added. That provides that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation. in cases where the goods are taxable under the Act. in addition to the tax recoverable, a sum of money not exceeding one thousand rupees or double the amount of tax recoverable. whichever is greater. This provision clearly requires the officer ordering confiscation to do two things(i) to order the person concerned to pay the tax recoverable. and (ii) to pay a sum of money not exceeding one thousand rupees or double the amount of tax recoverable. whichever is greater. We have already indicated that in a large majority of cases covered by the Act the tax is payable at the point of first sale in the State. But under cl.(a) of the second proviso the tax is ordered to be recovered even before the sale, in addition to the penalty not exceeding Rs. 1,000 or double the amount of tax recoverable whichever is greater. Therefore cl.(a) of the second proviso is clearly repugnant to the general scheme of the Act which in the majority of the cases provides for recovery of tax at the point of first sale in the State. In view of this repugnancy one or other of these two provisions must fall. Clearly it (1967) XIX S.T.C. 506.

is cl. (a) in the proviso which under the circumstances must fall, for we cannot hold that the entire Act must fall because of this inconsistency with respect to recovery of tax under cl.(a) of the ,second proviso even before the taxable event occurs in the large majority of cases which would be covered by the Act. We are ,therefore of opinion that cl.(a) of the second proviso being repugnant to the entire scheme of the Act, in so far as it provides for recovery of tax even before the first sale in the

State which is the point of time in a large majority of cases for recovery of tax, must ,fall, on the ground of repugnancy. It is next urged that in any case the second proviso is severable and therefore only this proviso would fall and not the main part of sub-s.(4). We are however of opinion that cl. (a) of second proviso is not severable. We have already indicated that originally the second proviso was not there in the Act. It was brought in by the amendment of 1961 and it compels the officer to give the 'Option, and thus compels recovery of tax even in those cases where the tax is recoverable only at the first point of sale in the State which naturally has not occurred in cases of goods seized 'from the dealer himself. Considering the fact that the legislature added this compulsory proviso later, it is clear that the legislature intended that the main part of the section and the second proviso should go together. It is difficult to hold therefore that after the introduction of the second proviso in 1961, the legislature could have intended that the main part of sub-s.(4) should stand by itself. We are therefore of opinion that sub-s.(4) with the two provisos must fall on this narrow ground. We therefore agree with the High Court and strike down sub-s.(4) but for reasons different from those which commended themselves to the High Court.

Then we come to the question whether sub-ss.(2) and (3) of s.41 of the Act which have been struck down by the High Court on the ground that they are unreasonable restrictions on the right to hold property and to carry on trade have been correctly struck down. The main reason which impelled the High Court to strike ,down sub-s.(2) was that there was no safeguard provided for search made thereunder. The High Court held that s. 165 of the Code of Criminal Procedure did not apply to searches made under sub-s(2). It also held that the State Government was given the power to empower any officer to make a search under sub-s.(2) and this meant that even an officer of low status could be empowered. Consequently the High Court struck down sub-s.(2) on the ground that it gave arbitrary power of search which could be made even by an officer of low status. It is true that search under this sub-section can be made by any officer empowered by Government in this behalf, but we have no reason to think that Government will not empower officers of proper status to make searches. In this very case, we find that the Government empowered an Assistant Commercial Tax Officer, a Revenue Inspector and a Sub Inspector of Police to make searches. Considering the large number of dealers who are covered by the Act, it cannot be said that these officers are of such low status that they cannot be depended upon to make a search with due care and caution. We cannot also forget that in a case of this kind the Government cannot find sufficient number of officers of what may be called high status to make searches, for dealers who may be covered by the Act may be legion throughout the State, and if such searches could only be made by high officers there would not be enough officers available to do so. The fact that the Act gives power to Government to, empower any officer is therefore no reason to strike. it down for, as we have said, the Government will see that officers of proper status are empowered. Nor do we think that an Assistant Commercial Tax Officer or an Inspector of Revenue Department or a Sub-Inspector of Police Department is not an officer of proper status to make searches under this provision.

We are also of opinion that though sub-s.(2) itself provides no safeguards and might have been open to objection on that ground, there is a provision in the proviso to, sub-s.(2) which lays down that all searches under this subsection shall, so far as may be. be made in accordance with the provisions of the Code of Criminal Procedure. Therefore, the provisions of the Code of Criminal Procedure, so far as may be, apply to all searches made under sub-s. (2). It appears that in the High Court, the parties

as well as the Court assumed that s.165 of the Code of Criminal Procedure would not apply to searches under sub-s.(2) We cannot see any warrant for this assumption. The proviso clearly lays down that all searches made under this sub-section, so far as may be, shall be made in accordance with the provisions of the Code of Criminal Procedure. Thus all provisions contained in the Code of Criminal Procedure relating to searches would be applicable to searches under sub-s.(2), so far as may be. Some of these provisions are contained in Chapter VII but one such provision is contained in s.165. It is true that that section specifically refers to an officer in-charge of a police-station or a police officer making an investigation. But when the proviso applies the provisions of the Code of Criminal Procedure to all searches made under this sub-section, as far as may be possible, we see no reason why s.165 should not apply, *mutatis mutandis*, to searches made under sub-s.(2). We are therefore of opinion that safeguards provided in S. 165 also apply to searches made under sub-s. (2). These safeguards are-(i) the empowered officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction, (ii) he must be of the opinion that such thing cannot be otherwise got without undue delay, (iii) he must record in writing the grounds of his belief, and (iv) he must specify in such writing so far as possible the thing for which search is to be made. After he has done these things, he can make the search. These safeguards, which in our opinion apply searches under sub-s.(2) also clearly show that the power to search under sub-s. (2) is not arbitrary. In view of these safeguards and other safeguards provided in Chapter VII of the Code apply so far as may be to search no reason to hold that the restriction, if any, on the right to hold property and to carry on trade by the search provided in sub-s.(2) is not a reasonable restriction keeping in view the object of the search, namely, prevention of evasion of tax.

Next we come to sub-s.(3), which as we have already stated, is complementary to sub-s.(2). It provides in addition to the safeguards- which have to be complied with when a search is made under sub-s.(2), that the officer may seize accounts etc. if he has reason to suspect that any dealer is attempting to evade the payment of any tax etc. due from him under the Act. It also provides that he has to record his reasons in writing and we are of opinion that these reasons have to be recorded before the accounts are seized. It further provides that the dealer shall be given a receipt, and this means that the receipt must be given as and when the accounts etc. are seized. Finally it provides that these accounts etc. shall be retained by such officer so long as may be necessary for their examination and for any enquiry or proceeding under the Act. These in our opinion are sufficient safeguards and the restriction is any, on the right to hold property and the right to carry on trade by sub-s.(3) must therefore be held to, be a reasonable restriction. We may add that the proviso to sub-s.(3) has fixed the period for which the officer seizing accounts can keep them, namely, '30 days at a time, and if he wants to keep them for has to 'take the permission of the next additional safeguard entitling the dealer accounts after every 30 days,' unless a higher officer has permitted the retention of accounts for a period longer than 30 days. We cannot therefore agree with the High Court that sub-ss. (2) and (3) of s. 41 of the Act are unreasonable restrictions on the right to hold property or carry on trade for reasons indicated. We are of opinion that they are reasonable restrictions which are protected by cls. (5) and (6) of Art. 19 of the Constitution.

We now proceed to consider what order should be passed in the appeals in the view we have taken about the interpretation and validity of sub-ss. (2) and (3) of s. 41 of the Act. We have already

indicated that the High Court held that the warrant issued by the Magistrate for search of the residential accommodation was bad because it showed that the Magistrate had not applied his mind to the question of issuing it, inasmuch as there were portions which should have been struck out from the printed form and gaps which should have been filled in. But this was not done.

That conclusion of the High Court has been challenged before us. The High Court has further held that a fair and reasonable opportunity was not given to the persons concerned to show that the goods seized were not properly accounted for in their account-books, though this finding is not material now for we have held that sub-s.(4) falls in its entirety. It follows therefore that anything recovered from the search of the residential accommodation on the basis of this defective warrant must be returned. It also follows that anything confiscated must also be returned, as we have held that sub-s.(4) must fall. As to the accounts etc. said to have been seized, it appears to us that the safeguards provided under s. 165 of the Code of Criminal Procedure do not appear to have been followed when the search was made for the simple reason that everybody thought that provision was not applicable to a search under sub-s.(2). Therefore, as the safeguards provided in s. 165 of the Code of Criminal Procedure were not followed, anything recovered on a defective search of this kind must be returned. It follows therefore that the final order of the High Court allowing the writ petitions must stand, though we do not agree with the interpretation of the High Court that sub-ss.(2) and (3) are unconstitutional on the ground of their being unreasonable restrictions on the right to hold property and to carry on trade. The appeals therefore fail and are hereby dismissed. In view of our decision on the main question of law, we order parties to bear their own costs in all the appeals.

Appeals dismissed, R.K.P.S.