

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2019

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.31825 of 2015

and

MP.Nos.1 & 2 of 2015

M/s.Devashi Enterprises,
Rep. by its Proprietor Vasanth Kumar,
No.5, Bommuliar Street,
Chennai-600 079.

... Petitioner

Vs.

1.The Joint Commissioner (CT),
Enforcement I,
PAPJM Buildings,
No.1, Greams Road,
Chennai 600 006.

2.The Commercial Tax Officer,
Group II, Enforcement (North),
PAPJM Buildings,
No.1, Greams Road,
Chennai 600 006.

3.The Assistant Commissioner [CT],
Peddunaickenpet Assessment Circle,
No.48/39, Rajaji Salai, Wavoo Mansion,
III Floor,
Chennai 600 001.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Prohibition, prohibiting the 2nd respondent from formulating any proposal for the purpose of assessment/re-assessment by the 3rd respondent based on the unauthorized audit conducted at petitioner's business from 14.7.15 to 19.9.15 as illegal, contrary to Sec.64(4) of the Act.

For Petitioner : Mr.P.Prithvi Chopda
for M/s.T.Pramodkumar Chopda

For Respondents : Mr.Mohd. Shaffiq
Special Government Pleader
and
Ms.G.Dhanamadhri
Government Advocate

ORDER

The petitioner seeks a writ of prohibition against the Commercial Tax Officer, Enforcement (North), from formulating any proposal for the purpose of assessment/re-assessment by the 3rd respondent Assessing Officer based on an alleged unauthorised audit conducted at the petitioners' business between 14.07.2015 to 19.09.2015.

2. According to the petitioner, the conduct of the aforesaid audit was illegal and contrary to the provisions of the Tamil Nadu Value Added Tax Act 2006.

3.The petitioner relies on the decision of a Division Bench of this Court in W.A.No.1757 of 2019, dated 04.06.2019, wherein the Division Bench upholds the order of a learned Single Judge quashing the audit conducted by the Commercial Taxes Department on the ground that authorisation approval for the search dated 16.05.2014 was bad in law. Consequently, all orders based on such approval are also bad in law, and liable to be set aside. At this juncture, Mr.Mohd. Shaffiq, learned Special Government Pleader brings to the notice of this Court that an application has been filed seeking review of the order passed by the Division Bench dated 04.06.2019 and the same is pending disposal. However, I need hardly go into that question for the reason that both the learned counsel, Mr.Prithvi Chopda, for the petitioner as well as Mr.Mr.Mohd. Shaffiq, learned Special Government Pleader for the respondents, appear to concur upon the position that the powers of the Assessing Authority in framing assessment based on materials found in the course of inspection/audit, even assuming the same had been held to be invalid/contrary to law, are unfettered.

4. The Supreme Court in the case of Pooran Mal vs. The Director of Inspection (Investigation), New Delhi and others (1974 1 SCC 345) considered a challenge to Sections 132 and 132(A) of the Income Tax Act, that provided for the conduct of search and seizure and at para-25, the Court states as follows:

'25. In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of Section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the Income-tax authorities against the person from whose custody it was seized and, therefore, no Writ of Prohibition in restraint of such use could be granted. It must be, therefore, held that the High Court was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs.'

India (45 S.T.R. 493), a Division Bench of the Delhi High Court states on this very point, as follows:-

'The writ petitioner is aggrieved by issue of the show-cause notice dated 21-4-2016. It is contended that this show-cause notice is untenable besides the fact that the authority issuing it does not possess necessary jurisdiction to do so.

2.The last ground urged in support of the petition is that show-cause notice is time-barred.

3.The petitioner relied upon a Division Bench judgment of this Court in Travelite (India) v. Union of India, 2014 (35) S.T.R. 653 (Del.) by which Rule 5A(2) of the Amended Service [Tax] Rules was held to be ultra vires its parent statute - Finance Act, 1994. Having regard to circumstances. Section 72A conferred specific power limited by certain contingencies to carry out an audit. The Court held that in the circumstances, the exercise of rule making power cannot enlarge the power to audit which was otherwise unauthorised in the parent statute. The petitioner's counsels submits that having regard to the judgment, the impugned show-cause notice is invalid given that the materials on the basis of which said impugned notice has been issued, were secured in the course of the audit conducted previously when the rule was in existence.

4.At the first instance, the petitioner's argument seems attractive. However, two important aspects are to be kept in mind. Firstly, no statute is deemed to be ultra vires or void - it is actually upon the court declaring it to be so, that it is void (refer Gurdev Singh v. The State of Punjab, 1997).

5.Furthermore, the argument proceeds on the assumption that if material is procured in an illegitimate manner or a manner unauthorised by law, it is per se inadmissible. That rule prevails in United States where evidence or material procured illegally is inadmissible. However, in India that rule is inapplicable (K.R.Malkhani 1973); the Supreme Court has consistently ruled that so long as material is relevant, how it is sourced is immaterial and the courts would examine it provided it fulfils the test of relevance. In the circumstances, the argument that the materials on the basis of which the impugned show-cause notice was issued could not have been used is rejected.

6.As far as the issue of jurisdiction of the Principal Commissioner (auditor who issued show-cause notice), the court notices that there is no

denial of the fact that the official who issued the show cause notice holds the rank of Principal Commissioner of Central Excise as defined by the Central Excise Act, 1944 read along with the rules. That he was assigned audit task is a matter of convenience; it in no way inhibits the officer from issuing the show-cause notice is exercise of primary authority concerned by the statute. Consequently, the argument about lack of authority/jurisdiction fails. So far as the last issue, i.e. of limitation is concerned, we are of the opinion that examination of that issue by this court would be premature. This task is best left to be examined by the concerned authority with regard to the facts it is also a mixed question of fact and law.

7. In the circumstances, the petitioner is granted one week to reply to the show-cause notice if not already filed. The writ petition is dismissed but with the above direction.'

6. In the case of The Joint Commercial Tax Officer, Central Intelligence Wing, Board of Revenue (C.T.) Madras vs. Purushotham Rungta, ((27) L.W. 499) a Division Bench of this Court considered the usage of illegally seized documents ordering them to be returned and permitting photostat copies to be retained in a sealed cover pending further directions. Referring to the provisions of the Evidence Act, the Court states that there is nothing contained therein which inhibits the use of illegally seized documents, and at paragraphs-3 and 4, states as follows:

'3. But we find that there is no controversy before us on the question that the seizure of the documents was illegal. It is not also in controversy that since the seizure was illegal, the documents are bound to be returned to Purushothamlal Rungta. As a matter of fact, this court has ordered the originals to be returned, which has been carried out. That being the case, the grounds as raised by Mr. Venugopl for Rungta do not arise for consideration. But the precise question we are called upon to decide is as to the permissibility of the user, for the purpose of assessment, of the photostat copies of the originals seized illegally. We have a line of cases in this court consistently taking the view that though the illegally seized documents have been made use of in a revenue assessment, the order of assessment on that ground will not be rendered illegal or void, because admissibility of such documents does not depend upon the source or the manner in which they are obtained, but on the relevancy and their admissibility. One of the earliest cases holding that view is Annamalai Chettiar & Co. v. Deputy Commercial Tax Officer

[1965] 16 S.T.C. 687, decided by one of us. The view was rested on the ratio of Kuruma v. Queen [1955] A.C. 197. But Mr. Venugopal's contention is that if, before the revenue makes use of the copies in making the assessment, his client is vigilant enough to come to this court and ask for forbidding of such user, the revenue cannot resist issuing such direction. In our opinion, in principle, no distinction, if the substance of the matter is borne in mind, can be drawn from an order passed on illegally seized documents not being rendered void and permissibility of the user of such documents before such an order is made and in the process of making it. We see no difference between the two, because user and its legality are entirely governed by the provisions of the Evidence Act and from a certain angle also, in some cases, on the power of the court or the authority concerned to summon documents from a party or a third party for purposes of making use of them. There is nothing in the Evidence Act which inhibits user of illegally seized documents ; nor the power of the court or the authority under the law to summon and make use of the documents is restricted to documents which have been seized lawfully.

4. It is true that the fundamental right of a citizen to property includes also illegally seized documents and their copies and that no property can be seized except under the authority of law. But neither of these rights really seems to impinge upon the basic rights under Article 19 and also Article 31 of the Constitution of India. The Fourth and Fourteenth Amendments to the American Constitution have been looked upon or interpreted by the American Courts in a slightly different way, but not always consistently. In any case, as we have already indicated, the same principle which holds valid an order which has used illegally seized documents informs the permissibility of the user of such documents in the process of making an assessment order. That principle is inherent in Kuruma v. Queen [1955] A.C. 197 and also R.S. Jhaver v. Commissioner of Commercial Taxes [1965] 16 S.T.C. 708 and all the subsequent cases which followed that principle. In fact, it seems to us that the question is concluded by Pooran Mal v. Director of Inspection [1974] 93 I.T.R. 505 (S.C). That was a case of an illegal seizure in connection with income-tax proceedings. Among others, one of the questions that was decided has a direct bearing to the instant case before us. The Supreme Court, dealing with that question, held in that case:

However, there was another relief claimed in

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the petitions and that was for a writ of prohibition restraining the income-tax department from using as evidence any information gathered from the search of the articles seized. It would appear from the record that the High Court was prepared to assume for the purposes of those cases that the search and seizure was illegal. Even so the question remained whether these victims of illegal search were entitled to a writ of prohibition that the income-tax authorities shall not use any information gathered from the documents which had been seized. The High Court held that they were not and proceeded to pass the following identical order in the two cases. It is as follows :

In this case all the documents seized in pursuance of the search warrant have been returned to the petitioners and the only question is whether the information gathered as a result of such search and seizure could be used in evidence if it be held that the search and seizure was illegal. In *Balwant Singh v. Director of Inspection* [1969] 71 I.T.R. 550, pronounced today, we have held that such information can be used. It is unnecessary, therefore, to pronounce upon the validity of the search and seizure. This petition, therefore, fails and is dismissed with no order as to costs.

Balwant Singh's case, referred to above, is reported in [1969] 71 I.T.R. 550. We understand that an appeal had been filed to this court but was not prosecuted. That decision not only upheld the constitutionality of Section 132 of the Income-tax Act, but also held that there was nothing in Article 19 of the Constitution which forbids the use of evidence obtained as a result of an illegal search. Consistently with that view the relief for a writ of prohibition was rejected and hence the two civil appeals before us.

Then the Court went on to further deal with this matter and then observed:

It, therefore, follows that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.

The Court expressed its conclusion on this matter :

In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of Section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the income-tax authorities against the person from whose

custody it was seized and, therefore, no writ of prohibition in restraint of such use could be granted. It must be, therefore, held that the High Court was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs.'

7. In fine, the prohibition sought for cannot be granted in the light of the settled position as discussed above. This writ petition is dismissed. Liberty is however granted to the petitioner to challenge the orders of assessment, if any, as and when passed by the Revenue, in a manner known to law. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Joint Commissioner (CT),
Enforcement I,
PAPJM Buildings,
No.1, Greams Road,
Chennai 600 006.
2. The Commercial Tax Officer,
Group II, Enforcement (North),
PAPJM Buildings,
No.1, Greams Road,
Chennai 600 006.
3. The Assistant Commissioner [CT],
Peddunaickenpet Assessment Circle,
No.48/39, Rajaji Salai, Wavoo Mansion,
III Floor,
Chennai 600 001.

+1cc to Mr.T.Pramodkumar, Advocate SR.95262

+1cc to Spl Government Pleader (Taxes) SR.95775,95799

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and
MP.Nos.1 & 2 of 2015

NRL (CO)
CB(25/02/2020)