(1966) ILR (Mad) 267 : (1965) 16 STC 708

Madras High Court

Case No: Writ Petition No"s. 1321, 1456, 1495, 1496 and 1553 of 1964 and C.M.P. No"s. 7593, 8724, 8725, 8726, 8937 and 8995 of 1964

Shri Ramkishan Srikishan Jhaver and Others		APPELLANT
	Vs	
Commissioner of Commercial Taxes and Others		RESPONDENT

Date of Decision: Feb. 25, 1965

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 18
- Commissions of Inquiry Act, 1952 - Section 3
- Constitution of India, 1950 - Article 10, 14, 19, 226, 31
- Income Tax Act, 1961 - Section 16, 28, 37, 5
- Industrial Disputes Act, 1947 - Section 10
- Penal Code, 1860 (IPC) - Section 143, 147, 149, 332, 333

Citation: (1966) ILR (Mad) 267 : (1965) 16 STC 708

Hon'ble Judges: Veeraswami, J; Kunhamed Kutti, J

Bench: Division Bench

Advocate: V.K. Thiruvenkatachari, for A.R. Ramanathan, V. Srinivasan, G. Ramaswamy, A. Devanathan, M.M. Ismail, A. Ramanathan and D. Trilokchand Chopda, for the Appellant; The Attorney-General of India and Advocate-General for the Additional Government Pleader and K. Venkataswami, for the Respondent

Judgement

Veeraswami, J.

These petitions under Article 226 of the Constitution concern the scope and validity of the powers of search and seizure of account books and other records and of confiscation of goods seized or imposition of penalties in lieu thereof under the provisions of the Madras General Sales Tax Act, 1959. They involve the construction and interpretation of Section

11, the legislative competency of some of its provisions and their constitutional vires.

2. At about 5 p.m. on 19th August, 1964, certain officers of the Commercial Taxes Department, Intelligence Wing, under the personal direction and supervision of the Deputy Commissioner of Commercial Taxes (Intelligence), Madras, raided the premises of Zenith Lamps and Electricals, Ltd., Madhavaram, inspected, searched and seized therefrom in the presence, among others, of one of the managing directors Mr. B.D. Mimani, a small leather suit-case with a khaki cover and certain records found on the top of the suit-case. The Deputy Commissioner, as he says in his counter-affidavit, had specific information that some secret account books relating to the various businesses in which one Sri Goenka was interested, were removed from his house in such a suit-case and hidden in the business premises of Zenith Lamps and Electricals Ltd. When he went in mufti and watched the place, he found a black Ambassador car leaving from that place and going to 366, Tiruvottiyur High Road. He contacted Mr. P. S. Marappan, Commercial Tax Officer (Intelligence) and directed him to get a warrant for search of the premises, 366, Tiruvottiyur High Road which he did from the Chief Presidency Magistrate, on the 19th itself. 366, Tiruvottiyur High Road is the residence of Mr. Ramkishan Srikishan Jhaver. The Deputy Commissioner also learnt from Mr. P.S. Marappan that his confidential enquiries revealed that Mr. Jhaver maintained some of his accounts and records of his business in his residence. The Deputy Commissioner, therefore, arranged for a simultaneous inspection of both the places at 4-45 p.m. sharp. Mr. P.S. Marappan went with four of his officers to the residence of Mr. Jhaver, while the Deputy Commissioner went with Commercial Tax Officers, Mr. Thambusami, Mr. Murugan, and Mr. Samraj, Joint Commercial Tax Officer, thirteen other officers and a few peons to the office and factory of Zenith Lamps and Electricals Ltd. The Deputy Commissioner wanted to get at the records in the suit-case to verify whether there was any attempt to evade payment of taxes due to the department, and also wanted to make a general inspection of the place of business of the company. He, therefore, directed one of the Commercial Tax Officers to inspect the factory and godowns, another to inspect the office, and the Joint Commercial Tax Officer to keep a watch over the outlying rooms and he himself went around supervising the entire inspections. On their entry into the premises, they introduced themselves to Mr. Mimani and told him that they had come there for inspection. Mr. Mimani, one Mr. Sharma, an employee of the company, one Mr. Vinayak Kishore, the accountant there, showed the records and stocks to the various officers, who secured, under an inventory, certain records like production statements pertaining to the business for detailed check with the regular accounts of the business. The Deputy Commissioner, who was making a genera] supervision, entered the office hall of the premises with a certain Joint Commercial Tax Officer-II and found another Commercial Tax Officer-II demanding Mr. Mimani and others to open the room at the nearest end but they refused to do so. This room was in fact a partition by brick walls of the hall and was open at the top. From the strength of their protest, the Deputy Commissioner felt that the room must contain the suspected suit-case. He directed an Assistant Commercial Tax Officer Mr. Radhakrishnan to get a ladder and look into the room which he did. He came

out with a suit-case and a bundle of papers. The Commercial Tax Officer-II received them and passed them on to the Joint Commercial Tax Officer-II. Mr. Mimani immediately intervened, laid a hand on the box and began to shout refusing them permission to see the box. The Commercial Tax Officer Mr. Murugan told Mr. Mimani that the department had specific information that the box had accounts meant to evade taxes and so, they were seized. Mr. Mimani refused to release his hold and dragged the box to a table nearby. Just then Mr. Sharma re-entered the room with about thirty Gurkhas and others armed with lathis, lead pipe etc., and started beating the officers. One person aimed a blow at the Deputy Commissioner with a lead pipe which he dodged. Mr. Mimani beat the officers on their wrists and got hold of the box and gave it to someone in the crowd who took it and ran away. Mr. Samraj and Mr. Francis, Assistant Commercial Tax Officer, followed them. Most of the persons who were assaulting the officers, followed them. The Deputy Commissioner too ran after them, but Mr. Sharma closed the door by which they came and left. So the Deputy Commissioner turned and ran outside shouting for jeep, got into it and went to the place where the man had run away with the box. There was a crowd of employees blocking the path. The Deputy Commissioner directed the jeep driver Sitaraman to run into the crowd, in a threatening way, as he wanted to reach Mr. Samraj whose life was in danger. At that time Mr. Samraj got hold of the box and passed it to Mr. Francis who, in turn passed it on to the Deputy Commissioner who took it, ran the jeep into the crowd of employees, who started throwing stones at him, and dashed to the police station. There he filed a complaint and sent a few constables and a Sub-Inspector to the spot. The police arrested the persons there and brought them along with the records to the police station. When the Commissioner of Commercial Taxes arrived, on his direction, an inventory of the records contained in the suit-case was prepared in his presence and in the presence of the accountant of the firm. At that time, the Commercial Tax Officer-II (Intelligence) recorded the reasons for seizure of the records and then made out a list of the records in the suit-case. These are the facts as mentioned by Mr. Narasimhan, Deputy Commissioner, in one of his counter-affidavits.

3. But not all those facts are common ground. Some of them as to what exactly happened inside the premises before and at the seizure of the suit-case and other records, have been stated somewhat differently by Mr. Mimani in his affidavit. According to him, when he asked the Deputy Commissioner if he wanted to see any accounts or records of the company, he answered that he was not interested in seeing the records and wanted to have a search of the entire premises. When the Deputy Commissioner was conducting a search in Mr. Mimani''s room, an officer of the department walked in and informed him that a suit-case was found in one of the rooms and that Mr. Sharma was claiming that it belonged to another person and could not be removed. The Deputy Commissioner and Mr. Mimani walked to that place. The Deputy Commissioner ordered the box to be removed. Mr. Mimani objected and said that the box did not belong to the company and did not contain any records of the company and that it belonged to Mr. R. S. Jhaver, and should not, therefore, be removed. Mr. Mimani offered to send for Mr. Jhaver to come to the premises and open the box for inspection but Mr. Narasimhan would not wait. He

ordered one of his officers to search Mr. Mimani''s person in spite of his objection. Mr. Mimani was man-handled and pushed down by the officers; and he sustained injuries on his knee-cap. When the watchman and the staff saw their managing director being assaulted, they tried to help him. But at this stage, the men of the raiding party assaulted Mr. Mimani''s men resulting in injuries to some of them. During this scuffle, the Commercial Tax Officers removed the box to a jeep and took it away. As the box was removed forcibly and even telephone contact with the police was made impossible, Mr. Mimani says, he decided to go to the Madhavaram Police Station along with Mr. Jhaver to complain about the high-handedness of the officials. When they started the car, they were prevented by some of the officials blocking up the passage. They left the car and walked out through another entrance to the police station. On their way they were forcibly put into a jeep and taken to a police station where they were taken into custody and released on bail the next day. That is, according to Mr. Mimani, what had happened.

4. We are not, in these petitions, concerned with the actual details of the raid and of the tussle there. But we have referred to the facts as mentioned by the Deputy Commissioner or by Mr. Mimani to show that the Intelligence Wing of the Commercial Taxes Department searched the premises of Zenith Lamps and Electricals Ltd., found out the leather suit-case, forcibly removed it in spite of objection and physical resistance, and took it away with certain other records and that this raid was carried out as the Deputy Commissioner, as he claimed, had specific information that the suit-case contained secret account books relating to the various businesses in which one Mr. Goenka was interested and was hidden in the business premises of Zenith Lamps and Electricals, Ltd., before its being airlifted to Bombay.

5. Mr. Marappan along with his officers searched the house of Mr. Jhaver on August 19 and 20, 1964, in the course of which they broke open a room, seized and took away certain records and books. They also searched a godown and took an inventory of the articles therein.

6. Mr. Vasudeva Sharma, a cashier of Zenith Lamps and Electricals Ltd., has alleged that while the search was going on in the office of the company, some of the raiding party had also entered his residence which was about 100 yards away from the office, started ransacking the papers in his house, opened two boxes and removed books, papers and memoranda. According to him, these books, papers and memoranda had nothing to do either with the company or with anybody else, but belonged to him. The Deputy Commissioner however says that the books, records and memoranda were seized by the Commercial Tax Officer-II from the premises of Zenith Lamps and Electricals Ltd., on 19th August, 1964, for reasons duly recorded by him.

7. In the above circumstances, Mr. Jhaver has filed W.P. No. 1321 of 1964 asking for mandamus to direct the Commissioner of Commercial Taxes and the Deputy Commissioner of Commercial Taxes, the two respondents, to produce the documents seized by them on 19th August, 1964, as per the list filed by them in this Court and the

photographic negatives prepared and all photo copies thereof and translations and notes therefrom and in case the same or any of them be with any other court or person, direct the same to be brought into this Court and handed over to him. He also asked for an injunction restraining the respondents from disclosing the information therein and making any use thereof. Mr. Jhaver claims that the suit-case and its contents noted in D. 7 slip belonged to him and was kept in a room locked by him in the premises of the company and that in spite of their telling the raiding party of the fact that the box did not contain any papers and records belonging to the company, it was forcibly removed by the officers and taken away by them. He submits that the search and seizure of the box and its contents are illegal and that he is entitled to the return of them. Mr. Jhaver has also filed W. P. No. 1456 of 1964 asking to call for the records connected with the search warrant and quash the search warrant issued to Mr. Marappan, who is the 3rd respondent in this petition, by the 4th respondent, the Chief Presidency Magistrate, on 19th August, 1964. His grounds are that the warrant was obtained on fraudulent misrepresentation by the Deputy Commissioner, the 2nd respondent, through Mr. Marappan for the ulterior purpose of tracing the box of one Mr. Goenka containing secret accounts of his many businesses, that the Madras General Sales Tax Act does not give a power to search but only a power of inspection, that the proviso to Section 41(2) for search of a residential building goes beyond the main provision relating to inspection, that when there is no provision for search of even business premises, there cannot be a search of a private residence and that if the proviso is construed as conferring a power of search, it offends Article 19(1) of the Constitution. He also adds that u/s 41(2) inspection can only be of the accounts maintained by a dealer for the purposes of checking up his conduct as a dealer in relation to the tax department and does not give a power of general search of any premises for offences alleged to have been committed by others. Mr. Vasudeva Sharma in his W.P. No. 1553 of 1964 prays for calling for the production of the documents seized with reference to him as per the list filed by the department along with the photographic negatives and copies thereof including their translations and directing the same to be handed over to him while forbidding the respondents from disclosing the information therein or making any use thereof. In the counter-affidavit of the Deputy Commissioner, Mr. Narasimhan, filed in this petition, it is stated on behalf of the three respondents that they have no objection to the return of the documents, in which the petitioner is interested, by the Sub-Divisional Magistrate, Poonamallee, to Zenith Lamps and Electricals Ltd., from whose possession the Commercial Tax Officer-II recovered them. It may be mentioned that in connection with the alleged seizure at the raid in the premises of the company, and on a police complaint, twenty persons connected with the company including Mr. B.D. Mimani had been charged before the Sub-Divisional Magistrate, Poonamallee, with alleged commission of offences under Sections 143, 147, 149, 332, 333, 363 and 395 read with 397, Indian Penal Code, and Section 45(3) of the Madras General Sales Tax Act, 1959. After an enquiry in P.R.C. No. 2 of 1964 on his file, the Sub-Divisional Magistrate, by an order dated 21st December, 1964, framed certain charges under certain sections under the Indian Penal Code against the accused before him and committed them to stand their trial before the Court of Sessions, Chingleput

Division. In this enquiry, it appears that not only the suit-case but also the records seized from the premises of the company at the raid have been marked as material objects. In view of this, the petitioners have asked for the production of the books and records from the Court of the Sub-Divisional Magistrate before this Court.

8. J. Hazarimal & Co., Madras, is the petitioner in W.P. Nos. 1495 and 1496 of 1964. It is a partnership firm which deals in electrical goods and which has been registered under the Madras General Sales Tax Act with its place of business at No. 126, Nainiappa Naicken Street, Madras. On 18th September, 1964, the Special Deputy Commercial Tax Officer (Intelligence) V, Madras, along with certain other officers of the Commercial Taxes Department searched the business premises and also the residence of the managing partner, one Ganmal K. Shah at No. 17, Luckmudoss Street, Madras, and the main godown at No. 18, Ponnappa Chetty, as well as the subsidiary godown at No. 6, General Muthiah Mudali Street. The search of the residence was carried out under a search warrant issued by a competent Magistrate. From the residence of the managing partner were, under an inventory, seized electrical goods such as electric fans, bulbs, toaster, tube lights, table lamps etc., and a hurricane lantern, the approximate value of which was said to be Rs. 1,04,543. Also were seized from No. 6, General Muthiah Mudali Street, electrical goods, such as junction boxes, Suraj main switches, insulated cables, etc., approximately valued at Rs. 4,000. The Special Deputy Commercial Tax Officer (Intelligence) V, and the Special Assistant Commercial Tax Officer-II, Madras City, issued separate notices of penalty in lieu of confiscation to the petitioners on 22nd September, 1964. The notices stated that, in the opinion of the officers, the petitioners had violated the conditions prescribed under Rule 38(1) of the Madras General Sales Tax Rules, 1959, and the goods were therefore liable to confiscation. The officers, by these notices, informed the petitioner that before ordering confiscation they were willing under the powers conferred on them by law, to give him the option to pay in lieu of confiscation a sum of Rs. 12,541 in one case and another sum of Rs. 4,080 in the other, as penalty and that the goods would be released on payment of the amounts. If the petitioner failed to pay the amounts, the goods, as was stated in the notices, were liable to be disposed of according to law. In answer to these notices, the petitioner filed objections which were all overruled by the two officers holding that the goods were unaccounted stock liable to confiscation u/s 41 of the Act, and renewed the option contained in the notices to pay the penalties before a specified time in lieu of confiscation. Their orders dated 22nd September, 1964, wound up by stating that if the penalties were not paid, the goods would be disposed of according to law. They also issued notices, in Form 53 under the Rules, to the petitioner on the same day. j. Hazarimal & Co., by its petitions prays for calling for the connected records and quashing the said orders of the Commercial Tax Officers. It asks for the relief on the ground that the decision of the two officers was arbitrary, that notwithstanding the fact that the petitioner has produced its account books to show that the stock of goods was properly accounted for, the impugned orders were passed without scrutinising them and merely on the basis that the values of some of the items of the goods seized were not to be found in the purchase vouchers, and that, in the

absence of such values, the inventory of the stock as on 31st March, 1964, was not complete. The respondents have filed counter-affidavits denying these grounds.

9. Mr. V.K. Thiruvenkatachariar for the petitioners argues that there is no power of search under the Madras General Sales Tax Act, 1959, but if there is, it is invalid so that the seizures from search in these cases are illegal, and makes his submission under three heads: (1) construction of Section 41 by itself and in the light of the other provisions of the Act, (2) if the section is construed as empowering search, its legislative competency with reference to the topic of tax on sale of goods, and (3) if the power exists, it offends Articles 19(1) and 31(1) and (5) of the Constitution. They will be dealt with in that order.

10. Before doing so and getting into the problem of construction, certain general observations, as to the law of search and seizure in respect of offences, may be made. Sections 51, 96, 98 and 165 of the Code of Criminal Procedure contain such power. Section 96 authorises search or inspection under and in accordance with a warrant issued by a court having jurisdiction on its being satisfied that the circumstances in which it may issue exist. One such circumstance is that a person to whom a summons to produce a document or thing has been or might be addressed, will not or would not produce as required. The scope of such warrant as to the particular place to be searched may be restricted by court u/s 97. In certain circumstances, the specified Magistrates, may, u/s 98, issue warrants authorising entry into and search and seizure in houses of documents and things concerned with the particular offence or suspected offence. Sections 101 to 103 make general provisions relating to searches and prescribe the procedure to be followed in search and seizure. Such warrants may be issued to any person including the police. During investigation, a police officer in case of urgency may, subject to the terms and restrictions of Section 165, search and seize without a warrant and such restrictions include the application, so far as may be, of Sections 102 and 103 and the further condition that copies of records made as required by Section 165 are sent by the officer concerned forthwith to a nearest Magistrate empowered to take cognizance 6f the offence and that the owner or occupier of the place searched shall, on application, be furnished with a copy of the same by the Magistrate. Section 51 empowers a police officer to search a person while arresting him in connection with a cognizable offence. Schedule V to the Code prescribes the form of a search warrant issued u/s 96 or 98. This form specifically shows that a search warrant includes a power to seize specified articles and produce the same forthwith before the court to which the warrant is returned. u/s 5(1), all offences under the Indian Penal Code should be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code and under Sub-section (2) all offences under any other law should be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to the enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Often fiscal statutes for their effective enforcement create offences and make special provisions prescribing the procedure for investigation, trial and punishment. We have referred to these matters, as during the argument before

us for the petitioners, stress was laid on the scope and nature of the power and procedure of search and seizure with or without a warrant and the safeguards in respect thereof under the Code of Criminal Procedure and it was stated that the court should bear them in mind both in interpreting Section 41 of the Madras General Sales Tax Act and considering its constitutional validity.

11. The Madras General Sales Tax Act, 1959, which will hereafter be referred to as the Act, repealed the Madras General Sales Tax Act, 1939, consolidated and amended the laws relating to the levy of a general tax on the sale or purchase of goods in the State of Madras and came into force on 1st April, 1959. Like other taxation statutes, the Act contains the usual broad features of such statutes, namely, definitions, charging provisions and taxable events, hierarchy of assessing, appellate and revisional authorities, provisions for making returns, assessments, quantification of tax, payment and recovery thereof and enforcement provisions including offences and penalties, and procedures in respect of them. Section 40 requires every person or dealer registered or required to register under the Act, to keep and maintain a true and correct account and such other records as may be prescribed. Section 41 which we are called upon to construe and interpret reads:

Powers to order production of accounts, and powers of entry, inspection, etc.--(1) Any officer empowered by the Government in this behalf may, for the purposes 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 taking action under Sub-sections (i), (2) and (3).

12. In exercise of the powers u/s 41, the Government by a Notification of March, 1959, have invested all officers of the Commercial Taxes Department not lower in rank than an Assistant Commercial Tax Officer, all officers of the Revenue Department not lower in rank than a Revenue Inspector and all officers of the Police Department not lower in rank than a Sub-Inspector with powers of inspection, seizure and confiscation under Sub-sections (2) to (4). Section 45 constitutes offences and prescribes penalties. One such offence is wilful acting in contravention of any of the provisions of the Act and another is fraudulent evasion by an assessee of the payment of any tax assessed on him. The penalty on conviction for any of these offences is a fine which may extend to Rs. 1,000 and, in the event of a second or subsequent conviction, simple imprisonment which may extend to six months or a fine which may extend to two thousand rupees or both. The section also provides that any person who prevents or obstructs entry, search or seizure by any officer empowered u/s 41 shall, on conviction, be liable to simple imprisonment which may extend to six months or a fine which may extend to two thousand rupees or both.

13. Sub-section (1) of Section 41 poses no problem of construction. It relates to the power to require production by a dealer, before the officer concerned, of accounts, registers, records and other documents, and furnishing any other information by him relating to his business. The power is to be exercised for the purposes of the Act and that means in relation to assessing proceedings at all stages including recovery and prosecution for offences. It is also clear that the power extends only to require a dealer to produce accounts etc., or furnish other information relating to his business and not to that of anyone else. A dealer "A" is not obliged under this sub-section to produce the

accounts, etc., of another dealer "B" or furnish information relating to "B" s" business.

14. The main part of Sub-section (2) prima facie relates to and contains the power to inspect all things or places specified therein, the accounts, registers, records and other documents which shall be open to inspection or those maintained by a dealer in the course of his business. The liability to inspection attaches itself only to such accounts, registers and other documents and not to any others not relating to or not maintained by a dealer in the course of his business. Similarly, it is only the goods in the possession of a dealer that are liable to inspection. The right of inspection is also confined to the dealer"s offices, shops, gddowns, vessels or vehicles. The main part of Sub-section (2) does not obviously include the dealer"s residence or residential accommodation. The words "shall be open to inspection" mean "shall be liable to inspection." Whether the collocation of the words used, particularly the word " open ", throws any light upon the scope of inspection we shall consider in due course. The first part of the proviso to Sub-section (2) is in a negative form. In effect, it forbids entry into a residential accommodation and search by an officer empowered under Sub-section (1) without the authority of a search warrant issued by a Magistrate having jurisdiction over the area. There is no dispute that the power to issue such a warrant is under the Code of Criminal Procedure. The second part of the proviso says 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. This part of the proviso obviously enacts the procedure for making searches and proceeds on the assumption that the sub-section includes searches.

15. The question is whether Sub-section (2) without or with the proviso includes a power of search and if it does, whether it is with or can be without a warrant. Four alternatives were suggested for the petitioners of which, according to them, the third is the correct one. The first is that Sub-section (2) only provides for inspection and the proviso is a positive enactment providing for a search of a house under authority of a warrant. The second is that by reason of the proviso the main limb includes searches without warrant and without a condition. The third is that Sub-section (2) is confined to inspection and the proviso is ineffective and the fourth is that Subsection (2) comprehends search without a warrant and the Code has no application.

16. On the other hand, while agreeing that the draft of Section 41 is not happy, the learned Attorney-General contends that having regard to the substance, objects and in general structure of the Act including the preamble therein and in the old Act of 1939 to ascertain the purpose of the enactment, there should be no difficulty in construing Subsection (2) by itself as including searches. The purpose of the Act is to collect tax and for that purpose the Act mentions the person to be taxed, the taxable event, how to assess the quantum of tax, sets up a hierarchy of officers and makes provisions for recovery of tax and to prevent and discourage evasion of tax. And so Section 40 requires maintenance of true and correct accounts by a dealer and Section 41(1) provides for production of books and records on requisition. In that background, read, says the Attorney-General, the whole structure and purposes of Section 41, look at it as a matter

of first impression and ascertain its general intent. The proviso to Sub-section (2) contemplates a power of search with warrant and its very negative form indicates the positive, namely, the officer can institute a search on a search warrant. The proviso does assume that "such officer" has a power upon which it puts a fetter. Work back from Sub-section (3) which contains the power of seizure. The officers can seize on production under Sub-section (1) or inspect under Sub-section (2). Subsection (2) is not restricted to books and goes beyond Sub-section (1) and includes goods, offices, vessels or vehicles. Inspection means, look closely at or look for and the particular aspect of the meaning relevant to the context must apply. Inspection of an office, vessel or vehicle, therefore, implies looking for something which is searched. So Subsection (2) includes a power of search and there is no need to resort to the proviso. This interpretation derives support from the second part of the proviso which says that " all " searches under " this Sub-section " shall, so far as can be, be made in accordance with the Code of Criminal Procedure. When a special law gives power of search, it will prevail and the Criminal Procedure Code will have no application. See State, by Nilratan Sircar, Enforcement Officer Vs. Lakshmi Narain Ram Niwas, . But since under the proviso to Sub-section (2) the Code will be applicable to searches only as far as may be, the Code will have no application at all to searches under that Sub-section. If Sub-section (2) provides for search, as indeed it does, the proviso takes out of its purview the particular kind of search. That in substance is the argument of the learned Attorney-General on the construction of Sub-section (2) and its proviso.

17. Now what is ordinarily meant by inspection, search and seizure? According to the Oxford Concise Dictionary, to "inspect" is to "look closely into"; "examine officially". To that extent what the Attorney-General said is correct. The word is derived from the Latin Spicere sped meaning look. The meaning of "search" in the same dictionary is given as "look or feel or go over (person or his face or pockets receptacle, place, book) for what can be found or to find something of which presence is suspected, probe, look for, seek out". Search warrant as seen from this dictionary is one that is granted by justice of peace to enter premises of person suspected of concealing stolen property. In French it is Chercher and the Latin word is Circare which in literal sense means, go around as in circus. It may be seen that a search is therefore not mere looking for something which is produced or open but which is hidden, concealed or not obvious. It is looking for in the sense of seeking out what is suspected or concealed by probing into or investigation or examination. Seize, as the dictonary shows, means " taking possession by warrant or legal right, confiscate, impound or attach, lay hold of forcibly or suddenly, snatch, grasp with hand or mind". Seizure, therefore, is not mere taking but taking with force. Davis in "Federal searches and seizures" says that the mere observation or visual inspection of what is open and patent does not constitute a search and that an "inspection" contemplates the examination of articles of objects made available for that purpose and is usually, but not invariably, associated with civil rather than criminal proceedings. He adds that an inspection cannot be used in lieu of a legally justified search for the purpose of discovering evidence of the commission of a crime. Referring to an American decision of

a Court of Appeal at page 367, it quotes:

It is, however, implicit in Davis v. United States 325 U.S. 888 that the right to inspect does not carry with it the right, without warrant and in absence of arrest, to reach that which is to be inspected by a resort to self-help in the face of the owner''s protest.

18. At page 350 Davis again refers to the American view that a search implies an examination of one''s premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action, that the term implies exploratory investigation or quest and that it is well established that it is not a search to observe what is open and patent either in daylight or artificial light. Though the American view of the meaning of the words "inspection" and "search" is so expressed in the context of the Fourth Amendment to the Constitution of the United States, it seems to us that it correctly represents the general import and content of those English words. An examination of Sections 96, 98 and 51 of the Code also shows that search has been used in contra-distinction with "inspection" and implies an exploratory examination or probing into or seeking out something which is hidden, concealed, suspected and not open, exposed or demonstrated. It appears to be hardly appropriate to say that when a person or place is explored or probed into for something hidden or not obvious, such a. person or place is inspected. That is clearly a search. Seizure implies not mere taking but forcible taking. It is taking with force possession of something contrary to the wishes of its owner or possessor: See Gianchand v. The State of Punjab [1962] Suppl. 1 S.C.R. 364. In Chandrika Sao and Hazari Lal v. State of Bihar [1964] 1 S.C.J. 116 it was pointed out:

In our opinion, merely holding books found lying in the premises for perusing them cannot properly be regarded as seizure because seizure implies doing something over and above holding an article in one''s hand. According to the Shorter Oxford Dictionary, seizure, among other things, means ''confiscation or forcible taking possession (land or goods); a sudden and forcible taking hold''. As already stated, Mr. Singh merely picked up the books which were lying in the shop and did not snatch them away from any one nor did he take them by force.

19. A mere power of inspection will not, therefore, take with it a power to seize unlike a search which often, particularly, as seen from the provisions of the Code of Criminal Procedure, includes a power of seizure. But we think a power of seizure need not necessarily imply a power of search, for, there may be seizure on production or on inspection.

20. Let us turn to Section 41 of the Act. If Sub-section (2) is taken by itself which follows the power to call for production in the preceding Sub-section, there is no reason, as far as we have been able to see, why we should import into it a power of search. There is nothing in the context or terms of Sub-section (2) or other Sub-sections all read together and harmoniously which compels us to do so. It is an elementary rule of construction that words in a statute are primarily to be construed in their ordinary meaning or common or

popular sense, unless such a construction would lead to manifest and gross absurdity or unless the context requires some special or particular meaning to be given to the words. See 36 Halsbury"s Laws of England, Simonds edition, paragraph 587. Again in paragraph 590 therein it is pointed out:

The words of a statute are to be taken as used in their ordinary sense and it is therefore permissible in ascertaining the ordinary sense of particular words to refer to dictionaries.

21. It may be remembered that in the Madras General Sales Tax Act, 1939, Section 14(1) and (2) contained provisions parallel to Subsections (1) and (2) of Section 41 of the present Act. In fact Subsection (2) in the two sections has almost been identically worded except that Sub-section (2) in the present Act has a proviso which is new. When the learned Attorney-General"s attention was drawn to this and asked whether he would imply a power of search in Sub-section (2) of Section 14 of the old Act, he felt hesitant to do so, though of course on his present argument on the scope of Section 41 of the Act, he should logically imply in that Sub-section such a power of search. In Public Prosecutor Vs. Syed Rowther and Another, , Anantanarayanan, J., held that Section 14 contained no power of search of the residential premises of a dealer without a warrant obtained from a Magistrate. With respect, we share that view. In our opinion, giving the word "inspection" in Sub-section (2) of Section 41 the ordinary meaning it has as mentioned by us, the Sub-section does not include a power of search and is confined to looking into or looking at or examination of all kinds of records, accounts and goods and places which are made available or open for the purpose. The Sub-section does not authorise an exploratory probing into or looking for something hidden or concealed with the ancillary or consequential power of seizure. We think that this conclusion is also strengthened by the significance to be attached to the word "open" in "shall be open to inspection" in Sub-section (2).

22. Does then, the proviso to Sub-section (2) make any difference? We have reached the conclusion, it does not. The proviso undoubtedly proceeds on the assumption that the Sub-section includes a power of search without a warrant and provides for an exception that no residential accommodation shall be searched without a warrant. It is on that assumption again the second part of the proviso says that searches under the Sub-section shall, as far as may be, be made in accordance with the Code of Criminal Procedure. If the main part does not contain the power, it cannot obviously be imported into it through a proviso. A proviso is one which excepts, cuts out or qualifies something which will otherwise be within the main part. When the main part is by itself clear as to its scope and meaning, a proviso cannot be read as enlarging its ambit. That strictly is the function, scope and effect of a proviso. Nor can the erroneous legislative assumption in the proviso have the effect of enacted law. These propositions to which Mr. V.K. Thiruvenkatachari invited our attention, are well established and cannot be disputed.

23. Craies on Statute Law, sixth edition, at page 217 states:

The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

24. Learned author quotes Lush, J., in Mullins v. Treasurer of Surrey (1880) 5 Q.B.D. 170, 173:

When one finds a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

25. Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. [1897] A.C. 647, 652 expressed his views thus which Craies has noticed:

I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light on the ambiguous import of the statutory words.

26. Lord Herschell in the same case declined to read into an enactment words which are not to be found there and which would alter its operative effect because of provisions to be found in a proviso. The following excerpt by Craies from the judgment of Moulton, L.J., in R. v. Dibdin [1910] P. 57(7) is also instructive:

The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as, for instance, in Ex p. Partington (1844) 6 Q.B. 64(9), Re Brocklebank (1889) 23 Q.B.D. 41(1) and Hill v. East and West India Dock Co. (1884) 9 App. Cas. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as these which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in the proviso.

27. A proviso cannot take the place of or substitute the main part. It can do no more than to restrict by exception or qualification the scope and ambit of the main provision and where the main provision is somewhat ambiguous, a proviso may sometimes throw light to clear the ambiguity but it can never as a proviso expand, enlarge or amplify the scop and ambit of the main provision which on its plain language is restricted. Nor can a proviso import, by any means, into the main part, words which are not there. A proviso

completely depends on the main part and is subject to it, as otherwise it will cease to be a proviso and be an independent provision by itself. If the draftsman or the Legislature assumed but wrongly wider scope and content of a main enacted provision which plainly or ex jade is not justified and on that assumption modelled and legislated a proviso, such an assumption implied in the proviso is entirely futile to have the effect of law. In West Derby Union v. Metropolitan Assurance Society [1897] A.C. 647, Lord Halsbury, L.C., has held, where the main provision does not contain affirmative words of power, its proviso cannot put them into it. Observed the Noble Lord at page 651:

It satisfies the words, whilst the other view gives to the proviso a meaning which I think would be most formidable, not merely with reference to the question which now is under debate before your Lordships, but also as a matter of construction, that a proviso could be so read as to suggest that the previous part of the section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the previous words of the section itself. My Lords, that certainly would be a very serious invasion upon any rule of construction by which any document, whether an Act of Parliament or anything else, has ever been construed, and I should be very much averse indeed to lend any countenance to such a mode of construing a proviso.

28. Inland Revenue Commissioners v. Dowdall, O''Mahoney & Co. Ltd. [1952] A.C 401 points out:

It is immaterial that Parliament in enacting the legislation of 1939 and 1940 may have assumed that there was a pre-existing right to make such deductions on Income Tax principles, since there is a distinction between Parliament accepting an erroenous opinion as to the existing law and its enacting that the law shall be changed.

29. In the same case Lord Radcliffe very pithily declared the law that the beliefs or assumptions of those who framed Acts of Parliament could not make the law. We cannot doubt, therefore, that, when, as construed by us, Sub-section (2) contains no power of search, the power cannot, so to speak, be put into it by its proviso. Factually here, it does no such thing. In enacting the proviso, the Legislature assumed such a power in the Sub-section which is not there, and this erroneous assumption is no law and does not and cannot enlarge the scope of the Sub-section. The result of this is, in our opinion, the entire proviso becomes meaningless and otiose.

30. On our construction of Sub-section (2) and its proviso, the further question that, if there was a power of search, how far the provisions of the Code of Criminal Procedure would be applicable does not arise. But having heard arguments on the question, we shall, out of deference to them, deal with it. Mr. V.K. Thiruvenkatachari says that if Subsection (2) includes search, it is with warrant, for according to him, search without warrant will render Sub-section (3) useless. He would add that Sub-section (2) does not include seizure because if it does, a separate Sub-section in relation to seizure will be unnecessary which we however find in Section 41. Learned Attorney-General would,

however, contend that search under Sub-section (2) is without warrant and Chapter VII of the Code of Criminal Procedure would be wholly inapplicable. We can accept neither of the constructions as entirely correct. If the main part means a search with a warrant, the proviso to it will be misplaced, unless its purpose is merely to subject a residential accommodation too to search. Such an accommodation is not within the main part and the proviso will not, as mentioned by us, have the effect of putting it into it. The second part of the proviso makes the provision of the Code of Criminal Procedure applicable to all searches under the Sub-section but only so far as may be. Some such limiting words not unoften occur in special enactments creating offences and penalties and prescribing procedures in respect of them. In Hinde v. Brayan (1884) 7 Mad. 52, "as far as may be" in Section 587 of the CPC came up for consideration. Innes and Muthusami Ayyar, JJ., were of the view that those words by which the provisions of Chapter XLI of the Code were made applicable to appeals from appellate decrees must be taken to mean "as far as is consistent with the principles on which appeals from appellate decrees are admitted and determined." They of course visualised the possibility that those words could be understood in the wider sense of "as far as possible", but in the context they preferred the narrower meaning. With reference to this judgment, Mr. V.K. Thiruvenkatachari argues that to the extent, which will not be inconsistent with Sub-section (2), the provisions of the Code of Criminal Procedure will apply to searches even taking the words "as far as may be" in the narrower sense. In State, by Nilratan Sircar, Enforcement Officer Vs. Lakshmi Narain Ram Niwas, , the Supreme Court held in the circumstances of that case that in view of Section 19-A of the Foreign Exchange Regulation Act, 1947, the Magistrate issuing a search warrant u/s 19(3) of that Act would have no power of disposal under the provisions of the Code of Criminal Procedure over documents seized in the course of search. Because Section 19(3) contains the power to issue a search warrant, that makes sections 96, 98 and Form 8 of Schedule V of the Code inapplicable, though of course as the Foreign Exchange Regulation Act does not provide for the procedure relating to the conduct of searches, Sections 101 to 103 of the Code will govern. The actual words used by Section 19(3) are that the Magistrate may issue a search warrant therein and the provisions of the Code of Criminal Procedure relating to the seraches under that Code shall, so far as the same are applicable, apply to searches under that Sub-section. Mohammad Serajuddin v. R.C. Mishra [1962] Suppl. SCR. 545 was distinguished on the ground that Section 172 of the Sea Customs Act itself provided that a search warrant issued under that section would have the same effect as one issued under the Code of Criminal Procedure. While Section 5 (2) of the Code says that all offences under special law shall be investigated, inquired into, tried or otherwise dealt with according to the provisions of the Code of Criminal Procedure, it makes it clear that this will be so only subject to the special law regulating the procedure in respect of those matters. The ambit of regulation in special law will therefore decide the extent of applicability or non-applicability of the provisions of the Code. That, as we understand, is also the test applied by the Supreme Court in those cases in the light of the specific or special provisions in the particular enactments with which it was concerned. Coming back to Section 41, on the assumption that Subsection (2) includes a power of search, its terms,

in our view, will exclude the application of sections 96 and 98 of the Code as also the form of warrant prescribed by it, but, at the same time, we can find nothing in those terms to make Sections 101 to 103 of the Code inapplicable to the conduct of search, whether the words "so far as may be" in the second part of the proviso are read in the narrower or wider sense as mentioned in Hinde v. Brayan (1884) 7 Mad. 52. We think that by applying the above test, conduct of searches under the first part of the proviso should be in accordance with Sections 101 to 103 of the Code. But if Sub-section (2) is read as search without a warrant, quite apart from the legal effect of the proviso, which we have already adverted to, it seems to us that even the issue of search warrants in respect of the proviso will have to be under the provisions of the Code including the form of warrant. Sub-section (3) of Section 41 contains the power of seizure, and in the context of the words used therein, it is a power to be exercised without a warrant. The Sub-section also provides as to how what has been seized should be dealt with. It is, therefore, somewhat analogous to Section 165 of the Code of Criminal Procedure and is unlike some of the requirements of the form of warrant prescribed by the Code, particularly in the matter of obligation to bring into court what has been seized in execution of a search warrant. We are, therefore, of the view that, Section 165 of the Code also will not apply to proceedings under Sub-section (3) of Section 41 of the Code. The State of Rajasthan Vs. Rehman, is distinguishable as it related to Section 18 of the Central Excises and Salt Act, 1944, which provides that all searches made under that Act and the Rules shall be carried out in accordance with the provisions of the Code relating to searches under it. It was for that reason thought in that case that there was no reason why conditions should be imposed in the matter of a search by the police officer u/s 165 of the Code but no such safeguard need be provided in the case of a search by the excise officer under the Rules. Our view as to the extent of applicability of the Code to matters under Sub-section (3) applies equally to those in Subsection (4) of Section 41 and we may add that in view of the specific provision in Sub-section (4) including seizure, it is not within the purview of Sub-section (2).

31. We pass on to the second contention of Mr. V.K. Thiruvenkatachari regarding legislative competency. He does not dispute that a topic of legislative power should be read as widely as possible and include all matters incidental, ancillary and necessary to the law made thereunder to be effective. Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer, , held that Entry 54, List I, of Seventh Schedule to the Constitution included the power to make a law to prevent evasion of tax. The Supreme Court observed at page 493:

So Entry 54 should be read not only as authorising the imposition of a tax but also as authorising an enactment which prevents the tax imposed being evaded.

32. It was considered that without such a power the effectiveness of the taxing provisions would be defeated. On that view Section 23A of the Indian Income Tax Act, 1922, was upheld as within the purview of the said entry on the ground that it was a provision to prevent evasion of tax. On a similar view, Section 16(3)(a)(i) and (ii) of the Indian Income

Tax Act was regarded by the Supreme Court in Balaji Vs. Income Tax Officer, Special Investigation Circle, , as within the topic of legislation to tax on income. If there is any likelihood of a loophole, the taxing power should necessarily include the power to plug it by requisite legislative provision. The Supreme Court in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, again observed:

Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries, in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation.

33. This Court had also earlier recognised this in Sivagaminatha Moopanar and Sons Vs. Income Tax Officer, II Circle, Madurai and Another, :

... the power to enact laws to prevent evasion and make it unremunerative to the evader could also be viewed as an incidental or ancillary power necessary to render effective the substantive power conferred by Entry 54 (tax on income).ï¿½

34. On that view, Section 28 of the Income Tax Act, which enabled the Income Tax Officers to levy a penalty in certain circumstances was held to be competent. It is beyond doubt, therefore, that an organic power or topic or field of legislation in the Seventh Schedule to the Constitution should be read in its widest possible amplitude and as including also all ancillary, subsidiary, incidental and necessary powers to make the legislation under the particular topic as effective as possible with reference to its objective and purpose. In fact, even a provision providing limitation for refund of excess collection of sales tax was regarded in Messrs Burmah Construction Co. v. The State of Orissa [1962] Suppl S.C.R. 242, as ancillary to the power to tax on sale of goods. In The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, , the Supreme Court held Section 14A of the Orissa Sales Tax Act as within the power to tax on sale of goods which provided that refund of tax could be claimed only by the person from whom the dealer had realised the amount by way of sales tax or otherwise. What are the provisions required to check the evasion of tax or make it unprofitable will naturally have to be commensurate with the exigencies, ingenuity and contrivance of tax evasion. Often the question largely is one of degree. Vide Indian Aluminium Co. Ltd. Vs. The State of Madras, . The question of ancillary nature or character of such provisions will have to be decided, therefore, with respect to the circumstances of the particular legislation, its objective and scope, vis-a-vis the particular legislative head or topic or power.

35. Mr. V.K. Thiruvenkatachari argues that while preventive and penalty provisions to check evasion are incidental and necessary, a power to search goods in a. business premises or residential accommodation of a dealer in sale of goods is not ancillary to or necessary for the topic of tax on sale of goods. Viewed in the background of what we

have stated above in relation to ancillary and subsidiary power, we are of opinion that power of search even of goods, if included in Section 41, will be competent. Such a power, as it seems to us, will be plainly in aid of achieving the purposes of the Act. No elaborate consideration seems necessary to sustain the power of search of books, documents etc., of a dealer maintained in the course of his business. So far as goods are concerned, take for instance charge of tax at purchase point and assume, a question arises as to whether purchases of goods have been made which are liable to tax. The presence of goods on a search of a dealer''s premises or his residence will then be one method of checking such purchases and of evasion of the tax. Mr. Thiruvenkatachari, however, urges that the power to search, and confiscate goods cannot, in any case, be regarded as ancillary or necessary. This power in Sub-section (4) relates to goods unaccounted for. Apparently the Sub-section pre-supposes suspected or suppression of sales or purchases of such goods or under cover of possession of such goods and possible evasion. But it is said that after all they may not be sold and further they are not contraband or offending goods to be seized and confiscated as under the Sea Customs Act. Where import of goods is forbidden but they are smuggled in across the customs barrier without payment of duty, or a ship, vehicle or other thing is used in smuggling, a power to seize and confiscate offending goods, ship or thing may be essentially ancillary to the law relating to customs. See Indo-China Steam Navigation Co'' v. Jasjit Singh [1964] 34 Comp. Cas. 435. In that case, a mere penalty or fine or other punishment alone will not wholly serve the purpose of the Sea Customs Act and secure its effective enforcement. There the Customs are concerned directly with the goods themselves which is not the case with sales tax. Sales tax is chargeable only if and when sales or purchases of goods are effected. The taxable event is the sale or purchase of goods and evasion of tax is not related to goods, though of course search for and presence of goods may, in particular circumstances, be evidence of evasion. A provision requiring maintenance of correct stock accounts of goods for purposes of sales tax is understandable. But we are unable to see how a power of seizure and confiscation of goods is or can be ancillary or incidental to the power to tax the sale or purchase of goods even from the standpoint of checking evasion or making evasion unprofitable. The Act is not a law on goods. No such law can be made under the guise of Entry 54, List II, of the Seventh Schedule. In R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, , the Supreme Court held that the provision in the Hyderabad General Sales Tax Act, 1950, that every person, who has collected before a specified date, any amount by way of tax which is not exigible under the charging provision shall pay over to the Government and that in default of payme R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, nt, it shall be recovered as if it were arrears of land revenue, was not within Entry 54 of List II. The Supreme Court observed:

The Legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax.... We are therefore of opinion that the provision...cannot be justified even as an incidental or ancillary provision

permitted under that entry.

36. Though there is no analogy to the present context,-the principle of this decision is clear that what has been properly a subject within the ambit of a legislative head of power including ancillary and incidental powers flowing therefrom, cannot be indirectly legislated upon under the guise of making a law which might otherwise be within the limits of the legislative head of power. We are of the view that the provision for seizure and confiscation of goods offends that principle. We hold, therefore, that Sub-section (4) of Section 41 in so far as it provides for such a power is not within the ambit of Entry 54, and is neither ancillary nor incidental thereto and is incompetent and invalid.

37. The next submission for the petitioners is that Clause (a) of the second proviso to Sub-section (4) is also invalid as it contemplates a tax on goods without reference to their sales or purchases. What the second proviso does is to offer to the person concerned an option to pay in lieu of confiscation and specifies the quantum of compensation in lieu of confiscation. The opening words of Clause (a) which are obviously ill-placed or ill-drafted assume that the goods not accounted for are taxable under the Act and on that assumption the clause says that 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, shall be the compensation in lieu of confiscation. We are not concerned at the moment with Clause (b). The compensation to be paid is thus made up of: (1) the tax recoverable, and (2) double the amount of tax if it falls short of one thousand rupees. Learned Attorney-General suggests that the first component is in the nature of an advance payment of tax and points to the provisions relating to provisional assessment of tax and advance collection. That clearly is not what the second proviso does or contemplates. The proviso uses the expression "where the goods are taxable under the Act" but we can find no provision in the Act which makes the goods taxable. Apart from this fallacy, there is no indication in the proviso that, as it speaks of "in addition to the tax recoverable", it is related to any actual sale or purchase chargeable under the Act. The provisional assessment is made no doubt on the basis of the figures of sales or purchases referable to the previous year or what may be expected, having regard to the outturn or the quantum of the business in question. The collection of an amount in advance in that context is not of tax per se but is of security and is adjusted when tax is charged and quantified by assessment. See Tobacco Trading Co. v. Assistant Commercial Tax Officer ILR 1957 Mad. 493. But that is not the case under the proviso and our attention has not been drawn to any provision for any such adjustment at the proper time of the first component under Clause (a) paid in lieu of confiscation. Entry 54, List II, does not cover a tax on goods and what is not a sale or purchase of goods, as was held in State of Madras v. Gannon Dunkerley & Co. [1958] 9 S.T.C. 353 On this ground, we are of the view that the first component of Clause (a) of the second proviso is ultra vires the powers of the Legislature under Entry 54, List II, and that, as we think, it is not severable from the rest of the clause, the entirety of Clause (a) of the second proviso to Sub-section (4) must be struck down.

38. Lastly we come to the contention of the petitioners based on Articles 19(1) and 31(1) of the Constitution. If the power u/s 41(2) is held to be a power of search without a warrant, so it is said, inasmuch as no safeguards have been provided for its due exercise, it is an unreasonable restriction and so infringes the rights of the petitioners under Article 19(i)(f) and (g). We recognise that a power of search and seizure is a drastic power and that if it is necessary in public interest, equally would it be essential to make suitable safeguards to ensure against arbitrary and unreasonable exercise of the power. During the arguments for the petitioners, reference was made to how the English common law viewed a power of search. We do not however think it necessary to notice in detail the struggle of eighteenth century common law lawyers and Courts and the relative decisions as to power of search. Entick v. Carrington 19 St. Tr. 1029 was a landmark which is regarded as having settled the common law as to general search of premises. Lord Camden, C.J., in that case condemned the practice of the Secretary of State issuing a general warrant to search a man''s property and his premises. He described the power claimed for the Secretary of State in the following words:

This power so claimed by the Secretary of State...is claimed by no other magistrate in the kingdom but himself...If honestly exerted, it is a power to seize that man''s papers who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man who is so described in the warrant, though he be innocent. It is executed against the party before he is heard or even summoned; and the information, as well as the informers, is unknown. It is executed by messengers with or without a constable (for it can never be pretended that such is necessary in point of law) in the presence or absence of the party, as the messengers shall think fit; and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof.

39. Such a power claimed by the Secretary of State was sought to be justified on two grounds: (1) long practice of the executive and (2) interest of the State. Rejecting them and holding that he could find no authority to justify the power, the learned Chief Justice went on:

If the power of search is to follow the right of seizure, everybody sees the consequence. He that has it or has had it in his custody ; he that has published, copied or maliciously reported it, may fairly be under a reasonable suspicion of having the thing in his custody, and consequently become the object of the search warrant. If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established. As therefore no authority in our books can be produced to support such a doctrine, and so may Star-Chamber decrees, Ordinances, and Acts have been thought necessary to establish a power of search, I cannot be persuaded, that such a power can be justified by the common law.

40. The English approach in those days to the sanctity of the home and privacy is illustrated by Lord Coke''s statement:

The house of every one is to him as his fortress, as well for his defence against injury and violence as for his repose

and the elder Pitt''s expression:

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail ; its roof may shake, the wind may blow through it ; the storms may enter; the rain may enter--but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenement.

41. That was the outlook of the seventeenth and eighteenth century England. It was in that background and the events in that country touching a general or unrestricted search warrant, which was regarded as unlawful, the American Fourth Amendment was made. It says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42. The Amendment was directed against unreasonable searches and was intended to provide safeguards for issuing warrants, namely, that they may be issued only on a probable cause, which must be shown by oath or affirmation and the warrants must particularly describe the place to be searched and the persons or things to be seized. But it was realised in course of time by later authorities in England that the Judges before them had gone too far in protecting the freedom of a man''s house and that the community was not sufficiently protected. And so, as observed by Lord Denning in his "Freedom under the Law" the balance was restored by Parliament. He points out that in a great many cases now Acts of Parliament permit magistrates to grant search warrants so as enable the police to enter and see if a house is being used for unlawful purposes. Referring to certain other Acts of Parliament before and after the Second World War, Lord Denning says at page 107:

The granting of these powers of entry is a complete departure from the principles hitherto in force in England. The powers conferred on these officers are greater than those conferred on the police. It is not necessary for these officers, as it is for the police, to go to a magistrate and satisfy him that a search should be allowed. It is not necessary for them to show reasonable grounds for thinking that an offence has been committed. It is not necessary for them to hold a specific authority in respect of specified premises. All that is necessary is that the inspector should produce, if required, a duly authenticated authority, which means a general authority issued by an official in a Government department, authorising the inspector to enter premises of the kind in question.

43. While being alive to the fact that conflict with the interests of the State did arise in England in relation to a right of search, Lord Camden, C.J., was not impressed with the argument based on State necessity and held fast to his opinion that the common law did not understand that kind of reasoning. Fishing warrants, so to speak, for seizure of papers in the hope of finding traces of guilt were severely criticised by some of the cases which followed Entick v. Carrington 19 St. Tr. 1029. But in Elias v. Pasmore [1934] 2 K.B. 164, Harridge, J., however held that interests of the State must excuse the seizure of the documents which were evidence of a crime committed by any one. The pendulum has therefore moved far away from Lord Camden, C.J., between 1763 and 1934. Beyond the historical interest and value, we think that not much assistance can be derived from the earlier English or even American cases based on the Fourth Amendment. We have to consider the problem in the context of the guaranteed rights of a citizen under Article 19(i)(f) and (g) and the violation of which can only be justified as a reasonable restriction in public interest.

44. As we mentioned, the general law relating to search and seizures is to be found in the Code of Criminal Procedure. M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, held that the provision for a search warrant under the first alternative of Section 96(1) of the Code did not offend Article 19(i)(f) of the Constitution. This was on the ground:

A search and seizure is only a temporary interference with the right to hold the property searched and the articles seized. Statutory recognition in this behalf is a necessary and reasonable restriction and cannot per se be considered to be unconstitutional.

45. Whether Section 96 of the Code was a reasonable restriction was not considered in Wazir Chand v. The State of Himachal Pradesh [1955] 1 S.C.R. 408, but it ruled that any seizure by the Indian Police of any property of a citizen not sanctioned under Sections 51, 96, 98 and 165 of the Code or any other law, infringed the fundamental rights of the citizen guaranteed under Articles 19 and 31 of the Constitution. In The State of Rajasthan v. Rehman [1960] 1 S.C.R. 991, it was pointed out that a search without a warrant which did not satisfy the conditions of Section 165 of the Code of Criminal Procedure was illegal. This was because as observed by the Supreme Court:

As search is a process exceedingly arbitrary in character, stringent statutory conditions are imposed on the exercise of the power.

46. Radha Kishan v. State of Uttar Pradesh [1963] Suppl. (1) S.C.R. 408 decided that the consequences of contravention of the provisions of Sections 103 and 165 of the Code were that the search could be resisted by the person whose premises were sought to be searched and that, because of the illegality of the search, the Court might be inclined to examine carefully the evidence regarding the seizure.

47. With reference to the above cases, Mr. Thiruvenlcatachari argues that because of the interposition of the Magistrate and his judicial discretion in issuing search warrants under sections 96 and 98 of the Code and of the safeguards and conditions provided therein and Form 8 in Schedule V to the Code and, in the case of a search without a warrant, because of the conditions of Section 165 of the Code for exercise of such power, they have been or may be regarded as reasonable restrictions in public interest. The form of warrant shows that a warrant must contain certain particulars, namely, the name and designation of the police officer or other person who is to execute the warrant, what information or complaint has been laid before the Magistrate, what offence has been committed or is suspected, what specific thing clearly specified in the opinion of the Magistrate should be produced as essential to the enquiry, what specific thing is to be searched for and where exactly it is to be searched for. The warrant also contemplates that the things seized during a search should be produced before the Magistrate forthwith while returning the warrant. So far as Section 165 of the Code is concerned, a search without a warrant cannot legally be carried out unless the four conditions mentioned therein and adverted to in The State of Rajasthan Vs. Rehman, are all complied with. In the absence of such and similar safeguards, the power of search under Sub-section (2) of Section 41 and the proviso thereto, so it is said, does not satisfy the test of reasonable restriction. In support of this contention, reliance is placed on 5. SENAIRAM DOONGARMAL AGENCY (P.) LTD. AND OTHERS Vs. K.E. JOHNSON AND OTHERS., . The Attorney-General counters this argument by stating that the question whether a restriction is a reasonable restriction cannot be judged with reference to any abstract or rigid standard and that the safeguards in the Code of Criminal Procedure do not by any means constitute the sole standard. He says that public interest against evasion of tax demands invasion of business premises or residential accommodation of a dealer by surprise and a power to search is necessary for effective and complete fulfilment of the object of the Act as disclosed in its preamble and several provisions and Rules made thereunder. While providing for such a power, he continues, Section 41 has provided every safeguard necessary to make a reasonable, restriction. First of all, the Government, the highest authority, is entrusted with the power of discretion to choose officers or class of officers to be invested with the power of seizure. The object of the Act is a sufficient guide to the officers empowered to search as to the occasion and circumstances the search may be called for, for instance the evasion or suspected evasion of tax by maintenance of false accounts or no accounts or other device. The place or places to be searched are indicated in Sub-section (2). Whose premises can be searched is also clear from Sub-section (2). It also indicates what books and records or other things which may be searched for and seized. Further the power of seizure under Subsection (3) can only be exercised if an officer has reason to suspect evasion of payment of tax, fee or other amount due from the dealer under the Act. If the officer wants to seize the records, he has to record his reasons in writing and when he seizes, he has to give to the dealer a receipt for what he has seized. Moreover, the records seized cannot be retained by the officer beyond a specified period and they can only be used for any enquiry or proceeding under the Act. These are sufficient safeguards, according to the Attorney-General, which

will prevent any arbitrary or unreasonable exercise of the power of search. He urges that while the power embodied in Section 41 is required in public interest to prevent evasion of tax and make its collection effective and complete, the exercise of the power is hedged in by checks and conditions so that it operates but as a reasonable restriction and does not therefore infringe Articles 19(1)(f) and (g) and 31(1) of the Constitution. He relies on Surajmull Nagarmull and Others Vs. The Commissioner of Income Tax, .

48. In SENAIRAM DOONGARMAL AGENCY (P.) LTD. AND OTHERS Vs. K.E. JOHNSON AND OTHERS., . Section 37(2) of the Income Tax Act, 1922, relating to search and seizure was by a majority view held to be invalid as violating, among other things. Article 19(1)(f) and (g) of the Constitution. But earlier Surajmull Nagarmull and Others Vs. The Commissioner of Income Tax, took a contrary view and held that the subsection was a reasonable restriction and did not violate Article 19(1)(f) and (g) of the Constitution. This accorded with the dissenting opinion in the Assam case. The majority view in Assam was based on the following grounds: (a) invasion of the fundamental right not as a result of enforcement of any judicial process or warrant of Court, (b) Sub-section (2) of Section 37 contains no indication of the object and purpose for which the power of search can be exercised and there is no nexus between the two, (c) when and in what circumstances the power is to be exercised there is no indication, (d) in respect of which persons and whose premises is not stated, (e) no principle or policy is indicated to guide the exercise of the power, (f) no opportunity is provided for to contest the validity of the exercise of power, (g) no opportunity is given to the affected person to make representations against the proposed search, (h) no notice is to be given before exercise of the power and (i) there is no provision for the return of books which have been seized. So the majority of the learned Judges of the Assam High Court considered that Subsection (2) of Section 37 of the Income Tax Act contained a concentration of naked, arbitrary and unrestricted power vested in the executive without any form of check, control or limitation. Learned Chief Justice of that Court differed and was of the view that Subsection (2) was a reasonable restriction because the deprivation was only temporary and was meant to serve a public purpose, namely, prevention of large scale evasion of tax. The Calcutta High Court repelled the argument that the Sub-section left the exercise of a drastic power to the decision of the executive and that it made no provision for hearing or representation before or after search or appeal from seizure and for return of documents. The Court upheld the validity of the power on the view: (a) exercise of the power is made subject to any rules made in that behalf, (b) the Commissioner of Income Tax, a high official, in the hierarchy, has been entrusted with the power to specifically authorise any Income Tax Officer to enter and search, (c) the provisions of the Code of Criminal Procedure applying to searches are made applicable, so far as may be, to searches u/s 37, (d) the Commissioner is to authorise an officer specifically in each case and not generally, (e) such authorisation by the Commissioner will be on examination of the reasons of the Income Tax Officer for his belief that any books of account or other documents which, in his opinion, will be useful or relevant to the proceedings under the provisions of the Income Tax Act, may be found, and (f) while authorising an Income Tax

Officer, the Commissioner will naturally specify the premises which the former is authorised to enter and search. The Calcutta High Court was of the view that the Income Tax Act contained sufficient criteria and guide with reference to its objects and various provisions as to the exigency of tax collection.

49. It is not necessary for our present purpose to express a preference to one or the other view, for, we are not concerned with the validity of Section 37(2) of the Income Tax Act. But what is important to notice is both the Assam and Calcutta High Courts proceeded to determine the constitutional validity of Section 37(2) on the basis of presence or absence of reasonable safeguards against arbitrary exercise of the power of search and seizure, though there may be difference of opinion as to "whether this or that safeguard will meet the test. As the Calcutta High Court itself has pointed out, the question of reasonableness or reasonable restriction is a relative question. N. T. F. Mills Ltd. v. The Second Punjab Tribunal AIR 1957 S.C. was concerned with the validity of Section 10 of the Industrial Disputes Act vis-a-vis Article 14 of the Constitution. The Supreme Court, referring to the purpose of the Act as disclosed by its preamble and the definition of an industrial dispute taken with the rest of the provisions relating to adjudication of various other matters, held that the achievement of one or the other objects must guide and control the exercise of the discretion of Government u/s 10 and there was no scope for the argument that the appropriate Government would be in a position to discriminate between one party and the other. It was, however, pointed out whether the one or the other of the steps contemplated by Section 10 should be taken by the appropriate Government must depend upon " the exigencies of the situation, the imminence of industrial strife resulting in cessation or interruption of industrial production and breach of industrial peace endangering public tranquility and law and order." The same reasoning was apparently adopted in upholding the validity of the section as a reasonable restriction in the context of Article 19(1)(f) and (g). PANNALAL BINJRAJ AND ANOTHER Vs. THE UNION OF INDIA AND OTHERS. (AND OTHER CASES)., held that Section 5(7A) of the Income Tax Act did not offend Article 19(1)(g) or Article 14 of the Constitution. The section gave power to the Commissioner of Income Tax to transfer any case from one Income Tax Officer subordinate to him to another. Under that section, the Central Board of Revenue also was given a similar power. There was no question that this was a discretionary power and the Supreme Court considered that it was not necessarily discriminatory in its nature.. The Court went on to say:

...and abuse of power cannot be easily assumed where the discretion is vested in such high officials.

50. Even if the abuse of power sometimes occurs, the validity of the provision cannot be denied because of such apprehension. What may be struck down in such cases is not the provision but the abuse of power itself. Another part of the reasoning on which the decision of the Supreme Court was founded is:

There is a broad distinction between discretion which has to be exercised with regard to a fundamental right guaranteed by the Constitution and some other right which is given by the statute. If the statute deals with a right which is not fundamental in character, the statute can take it away but a fundamental right the statute cannot take away. Where, for example, a discretion is given in the matter of issuing licences for carrying on trade, profession or business or where restrictions are imposed on freedom of speech, etc., by the imposition of censorship, the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions. Discretion of that nature must be differentiated from discretion in respect of matters not involving fundamental rights such as transfers of cases. An inconvenience resulting from a change of place or venue occurs when any case is transferred from one place to another but it is not open to a party to say that a fundamental right has been infringed by such transfer. In other words, the discretion vested has to be looked at from two points of view, viz., (1) does it admit of the possibility of any real and substantial discrimination, and (2) does it impinge on a fundamental right guaranteed by the Constitution?

51. These considerations, namely, that the Commissioner of Income Tax is to exercise discretion according to the exigencies of tax collection, that the power vested not in minor officials but the Commissioner and the Central Board of Revenue in whose cases abuse of power could not be easily assumed, that a power involving discretion is not necessarily discriminatory, that it may well be assumed that high officials in whom discretion is vested, would follow the law and that if an improper order is made, the same may be struck down, went into that decision. In Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, , the Supreme Court upheld the validity of Section 3(1) of the Commissions of Inquiry Act on the grounds among others,

Parliament has confided the task of selective application of the law to the appropriate Government and it is, therefore, for the appropriate Government to exercise its discretion in the matter. It is to be expected--and, until the contrary is proved, it is to be presumed--that the Government, which is responsible to Parliament, will act honestly, properly and in conformity with the policy and principle laid down by Parliament.

52. It was considered that where a discretion was vested in the highest executive body like the Central Government, it was not easily to be expected that it would be used in a discriminatory manner from the standpoint of Article 14 of the Constitution. The Collector of Customs, Madras v. Nathella Sampathu Chetty [1962] 3 S.C.R. 786 decided that Section 178A of the Sea Customs Act, 1878, did not offend Articles 14 and 19(1)(f) and (g) as the rule as to burden of proof embodied in the section was designed to trace prevention and for eradication of smuggling which is a reasonable restriction, though the provision might operate some hardship on a smaller section of the public.

53. It may be seen from these cases that the question of reasonableness or reasonable classification for the purpose of Article 14 or a reasonable restriction for the purpose of Article 19(1) is approached and decided with reference to the particular object and scope

of the provisions of an impugned Act and even to the special facts and circumstances in each case. As rightly pointed out by learned Attorney-General, no abstract or rigid formula or standard can be formulated to serve as a universal test of either reasonable classification or reasonable restriction: vide Arunachala Nadar v. State of Madras AIR 1950 S.C. 300. Observed the Supreme Court in State of Madras Vs. V.G. Row, :

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

54. It has been truly said that reason is a dove''s neck or a box of quick silver and its content, nature, scope and application must necessarily be shifting and changing according to persons, occasions and circumstances. But it seems to us that while there can be no particular standard or uniform yardstick of reasonableness, the broad grounds on which it may be founded may generally be conceived and properly understood in the context of particular statutes and circumstances which come up for test of constitutional validity. Those grounds may be common up to a point for the purpose of Article 14 and Article 19(1) but beyond that, there may be further grounds peculiar only to considerations in respect of reasonable restrictions. An impugned provision may pass the test of reasonable classification, not offending the equal protection clause. But notwithstanding that fact, it may not be considered a reasonable restriction. What is a reasonable restriction in the context of Article 19(1) will depend upon what is a just and equitable balance in the circumstances between two opposing factors, namely, the fundamental right of a citizen and the interests of the State. When they clash, to what extent the fundamental right should yield to State necessity or public interest or to what extent the law should prevail over it is a question of nicety and difficulty which has to be resolved having regard to several factors including those pointed out in State of Madras Vs. V.G. Row, . As pointed out by Davis on Federal Searches and Seizures:

Effective enforcement of the law in a democracy is based on an equitable balance between the rights of the individual and the welfare of society. The individual relinquishes a portion of his personal prerogatives through the legislative process in order that he and

his fellow-citizens may be free from criminal activities. Through this process, the officer is authorised, under appropriate circumstances, to invade personal privacy, to restrict individual liberty and to require disclosure of information.... Thus, law enforcement depends on legally sanctioned interference with individual rights.... Every citizen has a vital interest in preserving a reasonable relationship between individual liberties and law enforcement in view of the intolerable alternatives which are possible. If the officer has unrestrained authority to ignore personal liberties, the product is a police State ; if he is barred from any interference with private rights, the result is criminal anarchy.... In order to avert these alternative perils and their intermediate gradations, it is the responsibility of the Judge and the lawmaker to establish rules for law enforcement which will give society maximum protection from the criminal with a minimum of interference with individual liberties.

55. When we are on the question of search, there is not the slightest doubt that conflict with the interest of State does arise in relation to the right of search. As J.D.B. Mitchell on "Constitutional Law" points out at page 282:

The principle of the right of property means in this context that (except with consent or in extraordinary circumstances) a warrant is required for entry into a man''s property, and further that the invasion of property must be confined within necessary limits, which means in this context that the warrant shall be sufficiently specific.

56. But a safeguard need not necessarily be in the form of a warrant. As a matter of fact, as we have seen, there are cases in which the validity of the power of search and seizure has been upheld even where it is without a warrant. All that is necessary therefore is that there should be a balance struck, just and equitable, in all the circumstances between the sanctity of the property or individual rights and the interest of the community in law enforcement either in regard to tax collection or suppression of crimes or any other by the insistence upon proper safeguards against oppression or violation of guaranteed basic rights under the Constitution.

57. Let us now examine Section 41, and find out whether the power of search without a warrant in Sub-section (2)--we are assuming that it contains the power--and the power of seizure in Sub-section (3) are unreasonable restrictions on the petitioner''s right under Article 10(1)(f) and (g). We are inclined to think that the right under Article 10(1)(f) covers business premises and the kinds of records mentioned in Sub-section (2) of the Act. Any invasion of the business premises or search and seizure of records and goods from there will affect the right to hold and dispose of the property. The right to hold the property will, in our view, include the right to enjoy that property without interference or disturbance. Equally, when books of accounts or goods in trade are searched for and taken away, it necessarily affects the business, carrying on the business and also injuriously reflects on the business reputation of the individual concerned. But exigencies of tax collection, which constitute a public interest, may doubtless make it necessary to subordinate the rights under Article 10(1)(f) and (g). But in order that the invasion be lawful, it should be

reasonable and within limits, so that it may be regarded as a reasonable restriction. We may take it that the safeguards which the Attorney-General pointed out and which we have referred to in the earlier part of this judgment, are present in Sub-section (2) of Section 41. We are not prepared to hold that interposition of a Magistrate or judicial discretion is a sine qua non for a power of search to be a reasonable restriction. Nor do we think that a search to be valid must necessarily be on a warrant. The petitioners with reference to Entick v. Carrington 19 St. Tr. 1029 say that if there is to be a seizure it ought to be stated with precision, when, where, upon what charge, against whom, by what Magistrate and in what stage of the prosecution. While there is no doubt that statements of those details before search may serve as a safeguard, we cannot say that, in order to answer the test of reasonable restriction, such details should invariably be given as a condition for the validity of the power of search and seizure. The matter should be judged in the light of the exigencies and requirements of tax collection. When evasion takes place on a large scale, it is conceivable that a surprise element in the matter of search and seizure will be of great value from the point of view of the State. If this is necessary in public interest, insistence on all those details before a search cannot be admitted. But Sub-section (2) does in a way indicate what it is that can be searched and where and when, against whom and in what connection. A search and seizure u/s 41 cannot be for any extraneous purpose but only in respect of or in connection with proceedings regarding the particular dealer under the provisions of the Act. But the question still remains whether the power of search and seizure, if any, u/s 41 can be regarded as a reasonable restriction so as to justify its constitutional validity. Learned Attorney-General argues that the power to delegate to officers the authority to search and seize is vested in the State Government, the highest executive authority, and it may be trusted to exercise the power reasonably and for the purpose of the Act. But this power of the State Government cannot be approximated to or is not like the power of the Commissioner of Income Tax u/s 37(2) or 5(7A) of the Income Tax Act or of the Central Government in the Commissions of Inquiry Act, 1952, which have been held as not to offend Article 19(1). The power of the Commissioner of Income Tax u/s 37(2) is that in each case brought to his notice, he authorises the Income Tax Officer to make a search and the officer seizes books of account and records in connection with the proceedings relating to an assessee under the Income Tax Act. What is given is not a general power to authorise all the Income Tax Officers without reference to the merits and needs of particular cases to search and seize if and when they think fit in the light of the exigencies of the tax collection. Under Sub-section (1) of Section 41, the Government does not examine each case and satisfy itself on the materials before it whether an officer in a particular or given case should be authorised to search and seize a dealer''s accounts, records, etc., or goods in his possession, either in his business premises or in his residence. The power of the Government is only to invest, without reference to a particular case, officers chosen for that purpose with power to search and seize. In fact, as may be seen from the Explanation at the end of Section 41, it will be open to the Government to empower different classes of officers for the purpose of taking action under Subsections (1) to (3). The notification actually made by the Government which is

dated 23rd March, 1959, in exercise of the powers conferred by Section 41 shows how it has invested the power of search and seizure in all kinds of officers, namely, all officers of the Commercial Taxes Department, not lower in rank than an Assistant Commercial Tax Officer, all officers of the Revenue Department not lower in rank than a Revenue Inspector and all officers of the Police Department not lower in rank than a Sub-Inspector. The investiture of power is of a general character and on officers not confined to the highest or top rank in the hierarchy but on all officers from top to bottom, both of the Commercial Taxes Department, Revenue Department as also the Police Department. The only limit is that the officer should not be below the rank of an Assistant Commercial Tax Officer, a Revenue Inspector or a Sub-Inspector. The officers, so authorised, can at their will and whim exercise a power of search and they are not obliged to tell or explain to anyone higher up in the tax department as to why and in what circumstance they happen to exercise the power and the manner of search. They are the sole judges whether they ought to exercise the power or not. We apprehend, drastic and serious as the power of search is, that the exigencies of tax collection do not justify such a general, unrestricted and direct investiture of power of search on even the minor officials of various departments, not confined to the tax authorities alone, without a fairly higher official above them having to examine in each case whether the interests of the State demand or the circumstances of tax collection require, that the power of search should be exercised in particular and specific cases in the light of information and reasons they have for the purpose and thus exercise caution and eliminate arbitrary, harmful but sometimes futile exercise of the power. Such a serious power vested in all kinds of officers, high and low, without any such safeguards, cannot, in our view, be regarded by any means as a reasonable restriction. Sub-section (3) no doubt enacts that an officer may, for reasons to be recorded in writing, seize. But it does not say whether he has to record his reasons before or after and if he records his reasons, whether he is obliged to forward the same to any higher officer to ensure proper exercise of the power. The officer is totally unrestricted and unchecked at any stage like any other authority in the exercise of his power of search. The Sub-section does not provide even for seizure in the presence of independent witnesses. True it is, under Sub-section (3) the officer, who seizes, has to give a dealer a receipt for what he has seized. But obviously this in itself is nowhere a safeguard to the proper exercise of the power of seizure and the Sub-section does not even say when that receipt is to be given to the dealer, whether it is to be at the completion of the search and seizure or long thereafter. Even the little protection to be found in Sub-section (3) is absent in Sub-section (4). In the circumstances, we are constrained to hold that Sub-sections (2) to (4) just as they are, as we pointed out, cannot be viewed as reasonable restrictions and that they offend Article 10(1)(f) and (g) of the Constitution.

58. But it was faintly suggested for the State that there is no fundamental right against a. search. M.P. Sharma v. Satish Chandra, District Magistrate, Delhi [1954] SCR. 1077 no doubt held so. There it was stated:

But a search by itself is not a restriction on the right to hold property.

59. But it was recognised in that case itself that a seizure and carrying away is a restriction on possession and enjoyment of the property seized. These observations were made while considering the validity of Section 96(1) of the Code of Criminal Procedure. But one of the grounds for upholding the validity was that search and seizure was only a temporary interference with the right to hold the premises searched and the articles seized. In Wazir Chanel v. State of Himachal Pradesh [1955] 1 S.C.R. 408, however, the Supreme Court held that a search without a warrant would offend Articles 19(1)(f) and 31. In Kharak Singh Vs. The State of U.P. and Others, , the Supreme Court, after pointing out that our Constitution does not in terms confer any constitutional guarantee like that under the Fourth Amendment to the Constitution of the United States, observed:

Nevertheless, these extracts would show that an unauthorised intrusion into a person''s home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man--an ultimate essential of ordered liberty, if not of the very concept of civilization. An English Common Law maxim asserts that '' every man''s house is his castle'' and in Semayne''s case (1604) 5 Co. Rep. 91a, where this was applied, it was stated that '' the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose ''. We are not unmindful of the fact that Semayne''s case4 was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of '' personal liberty '' which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

60. Anyway, in view of the clear statement of the position in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, and Wazir Chand Vs. The State of Himachal Pradesh, , we have considered and decided the question whether the power of search and seizure u/s 41 of the Act is a reasonable restriction, on our assumption that a search by itself is a restriction on the right to hold and enjoy property. If we may say so with great respect, the scope and effect of Article 19(1)(f) and (g) in the present context can only be finally settled by the Supreme Court but, as it is, this Court is bound by M.P. Sharma v. Satish Chandra, District Magistrate, Delhi [1954] S.C.R. 1977, and at the same time also by Wazir Chand Vs. The State of Himachal Pradesh, to a different effect.

61. The petitioner in W.P. No. 1321 of 1964 has on facts contended that the suit case with its contents seized from the premises of Zenith Lamps and Electricals Limited, is his personal belonging and is not in any way related or connected with the business of the Company, while the respondents would assert that the suit case belonged to one Sri Goenka and contained secret account books relating to the various businesses in which he has interested. But Sri Ramnath Goenka, as on his own and on behalf of his son, Sri Bhagwandas Goenka, stated to be in the United States at the time, has sworn to an affidavit disclaiming that he or his son has anything to do with the books and records in

the suit case seized from the presmies of Zenith Lamps and Electricals Limited and that they have no claim whatsoever to the suit case or its contents. On the materials before us in the form of affidavits and counter-affidavits, we do not find it possible to decide the issue especially when even now the respondents, beyond stating that they have no reason to think that the records found in the suit case do not relate to any of the businesses in which Sri Goenka was interested, are not able to tell the court what exactly the contents of the documents in the suit case are and how they related to either Goenka or any of his businesses in which the two Goenkas as interested or the Zenith Lamps and Electricals Limited. They have not furnished any precise information on that matter. On the view we have taken on the scope and validity of the power of search and seizure under Sub-sections (2) and (3) of Section 41 of the Act, we do not think it also necessary to decided that question and also the further point for the petitioner that Sub-section (2) in any way does not authorize search in the presmises of a dealer A for the books, records or goods of a dealer B, though we see force in the latter point. In the affidavit dated 5th November, 1964, sworn to by the second respondent, the Deputy Commissioner, Commercial Taxes, in W.P. No. 1553 of 1964, he has stated, as already noticed by us, that the respondents have no objection to the return of the documents there in question by the Sub-Divisional Magistrate, Poonamalle, to Zenith Lamps and Electricals Ltd. In view of this, there is nothing further to be said on the facts in this petition. In W.P. No. 1456 of 1964, the petitioner has attacked the validity of the search warrant on the ground that it has been obtained from the Chief Presidency Magistrate on misrepresentation and mala fides and also for an ulterior purpose wholly unconnected with the petitioner as a sales tax assessee. The affidavits and counter-affidavits filed in this petition as well as in W.P. No. 1321 of 1964 do leave the impression that the real object of obtaining the search warrant was to search and trace for the suit case above mentioned in the residential premises of the petitioner at No. 366, Tiruvottiyur High Road, Madras. Though it was stated in the counter-affidavit that enquiry also revealed that the petitioner maintained some accounts and records of his business at his residence, the facts and circumstances of the case, as disclosed in the affidavits and counter-affidavit show that the immediate and real purpose was to search for the suit case in those premises. But this purpose was not the one for which the warrant was issued by the Chief Presidency Magistrate. Apart from that, a perusal of the original search warrant is open to attack that the columns which should be struck out in the printed form and the gaps to be filled therein while issuing the search warrant had not been attended to and that, therefore, the authority that issued it had not particularly applied its mind to those matters. We think, therefore, that on these grounds too the search warrant should be quashed. In W.Ps. Nos. 1495 and 1496 of 1964, we accept the contention of learned Attorney-General that this Court under Article 226 of the Constitution will not review the sufficiency of the reasons in the impugned orders in support of the confiscation of the goods. But we are not satisfied that the first respondent, in those petitions, has given the petitioner a proper and reasonable opportunity to prove before him that the goods seized were properly accounted for in his account books. But the first respondent mainly proceeded on the basis of the purchase vouchers relating to the goods and certain defects therein and

absence of stock registers. But the petitioner, it is stated, is not a wholesale dealer and Rule 26(9) of the Rules framed under the Act only requires a wholesale dealer, importer or manufacturer to maintain stock accounts of goods dealt with by him. Further, there is a clear statement in the affidavit of the petitioner that he has produced all his account books and correspondence before the first respondent, not merely purchase vouchers, and this averment has not been specifically met by the first respondent in his counter-affidavit dated 13th November, 1964. All he has stated therein is that " the petitioner''s statement in paragraph 4 is not wholly correct ". The learned counsel for the petitioner actually showed an account book maintained by the petitioner in Gujarathi which bears the seal of the Commercial Taxes Department in token of its being inspected or perused in connection with earlier assessments and which, as we are told, contains entries accounting for the goods seized from him. Learned Attorney-General looked into this account book but could not state that the account book had no relevance to the goods in question. It was the duty of the first respondent to have given a proper and reasonable opportunity to the petitioner to produce his account books and if, as the petitioner alleges which the first respondent has not denied, he produced that account book, the first respondent could have carefully looked into it to see whether the goods in question were or were not accounted for. The proceedings of the first respondent disclosed that he was somewhat in a hurry and did not look into the account books of the petitioner. It is, therefore, obvious that these orders, which the petitioner impugned, cannot be sustained as valid.

62. The petitions are allowed with costs in each of them except in W.P. No. 1496 of 1964. Counsel''s fee Rs. 250 in each of the petitions in which we have allowed costs. We direct that the documents, things and goods covered by these petitions are returned to the respective petitioners along with photo copies, photo negatives, translations and notes referred to in the amended prayer in C.M.P. No. 8724 of 1964 which is allowed. The rest of the civil miscellaneous petitions in the main petitions are dismissed.