

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 18463 of 2019**

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PARESH NATHALAL CHAUHAN

Versus

STATE OF GUJARAT

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Appearance:

MR CHETAN K PANDYA(1973) for the Petitioner(s) No. 1

MR MIHIR THAKORE, SR. ADVOCATE WITH MS MAITHILI MEHTA,

ASST. GOVERNMENT PLEADER(1) for the Respondent(s) No. 1,2

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

Date : 24/12/2019

ORAL ORDER

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. In this case, pursuant to an authorisation issued under sub-section (2) of section 67 of the Central Goods and Services Tax Act, 2017/Gujarat Goods and Services Tax Act, 2017 (hereinafter referred to as "the GST Acts"), a search came to be conducted at the residential premises of the petitioner herein, which went on from 11.10.2019 to 18.10.2019. The manner in which the search has taken place, whereby a search for any goods liable to confiscation or any documents or books or things, has literally been converted to a search for the taxable person and the search party has camped in the residential premises of

the petitioner for in all eight days, during which period the family members of the petitioner were at the mercy of the authorised officer and were confined to the searched premises and kept under surveillance and were not permitted to leave the premises without the permission of the authorised officer, has shocked the conscience of this court. This court is, therefore, of the view that it would be failing in its duty as a sentinel on the *qui vive* if it were to turn a blind eye to the violation of the legal and fundamental rights of citizens by authoritarianism and remain a mute spectator. It is, in these circumstances, that the court has thought it fit to comment upon the validity and nature of the search proceedings.

2. On 25.10.2019 this court passed an order in the following terms:

"1. Mr. Chetan Pandya, learned advocate for the petitioner has tendered an affidavit of Nathalal Maganlal Chauhan, the father of the petitioner. The same is taken on record.

2. The learned Assistant Government Pleader has submitted a confidential report of the proceedings carried out by the respondents at the premises of the petitioner pursuant to the authorization issued in favour of the second respondent under sub-section (2) of section 67 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as

"the CGST Act").

3. This court has perused the report in its entirety. A perusal of the report reveals that the concerned officers authorised to carry out the search at the residential premises of the petitioner had stayed there from 11.10.2019 to 18.10.2019. A perusal of the record of the proceedings of the case reveals that on 11.10.2019 at 2:15, it has been recorded that after searching the rooms in the premises, the records of the accounts were brought to the main room and gathered there, which included the bank passbooks of the family members as well as cheque books and that verification thereof is continuing. The proceedings thereafter do not reveal any further search carried out at the premises but reveal that the officers had stayed at the premises and had examined the phone calls that were received by the family members and had recorded their phone calls. They had also recorded statements of the family members of the petitioner on 11.10.2019. The record further reveals that the officers who had arrived on the previous day as well as the panchas were relieved by new set of officers and panchas and this cycle continued till 18.10.2019. It appears that thereafter they have been questioning the family members of the petitioner on a day to day basis till 18.10.2019.

4. Section 67 of the CGST Act, reads thus:-

"67. Power of Inspection, search and seizure.

(1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that-

(a) a taxable person has suppressed any

transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things: Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorised by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part

with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in subsection (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

(4) The officer authorised under subsection (2) shall have the power to seal or break open the door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied.

(5) The person from whose custody any documents are seized under sub-section (2) shall be entitled to make copies thereof or take extracts therefrom in the presence of an authorised officer at such place and time as such officer may indicate in this behalf except where making such copies or taking such extracts may, in the opinion of the proper officer, prejudicially affect the

investigation.

(6) The goods so seized under sub-section (2) shall be released, on a provisional basis, upon execution of a bond and furnishing of a security, in such manner and of such quantum, respectively, as may be prescribed or on payment of applicable tax, interest and penalty payable, as the case may be.

(7) Where any goods are seized under sub-section (2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the period of six months may, on sufficient cause being shown, be extended by the proper officer for a further period not exceeding six months.

(8) The Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant considerations, by notification, specify the goods or class of goods which shall, as soon as may be after its seizure under sub-section (2), be disposed of by the proper officer in such manner as may be prescribed.

(9) Where any goods, being goods specified under subsection (8), have been seized by a proper officer, or any officer authorised by him under sub-section (2), he shall prepare an inventory of such goods in such manner as may be prescribed.

(10) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

(11) Where the proper officer has reasons to believe that any person has evaded or is attempting to evade the payment of any tax, he may, for reasons to be recorded in writing, seize the accounts, registers or documents of such person produced before him and shall grant a receipt for the same, and shall retain the same for so long as may be necessary in connection with any proceedings under this Act or the rules made thereunder for prosecution.

(12) The Commissioner or an officer authorised by him may cause purchase of any goods or services or both by any person authorised by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier."

5. Thus, sub-section (2) of section 67 of the CGST Act empowers the authorised officer to search and seize goods, documents or

books or things. Sub-section (4) of section 67 empowers the officer authorised under sub-section (2) to seal or break open door of any premises or to break open any almirah, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed, where access to such premises, almirah, electronic devices, box or receptacle is denied. Thus, the officers concerned were authorised to seize such books, goods, documents, or things which were found at the premises. Sub-section (2) of section 67 does not empower the officer concerned to record statements of family members through force or coercion or to record their conversations in their mobile phones. In exercise of powers under sub-section (2) of section 67 of the CGST Act, it is not permissible for the authorised officer to use coercive measures against family members to find out the whereabouts of the taxable person. It is shocking to see that in a premises where there are three ladies, namely, the petitioner's mother, wife and young daughter, male officers together with a CRPF Officer have stayed throughout day and night despite the fact that the goods, articles and things were already seized on 11.10.2019. The entire exercise carried out by the concerned officers from 12.10.2019 to 18.10.2019 was totally without any authority of law and in flagrant disregard of the provisions of the Act and the rules and in total abuse of the powers vested in them under the Act. The manner in which the officers have conducted themselves by overreaching the process of law and acting beyond the powers vested in them under sub-section (2) of section 67 of the CGST Act needs to be deprecated in the strictest terms. Therefore, a proper inquiry needs to be made in respect of the action of

the respondent officers of staying day and night at the premises of the petitioner without any authority of law.

6. In the aforesaid premises, the first respondent Commissioner of State Tax, Ahmedabad shall carry out a proper inquiry in the matter and submit a report before this court on or before 13th November, 2019.

7. Stand over to 13th November, 2019.

8. Registry to forthwith forward a copy of this order to the Commissioner of State Tax as well as Chief Secretary of the State to look into the matter and do the needful to ensure that such incidents are not repeated."

3. Thereafter, on request made by the learned Government Pleader, time was granted to place the report in compliance with the above order and the matter was adjourned to 20.11.2019.

4. On 20.11.2019, this court passed the following order:

"1. Ms. Manisha L. Shah, learned Government Pleader has tendered a report of inquiry made by the Chief Commissioner of State Tax, Gujarat State, Ahmedabad in compliance with the directions issued by this court vide order dated 25.10.2019.

2. Upon perusal of the report, it emerges that it is no better than the earlier report dated 20.10.2019 submitted by the Assistant Commissioner of State Tax, and does not meet

with the directions issued by this court in letter and spirit. It appears that the Chief Commissioner of G.S.T. has taken a very lenient view in the matter and instead of examining the action of the concerned officers in the context of the relevant provisions of the Goods & Services Tax Act, has tried to justify the action of the concerned officers, which is required to be deprecated in the strictest terms.

3. *The learned Government Pleader prays for time to submit another report. At her request, the matter is adjourned to 11th December 2019."*

5. Thereafter, Mr. Mihir Thakore, Senior Advocate, learned counsel appeared on behalf of the respondents and submitted proposed Departmental Instructions in the nature of guidelines for conducting search under sub-section (2) of section 67 of the GST Acts. The said guidelines did not address the concerns of this court in the context of situations like the one involved in the present case. Moreover, the report, in compliance with the order dated 25.10.2019, was not yet submitted. Subsequently, a report dated 19.12.2019 made by the Chief Commissioner of State Tax, Gujarat State came to be submitted, reference to which shall be made at an appropriate stage.

6. Considering the action of the respondents of

staying in the residential premises of the petitioner, wherein five members, including three female members, out of whom one was a young unmarried girl, for a period of eight days, despite the fact that the search was concluded on the first day itself, the court was deeply concerned about the matter, and more particularly that such incidents should not be repeated. Therefore, Mr. Tushar Hemani, Senior Advocate, was requested to assist the court as an *amicus curiae*.

7. Mr. Mihir Thakore, learned counsel for the respondent State authorities, submitted that sub-section (2) of section 67 of the GST Acts empowers the proper officer to search and seize goods, documents, books or things secreted at a place. Thus, an authorization is issued qua a place and not a person. Referring to sub-section (10) of section 67 of the GST Acts, it was pointed out that the same provides that the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") relating to search and seizure apply to search and seizure under that section. Reference was made to the provisions relating to search and seizure as provided in the Code, to submit that the officers concerned had resorted to the powers of search and seizure as contained therein.

Insofar as the statements of the members residing in the searched premises are concerned, reference was made to section 161 of the Code.

7.1 However, the learned counsel, despite his best efforts, could not justify the continued stay of the search party in the searched premises after the search was over on 11.10.2019. It was, however, submitted that such action of the officers, though not backed by any statutory provision, was bona fide, and the reason why this has happened is because of past precedents inasmuch as such action was being taken earlier under the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the GVAT Act"). It was urged that the respondents have already framed guidelines laying down the procedure to be followed while conducting search under sub-section (2) of section 67 of the GST Acts and that the respondents are ready and willing to incorporate such suggestions as may be made by this court.

8. Mr. Tushar Hemani, learned amicus curiae, invited the attention of this court to the decision of the Supreme Court in ***District Registrar and Collector, Hyderabad and Another v. Canara Bank***, (2005) 1 SCC 496, wherein the

provisions for search and seizure under section 132(5) of the Income Tax Act, 1961 were construed strictly on the ground that they were a "serious intrusion into the privacy of a citizen". The court further held thus:

"35. The earliest case in India to deal with "privacy" and "search and seizure" was *M.P. Sharma v. Satish Chandra* in the context of Article 19(1)(f) and Article 20(3) of the Constitution. The contention that search and seizure violated Article 19(1)(f) was rejected, the Court holding that a mere search by itself did not affect any right to property, and though seizure affected it, such effect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the accused were unconstitutional was not gone into. The Court, after referring to the American authorities, observed that in the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the accused and did not violate Article 20(3). In the present discussion the case is of limited help. In fact, the law as to privacy was developed in later cases by spelling it out from the right to freedom of speech and expression in Article 19(1)(a) and the right to "life" in Article 21.

36. Two later cases decided by the Supreme Court of India where the foundations for the right were laid, concerned the intrusion into the home by the police under State

regulations, by way of "domiciliary visits". Such visits could be conducted any time, night or day, to keep a tab on persons for finding out suspicious criminal activity, if any, on their part. The validity of these regulations came under challenge. In the first one, *Kharak Singh v. State of UP*, the U.P. Regulations regarding domiciliary visits were in question and the majority referred to *Munn v. Illinois* and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to "life" in Article 21. According to the majority, clause 236 of the relevant Regulations in U.P., was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the "right to privacy". But, *Subba Rao, J.* while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1) (a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In the discussion the learned Judge referred to *Wolf v. Colorado*. In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.

37. We now come to the second case, *Gobind v. State of M.P.* in which *Mathew, J.* developed the law as to privacy from where it was left in *Kharak Singh*. The learned Judge referred to *Griswold v. Connecticut* where *Douglas, J.* referred to the theory of penumbras and peripheral rights and had stated that the right to privacy was implied in the right to free speech and could be

gathered from the entirety of fundamental rights in the constitutional scheme, for, without it, these rights could not be enjoyed meaningfully. Mathew, J. also referred to *Jane Roe v. Henry Wade* where it was pointed out (SCC p. 155, para 18) that though the right to privacy was not specifically referred to in the US Constitution, the right did exist and

“roots of that right may be found in the First, Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment”.

Mathew, J. stated that, however, the “right to privacy was not absolute” and that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness as explained in *Olmstead v. United States, US* at p. 471; the privacy right can be denied only when an “important countervailing interest is shown to be superior”, or where a compelling State interest was shown. (Mathew, J. left open the issue whether moral interests could be relied upon by the State as compelling interests). Any right to privacy, the learned Judge said (see para 24), must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-bearing. This list was however not exhaustive. He explained (see para 25) that, if there was State intrusion there must be “a reasonable basis for intrusion”. The right to privacy, in any event (see para 28), would necessarily have to go through a process of case-by-case development.

38. Coming to the particular U.P.

Regulations 855 and 856, in question in Gobind, Mathew, J. examined their validity (see para 30). These, according to him, gave large powers to the police and needed, therefore, to be read down, so as to be in harmony with the Constitution, if they had to be saved at all. "Our Founding Fathers were thoroughly opposed to a Police Raj" he said. Therefore, the Court must draw boundaries upon these police powers so as to avoid breach of constitutional freedoms. While it could not be said that all domiciliary visits were unreasonable (see para 31), still while interpreting them, one had to keep the character and antecedents of the person who was under watch as also the objects and limitations under which the surveillance could be made. The right to privacy could be restricted on the basis of compelling public interest. The learned Judge noticed that unlike non-statutory regulations in Kharak Singh, here Regulation 856 was "law" (being a piece of subordinate legislation) and hence it could not be said in this case that Article 21 was violated for lack of legislative sanction. The law was very much there in the form of these Regulations. Regulations 853(1) and 857 prescribed a procedure that was "reasonable". So far as Regulation 856 was concerned, it only imposed reasonable restrictions within Article 19(5) and there was, even otherwise, a compelling State interest. Regulations 853(1) and 857 referred to a class of persons who were suspected as being habitual criminals, while Regulation 857 classified persons who could reasonably be held to have criminal tendencies. Further Regulation 855 empowered surveillance only of persons against whom reasonable materials existed for the purpose of inducing an opinion that they show a determination to lead a life of crime. The

Court thus read down the Regulations and upheld them for the above reasons.

39. We have referred in detail to the reasons given by Mathew, J. in *Gobind* to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has reasonable basis or reasonable materials to support it.

40. A two-Judge Bench in *R. Rajagopal v. State of T.N.* held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be let alone." Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, *People's Union for Civil Liberties v. Union of India*, *'X' v. Hospital 'Z'*, *People's Union for Civil Liberties v. Union of India* and *Sharda v. Dharmpal*.

49. While we are on (B), it is necessary to make a brief reference to Section 93(1) of the Code of Criminal Procedure, 1973 which deals with power of the court to issue "search warrants" (a) where the court has "reason to believe" that a person to whom a summons or order under Section 91 or a requisition under Section 92(1) has been, or might be, addressed, will not or would not produce the document or thing as required by summons or requisition, or (b) where such document or thing is not known to the court to be in the possession of any person, or

(c) where the court considers that the purposes of any inquiry, trial or other proceeding under the Code, will be served by a general search or inspection, it may issue a search warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions contained in the Code. Under Section 93(2), the court may, if it thinks fit, specify in the warrant, the place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified. Under Section 93(2), a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority, has to be issued by the District Magistrate or the Chief Judicial Magistrate.

50. Section 165 of the Code deals with the power of a police officer to search. Under Section 165(1) he must have reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence, which he is authorised to investigate, may be found in any place within the limits of the police station and that such thing cannot, in his opinion, be otherwise obtained without undue delay. He has to record the grounds of his belief in writing and specify, so far as possible, the thing for which search is made. Section 166 refers to the question as to when an officer in charge of a police station may require another to issue search warrant.

51. In the Income Tax Act, 1961 elaborate provisions are made in regard to "search and seizure" in Section 132; power to requisition books of account, etc. in

Section 132-A; power to call for information as stated in Section 133. Section 133(6) deals with power of officers to require any bank to furnish any information as specified there. There are safeguards. Section 132 uses the words "in consequence of information in his possession, has reason to believe". (emphasis supplied) Section 132(1-A) uses the words "in consequence of information in his possession, has reason to suspect". Section 132(13) says that the provisions of the Code of Criminal Procedure, relating to searches and seizure shall apply, so far as may be, to searches and seizures under Sections 132(1) and 132(1-A). There are also Rules made under Section 132(14). Likewise Section 132-A(1) uses the words "in consequence of information in his possession, has reason to believe". (emphasis supplied) Section 133 which deals with the power to call for information from banks and others uses the words "for the purposes of this Act" and Section 133(6) permits a requisition to be sent to a bank or its officer. There are other Central and State statutes dealing with procedure for "search and seizure" for the purposes of the respective statutes."

8.1 It was submitted that "privacy" is a right and that prolonged stay at the premises of the petitioner was an invasion of the right to privacy of the residents of such premises.

8.2 Reference was made to the decision of the Supreme Court in the case of **Income Tax Officer v. Seth Brothers**, (1969) 74 ITR 836 (SC), wherein the court, in the context of section 132 of the

Income Tax Act, 1961, has held that since by the exercise of such power, a serious invasion is made upon the rights, privacy and freedom of the tax payer, the power must be exercised strictly in accordance with law and only for the purposes for which the law authorises it to be exercised.

8.3 Reliance was placed upon the decision of the Allahabad High Court in the case of **Dr. Nand Lal Tahiliani v. Commissioner of Income-tax, (1988) 170 ITR 592 (Allahabad)**, wherein the court has held that the dwelling house of a person is a high fortress. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. Ransacking of the house and the act of taking away the property is an inroad on citizens' right of privacy, one of the values of civilization. Any unwarranted intrusion of it cannot be countenanced. Reasonable belief exists if the information is not only trustworthy, but reasonable and sufficient in itself to warrant the conclusion that the provisions of section 132 were being violated. Because if the exercise of power is bad or unlawful from its inception, then it is not validated or changes character from its success. It would not, therefore, be asking too much from the authorities to comply with the

basic requirements of the section before they are permitted to invade the secrecy of one's home.

8.4 The attention of the court was invited to the provisions of section 132 of the Income Tax Act, 1961, to point out that clause (iia) of sub-section (1) thereof specifically permits search of any person who has got out of, or is about to get into, or is in the building or place, if the authorised person has reason to suspect that such person has secreted about his person any such books of account, documents, money, bullion, jewellery or other valuable article or thing, to submit that there are no similar provisions in the GST Acts, which permit search of a person. Reference was made to clause (iib) of sub-section (1) of section 132 of the Income Tax Act, 1961, which provides that the authorised officer may require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record, as defined in clause (f) of sub-section (1) of section 2 of the Information Technology Act, 2000, to afford the authorised officer the necessary facility to inspect such books of accounts or other documents, to submit that there are no similar provisions under the GST Acts.

8.5 The learned amicus curiae submitted that section 67 of the GST Acts, per se, does not empower the authorised officer to record the statement of any person, including the person in whose name the authorisation has been issued. It was submitted that rule 139 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the CGST Rules") and the authorisation for inspection or search in FORM GST INS-1, do not confer any such power on the authorised officer under sub-section (2) of section 67 of the GST Acts.

8.6 Next, it was submitted that the family members of the dealer or person, whose premises are searched, cannot be touched during the course of search. It was contended that the provisions of sub-section (2) of section 67 of the GST Acts deal only with goods, documents, books or things and do not confer any power on the authorised officer to touch any other person present at the searched premises, leave alone, take his phone and copy it or use it.

8.7 Emphasis was laid on sub-section (4) of section 132 of the Income Tax Act, 1961, to submit that the same empowers the authorised officer to examine on oath any person who is found to be in possession or control of any books

of accounts; whereas no such power is conferred on the authorised officer under section 67 of the GST Acts. It was submitted that under sub-section (2) of section 67 of the GST Acts, the authorised officer does not have any power to record statement/s of the person/s residing in the premises inasmuch as this is not an inquiry or investigation, but a search. Therefore, the family members cannot be questioned about anything.

8.8 It was further submitted that sub-section (2) of section 67 of the GST Acts speaks of goods liable to confiscation and documents or books or things. The expression "books" is not defined in the GST Acts, but finds place in sub-section (12A) of section 2 of the Income Tax Act, 1961 which says that "books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device. It was submitted that, therefore, the expression "goods, documents or things", does not contemplate live things or human beings and hence, the power of search is restricted to four things, viz. goods liable to confiscation, documents, books or things and that none of the fiscal statutes even remotely

contemplate search for a human being.

8.9 It was submitted that unless specifically so authorised by the statute and the authorisation, no power is conferred on the search party to search a person. It was submitted that section 70 of the GST Acts empowers the proper officer to summon any person whose attendance he considers necessary either to give evidence or to produce a document or thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908. For issuing summons, proper procedure must be followed by the Department. Thus, in the absence of any summons being issued under section 70 of the GST Acts, no statement can be recorded under section 67 of the GST Acts.

8.10 The attention of the court was invited to the provisions of Order V of the Code of Civil Procedure, which provides for issue and service of summons as well as to the provisions of Order XVI of the Code of Civil Procedure, which provides for summoning and attendance of witnesses, to submit that the same contemplate reasonable time being provided to a person to whom a summons is issued and hence, section 70 of the GST Acts cannot be read with sub-section (2)

of section 67 thereof and that both the powers cannot be exercised concurrently.

8.11 It was pointed out that section 144 of the GST Acts, which makes provision for presumption as to documents in certain cases, is in *pari materia* with sub-section (4A) of section 132 of the Income Tax Act, 1961. It was submitted that accordingly, in the absence of any specific provision empowering the authorized officer to record statements and carry out investigation, no powers can be conferred on a presumptive basis. It was submitted that the family members of the supplier / dealer are out of the purview of sub-section (2) of section 67 of the GST Acts, which includes their mobile phones also.

8.12 Reference was made to sub-rule (4) of rule 112 of the Income Tax Rules, 1962, which provides that if ingress into such building or place cannot be so obtained, it shall be lawful for the authorized officer executing the authority, with such assistance of police officers or of officers of the Central Government or of both, as may be required, to enter such building or place. It was submitted that, therefore, assistance of police can be taken only for the limited purpose of entry into the premises.

8.13 Lastly, it was submitted that a search action is an invasion of the privacy of an individual, and hence, search must be carried out in a continuous manner and the Department cannot carry out search action in bits and pieces as per their convenience.

9. Mr. Mihir Thakore, learned counsel for the respondent State authorities, submitted that the right to privacy exists and is recognized under article 21 of the Constitution of India and any infringement of such right has to be supported by a statutory provision. It was submitted that in this case the overstay at the search premises was because the search party was scrutinising the phone calls recorded in the mobile phone of the mother of the petitioner, as material relevant to the search was contained therein. It was submitted that under sub-section (2) of section 67 of the GST Acts, the authorized officer if he has "reason to believe" that any goods, documents, books or things are secreted in any place, he can authorise any officer of central tax/state tax, as the case may be, to search and seize such goods, documents, books or things. Accordingly, if the officer so authorised is of the opinion that any information useful or relevant to any proceedings under that Act is

contained in a mobile phone, it is permissible for him to look into its contents. It was submitted that documents, books or things would also include a mobile phone and that while a person cannot be searched, anything that he has, can certainly be seized and hence, there is no infirmity in the action of the respondents in seizing the mobile phone of the petitioner's mother and making a copy thereof.

9.1 Reference was made to the provisions of section 144 of the GST Acts which reads thus:

144. Presumption as to documents in certain cases.— Where any document—

(1) is produced by any person under this Act or any other law for the time being in force; or

(ii) has been seized from the custody or control of any person under this Act or any other law for the time being in force; or

(iii) has been received from any place outside India in the course of any proceedings under this Act or any other law for the time being in force, and such document is tendered by the prosecution in evidence against him or any other person who is tried jointly with him, the court shall—

(a) unless the contrary is proved by such person, presume—

(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

It was submitted that sub-section (2) of section of the GST Acts has to be read with section 144(ii) thereof, and hence, a mobile phone can certainly be seized from the custody or control of any person present at the searched premises. Accordingly, the authorised officer has the power to seize a mobile phone, which would not violate the right of privacy of the concerned person.

9.2 It was further submitted that if during the course of search, the authorised officer finds it necessary to record the statement of any person

present at the premises, it is permissible for him to issue a summons under section 70 of the GST Acts to such person in the searched premises and record his/her statement accordingly. He, however, admitted that once the search is over, the search party has to leave the premises and they cannot prolong their stay to find out a person. It was urged that the action of the concerned officers carrying out the search was bona fide and the prolonged stay at the searched premises was in the light of the previous precedents. Moreover, the efforts of the concerned officers during the course of their continuous stay to find out where goods, documents, books or things were secreted were successful inasmuch as on the last day of the search, they could obtain information from the mobile phone regarding where the other documents, books or things were secreted. Therefore, such overstay has yielded results. It was, accordingly, urged that a lenient view be taken as regards the prolonged stay of the search party at the premises of the petitioner.

10. Before adverting to the submissions made by the learned counsel for the respondent authorities and the learned amicus curiae as referred to hereinabove, reference may be made to certain facts, as averred in the affidavit dated

24.10.2019 made by Shri Nathalal Maganlal Chauhan, the father of the petitioner, who has *inter alia* stated that the officers who had come to their flat for search were inquiring about the petitioner's presence till late in the evening and thereafter, the officers were replaced by others. It is further stated that out of five family members, three members were female, whereas all the three officers, including the Gunman, were male, who had stayed back forcibly at their residential premise and such episode continued till 18.10.2019. It is *inter alia* stated that during the course of the day, statements of the family members were recorded and their mobile phones were checked from time to time. It is further stated that during the course of the eight days of search, the family members were more or less confined to the house and were not allowed to go anywhere without their permission. Various other submissions have been made, but it is not necessary to refer to the same at this stage.

11. In the aforesaid backdrop, reference may be made to the relevant statutory provisions. Sub-section (2) of section 67 of the GST Acts makes provision for search of such place where the proper officer, not below the rank of Joint Commissioner, has reason to believe that any

goods liable to confiscation or any documents or books or things, which, in his opinion, shall be useful for or relevant to any proceedings under the Act, are secreted. On forming such belief, the proper officer may authorise in writing any other officer of central tax/state tax to search and seize or may himself search and seize such goods, documents or books or things. Under sub-section (2) of section 67, the proper officer authorises an officer of central tax/state tax to search the premises and seize goods, documents, books or things. Sub-section (4) of section 67 empowers the officer so authorised to seal or break open the door of any premises or to break open any *almirah*, electronic devices, box, receptacle in which any goods, accounts, registers or documents of the person are suspected to be concealed. Sub-section (10) of section 67 makes the provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, so far as may be, applicable to search and seizure under that section subject to the modification that sub-section (5) of section 165 of the Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

12. The provisions relating to search and seizure insofar as the same are relevant for the purposes

of section 67 of the GST Acts are contained in sections 93, 94, 99, 100, 102, 103 and 165 of the Code, which read as under:

"93. When search warrant may be issued.—

(1)(a) Where any Court has reason to believe that a person to whom a summons or order under section 91 or a requisition under sub-section (1) of section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(b) where such document or thing is not known to the Court to be in the possession of any person, or

(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph

authority.”

“94. Search of place suspected to contain stolen property, forged documents, etc.—

(1) If a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place,

(b) to search the same in the manner specified in the warrant,

(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies,

(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety,

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen

property or, as the case may be, objectionable article to which this section applies.

(2) The objectionable articles to which this section applies are—

(a) counterfeit coin;

(b) pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under Section 11 of the Customs Act, 1962 (52 of 1962);

(c) counterfeit currency note; counterfeit stamps;

(d) forged documents;

(e) false seals;

(f) obscene objects referred to in Section 292 of the Indian Penal Code (45 of 1860);

(g) instruments or materials used for the production of any of the articles mentioned in clauses (a) to (f)."

"99. Direction, etc., of search warrants.—The provisions of Sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search warrants issued under Section 93, Section 94, Section 95 or Section 97."

"100. Persons in charge of closed place to allow search.—

(1) Whenever any place liable to search or inspection under this Chapter is closed, any

person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of Section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by

it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under subsection (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860)."

"102. Power of police officer to seize certain property.—

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under subsection (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized

is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale."

"103. Magistrate may direct search in his presence.—

Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant."

"165. Search by police officer.—

(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he

is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate."

13. Sections 93 and 94 of the Code are more or less similar to sub-section (2) of section 67 of the GST Acts and provide for the contingencies when a search warrant can be issued and the scope of powers of search and seizure. Section 95 relates to powers of search in case of the specific instances set out therein. Section 100 of the Code casts an obligation upon the persons in charge of a closed space to allow search. Sub-section (3) of section 100 provides that where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency. Thus, for this limited purpose, search of a person is permitted under sub-section (3) of section 100 of the Code.

14. Chapter XVII of the GST Rules bears the heading – “Inspection, Search and Seizure” and is comprised of rules 139 to 141, which read as under:

“139. Inspection, search and seizure.-

33. Where the proper officer not below the rank of a Joint Commissioner has reasons to believe that a place of business or any other place is to be visited for the

purposes of inspection or search or, as the case may be, seizure in accordance with the provisions of section 67, he shall issue an authorisation in FORM GST INS-01 authorising any other officer subordinate to him to conduct the inspection or search or, as the case may be, seizure of goods, documents, books or things liable to confiscation.

(2) Where any goods, documents, books or things are liable for seizure under sub-section (2) of section 67, the proper officer or an authorised officer shall make an order of seizure in FORM GST INS-02.

(3) The proper officer or an authorised officer may entrust upon the owner or the custodian of goods, from whose custody such goods or things are seized, the custody of such goods or things for safe upkeep and the said person shall not remove, part with, or otherwise deal with the goods or things except with the previous permission of such officer.

(4) Where it is not practicable to seize any such goods, the proper officer or the authorised officer may serve on the owner or the custodian of the goods, an order of prohibition in FORM GST INS-03 that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(5) The officer seizing the goods, documents, books or things shall prepare an inventory of such goods or documents or books or things containing, inter alia, description, quantity or unit, make, mark or model, where applicable, and get it signed by the person from whom such goods or documents or books or things are seized.

140. Bond and security for release of seized goods.-

(1) The seized goods may be released on a provisional basis upon execution of a bond for the value of the goods in FORM GST INS-04 and furnishing of a security in the form of a bank guarantee equivalent to the amount of applicable tax, interest and penalty payable.

Explanation.- For the purposes of the rules under the provisions of this Chapter, the —applicable tax|| shall include central tax and State tax or central tax and the Union territory tax, as the case may be and the cess, if any, payable under the Goods and Services Tax (Compensation to States) Act, 2017 (15 of 2017).

(2) In case the person to whom the goods were released provisionally fails to produce the goods at the appointed date and place indicated by the proper officer, the security shall be encashed and adjusted against the tax, interest and penalty and fine, if any, payable in respect of such goods.

141. Procedure in respect of seized goods.-

(1) Where the goods or things seized are of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such goods or things or the amount of tax, interest and penalty that is or may become payable by the taxable person, whichever is lower, such goods or, as the case may be, things shall be released forthwith, by an order in FORM GST INS-05, on proof of payment.

(2) Where the taxable person fails to pay the amount referred to in sub-rule (1) in respect of the said goods or things, the

Commissioner may dispose of such goods or things and the amount realized thereby shall be adjusted against the tax, interest, penalty, or any other amount payable in respect of such goods or things."

15. Considering the provisions referred to hereinabove, it is apparent that the officer who is armed with a search warrant is authorised to search the premises referred to in the warrant of authorisation and to seize goods, documents, articles or things, which are useful for or relevant to any proceedings under the GST Acts. The provisions nowhere arm the officer, in whose favour the authorisation is issued, to search for any person or to remain in the premises after the search is over, or to monitor what the persons residing in the premises are doing and to reside in the premises. In fact, no provision under the Code permits even the Investigating Officer to continuously stay inside the residential premises to apprehend an accused as and when he returns home. The powers vested in the officer armed with a search warrant are limited to searching the entire premises. Once the premises are searched, the search party would have to leave the premises and cannot wait there indefinitely for days on end under the expectation that the person whom they are searching for may return home or may contact his family members.

16. In the facts of the present case, the authorised officer was authorised to search only the premises. The nature of the search conducted by him is discernible from the panchnama of the search proceedings drawn by the authorised officer in the presence of panchas, a copy whereof has been produced for the perusal of this court. In terms of the panchnama, on 11.10.2019, in the afternoon, the officers searched the residential premises of the petitioner; and the books of accounts and other documents which they found were brought to the main room, which included the bank pass-books and cheque books, etc. of the family members. At about 4:02 pm, the officers asked the parents of the petitioner to present the petitioner; whereupon they had made a phone call to him and stated that he was not picking up the phone. Thereafter, they recorded statements of the parents of the petitioner in question-answer form. It is recorded in the panchnama that at 4:45 pm, upon asking the mother of the dealer (petitioner) to keep the dealer present and upon making her to listen the recording of her phone call, she behaved in an inappropriate way and said that every mother lies to protect her son and that even if she lies, what is wrong with it. It is further recorded that the dealer's mother, in his presence as well

as in the presence of panchas and officers, said that every person sitting there must have done something wrong. Thus, the dealer's mother conduct was uncooperative. At 5:14 pm it is recorded that Alpesh Wadher of Hollywood Shoes having remained present, a team with one officer and panchas set off to the dealer's shop for investigation. At 6:10 pm, it is recorded that the officer along with the panchas returned and they had brought along with them pass-books related to the bank and Shri H.T. Barad an officer of the office was informed about the documents which were found there. It is further recorded that an expert was called to obtain a mirror image of the calls made from the phone of the petitioner's mother, which was found at the said premises and a master copy thereof was prepared in a Sandisk Pen Drive 16 GB, which was sealed in the presence of panchas and a working copy was made in a pen drive. At 7:10 pm it is recorded that the petitioner's father and mother informed that they wanted to visit a friend of their son in case they can get any information from there and hence, they had asked permission to go there and hence, they had taken the petitioner's daughter and panchas with them and gone near Jivraj Park where her maternal uncle (maternal aunt's husband) Hareshbhai Vandhra was residing and he informed that on that day in the

morning at 9:00 am, Pareshbhai Chauhan had come to him to take a bag which he had given. Thereafter, he did not have any contact with him and if he is able to contact him in any manner, he would try to bring him home. At 8:05 pm, it is recorded that during the course of search for the dealer, the dealer's mother was not feeling well and had stated that on account of tension her entire body was aching and hence, they had informed an officer there to take her to the hospital along with panchas, whereupon she had refused to go and had said that she was worried that her son may take a wrong step. At 8:45 pm it is recorded that at the dealer's place the statement of his mother in question – answer form and the statement in question – answer form of Alpesh Wadher who was running Hollywood shoes was recorded. [Thus, despite the fact that the petitioner's mother, an elderly lady, was suffering from ill health at 8:05 pm, her statement came to be recorded by 8:45 pm.] At 9:35 pm it is recorded that another officer came to relieve the officer who was present at the premises and he was acquainted with the proceedings conducted throughout the day and was told that in case the dealer comes at night, his statement should be recorded.

16.1 At 9:15 on the next morning, it is recorded

that at night, the family members again tried to contact the dealer on his mobile phone, but his phone was found to be switched off. Thereafter, the family members were again interrogated for some time and later, they were allowed to go to sleep. It is further recorded that on the next day, at 7:00 am, the son had gone to school. [Thus, it appears that even after 9:35 at night the family members of the petitioner were interrogated.]

16.2 At 10:05, it is recorded that the Investigating Officer of the earlier day having returned and having relieved the panchas and officer R.B Dodiya, the new officer and panchas have arrived at the spot. At 01:55 pm, it is recorded that during the course of search, they recorded the statements of the dealer's wife Shrimati Mantaben and her daughter Honey in question-answer form and asked them as to where the dealer was and as to whether they had any news about him. However, they had informed that till then, they had no news about the dealer. At 8:05 pm, it is recorded that after resting his (the petitioner's) father's statement was recorded in question - answer form. Moreover during the said search different officers has recorded statements of Pareshbhai's father Nathalal Chauhan in question - answer form and

had questioned him as to where the Pareshbhai was; and different officers had recorded statements of the Pareshbhai's wife, his mother/father and inquired as to whether or not they had any talk with the Pareshbhai and upon Officer Shri B.H. Modi arriving to relieve them, the officers of that morning as well as the panchas were being relieved and the charge of the search was handed over to the new officer. It is further recorded that at night, the family members of the dealer again tried to contact the dealer via mobile phone, but the dealer's phone appeared to be switched-off. Thereafter, after some interrogation, as they needed to rest at night they had gone to sleep. [Thus, the family members were interrogated even at night time.]

16.3 On 13.10.2019, at 12:55 pm, it is recorded that the officers who were present at night were relieved and the day-time officer took charge. It is further recorded that they had offered personal search of those officers to Pareshbhai's mother and father, but they had not accepted such offer and upon asking them as to whether they had received any news about Pareshbhai at night, they had informed that they did not have any news. At 2:10 pm, it is recorded that the family was permitted to rest post-lunch. At 3:25 pm, it is recorded that the Pareshbhai's

father's medicines were finished and hence an inspector was sent with him to purchase the medicines. At 6:10 pm, it is recorded that Pareshbhai's wife and daughter Honey had gone to the market in the presence of panchas to fetch vegetables and clothes given for ironing and had returned in half an hour along with those things. At 6:30 pm, it is recorded that upon asking the Pareshbhai's family members as to whether there was any news about him, but they had said that no information was received. Thereafter, without recording the time, it is recorded that another officer A.B. Parmar had arrived to relieve the officer who was at the spot during daytime and the charge was handed over to him. At 10:30 pm, it is recorded that the dealer's mother sought permission to go down-stairs, and she was permitted to go and she returned after 15 minutes with vegetables (potatoes). It is further recorded that she had become emotional about her son and hence, they consoled her and explained to her that this is part of a Government inquiry and after pacifying her, advised her to rest peacefully.

16.4 On 14.10.2019, it is recorded that the dealer's father sought permission to go down-stairs to fetch milk and such permission was granted. At 8:45 am, the dealer's mother sought

permission to go to the temple and such permission was granted. At 10:45 am, the dealer's mother sought permission to go to some place for returning the clothes brought for Navratri celebrations, which was granted and she returned after 15 minutes. It is recorded that on 14.10.2019, the Investigating Officer Shri Rabari had presented himself and had taken charge of the proceedings.

16.5 The proceedings of the other days are similar in nature and do not reflect search of any kind having been carried out, but show that the officers have remained in the house and have kept surveillance over the members of the house. All that is recorded is when, where, why, at what time and for how long any family member went out of the premises and that time and again the family members were asked as to whether they had any information about the petitioner. It also appears that every time when a family member left the premises, he/ she was required to inform the concerned officer the reason why he/she wanted to go out and such member was required to take the permission of the officer concerned. Several times, it has been recorded that liquor bottles were found at the premises during the course of search and that the family members were interrogated in respect of the same and as to

whether they had a permit to keep such liquor bottles and the fact regarding Anandnagar Police Station being informed about the same and recording of an offence by the Police Station and the action taken by it etc.

16.6 On 17.10.2019 at 11:10 am it is recorded that the officers who were present at the premises at night are relieved and the daytime officer has taken charge. It is further recorded that upon asking the family members of Pareshbhai as to whether they had any news about him, they had said that they did not have any news about him and upon the request of Pareshbhai's family members, his mother was permitted to go to the temple and his daughter was permitted to go for her job. At 12:30 pm (presumably in the afternoon of 18.10.2019) it is recorded that night time officer of 17.10.2019 has been relieved and the day time officer has taken charge.

16.7 On a perusal of the contents of the panchnama, it is evident that during the time the officers were present in the premises, the movements of the family members were restricted and they were required to take permission of the officers concerned if they had to go out of the house. The family members, including female members, have been interrogated even during night

hours, and there is nothing in the panchnamas, to show the presence of any female officer during the night time. Moreover, on each day, in the morning shift and night shift, there were two different panchas from different localities residing in the premises and it also appears that an SRP constable was also present throughout. Thus, the family members of the petitioner were constrained to put up with different sets of strangers in their residential premises throughout the day and night for eight days.

16.8 While it is an admitted position that the officers along with the panchas and the SRP constable were inside the residential premises during the course of the entire search, in the entire panchnama, there is no mention as to what the officers and panchas and SRP constable did inside the residential premises of the petitioner throughout the day, except for having recorded the statements of the family members of the petitioner at different times of the day. Nothing is stated as regards where the members of the search party stayed during the course of the day and where they slept at night.

16.9 It may be noted that on 18.10.2019, this court passed an order in the following terms:

"Mr. Chetan Pandya, learned advocate for the petitioner has vehemently assailed the action of the respondents by submitting that the officers of the respondents have camped inside the house of the petitioner since 11.10.2019 wherein his family members are residing and that the family members of the petitioner are virtually under house arrest. Issue notice returnable on 21st October, 2019. Direct service is permitted today."

16.10 Thereafter, on 18.10.2019, at 4:30 pm, it is recorded that at the site upon hearing the recording from the mobile phone of Pareshbhai's mother, in her recording (7.10.2010, 6:52 pm) of 4 minutes 13 seconds it could be heard that the office record was kept at Harishbhai's house, after which it was transferred to the house next door where a single person was residing which was being said by his wife, and his mother was saying that the record which was inside the house was kept at Munni's house (Pinkyben Gohil). Hence, officer A. L. Rabari obtained summons and went to the said place to record statement. At 5:20, it is recorded that at the search place, as Pareshbhai's wife was required to go to fetch vegetables and get the grains ground at the flour mill, with the consent of the officer she was given permission to fetch such things and she had

gone and returned in 0:45 minutes (time 5:20 pm.). Lastly, at 7:40 it is recorded that upon the officer of the search premises Shri A. L. Rabari returning from the said place along with one panch whom he had taken, he had informed that he had gone with a summons to the address – 102, Mira Madhav Apartment, First Floor, in the lane of Ashapura Mataji Temple, Vejalpur, Ahmedabad to Hareishbhai Vandra's place and after serving summons on him it was explained to him and his statement was recorded and he was made to hear the recording found at the searched place in the context of which he had stated that the books of account were kept in the house next door to the office, which was informed to the higher officer and after obtaining a warrant from the head office they had come to that place and after showing them the said documents they had returned (time 7:40 pm).

16.11 It is further recorded that after coming to the searched place, upon asking the family members of Pareshbhai Chauhan as to whether they had received any news about Pareshbhai, they had stated that till then they had not received any news about him. Since the books of accounts of Pareshbhai Chauhan's office were found from some other place, the higher officer was informed about it. The intention behind staying at that

place and searching the place was that Pareshbhai remains present and produces the books of accounts. Out of which, a part of his accounting record having been found from some other place, the higher officer was informed and after recording the last statement of Pareshbhai Chauhan's father Nathabhai Chauhan, the search of the residential premises was completed at 9:15 hours at night.

17. This, in sum and substance is the nature of the proceedings conducted by the respondents from 11.10.2019 to 18.10.2019 at the residential premises of the petitioner.

18. The entire action of the search party after the first day, i.e. from 12.10.2019 to 18.10.2019, was, therefore, illegal, invalid and not backed by any provision of the GST Acts. Moreover, it is only after this court issued notice on 18.10.2019, that the search was brought to an end on the ground that from the recording of the petitioner's mother of 7.10.2019, they could find out the place where certain accounting record was secreted. In this regard, it may be noted that from the contents of panchnama of the search proceedings as recorded hereinabove, it is apparent that the authorised officer on day one of the search itself, that is on 11.10.2019, had

got a mirror copy of the data contained in the mobile phone of the petitioner's mother copied in a pen drive which was sealed in the presence of panchas and a working copy thereof was also made in a pen drive. Therefore, the details contained in the mobile phone of the petitioner's mother were already available with the respondents. For the purpose of hearing what was recorded therein, there was no necessity of staying at the searched premises. Moreover, from the contents of the panchnama, there is nothing whatsoever to indicate that at any point of time any member of the search party or the authorised officer was hearing the recording. The only reason why the search party remained back appears to be to intimidate the family members of the petitioner to extract information about the petitioner or records of his business, and to either coerce the petitioner to return home or to apprehend him if he returns home.

19. From the facts recorded in the panchnama, it is abundantly clear that while the authorisation issued to the officer concerned was to search the premises mentioned in the authorisation, the entire search was converted to a search for the dealer, namely the petitioner herein. One relevant fact which is to be kept in mind in this context is that, admittedly, no summons was

issued to the petitioner under section 70 of the GST Acts nor is it the case of the respondents that he was summoned, but had not remained present. While the petitioner was not present at the premises when searched, there could be a reasonable explanation for his absence. Moreover, even if the petitioner may have been intentionally avoiding the authorities, the same is not a valid ground for converting the search proceedings to a search for the petitioner, more so, when no such power is vested in the authorities.

20. Moreover, as is evident from the contents of the panchnama, the members of the petitioner's family were literally under house arrest and were not permitted to leave the premises without the permission of the authorised officer and at times without being escorted by a member of the search party. It may be noted that there is no provision under the GST Acts which empowers the authorised officer to confine family members of a dealer in this manner and to interrogate them at all times of the day and even late at night as has been done in this case. Even the elderly lady was not spared and despite not being well was interrogated at night, that too, without any such powers being vested in the authorised officer. As rightly pointed out by the learned amicus curiae,

the only power to record statements is traceable to section 70 of the GST Acts which requires the concerned officer to issue summons to the person whose statement is sought to be recorded by following due procedure in accordance with law, and thereafter record his statement. But in this case all statutory requirements are thrown to the winds and in flagrant violation of the powers vested in them, the concerned officers have resided in the residential premises of the petitioner for eight days and confined and intimidated his family members. Thus, apart from the illegality of the continuation of the search proceedings, the conduct of the search officers in confining the family members of the petitioner to the house and of interrogating them time and again is nothing but a blatant abuse of powers. Since, the continued stay at the premises of the petitioner after 11th October, 2019 was not for search of the premises but to search for the petitioner and to obtain further information about where else he could have secreted documents, books or things relevant for any proceedings under the GST Acts, such continued stay was totally unauthorised as it was not backed by any statutory provision. As discussed hereinabove, the powers conferred by sub-section (2) of section 67 of the GST Acts is to search for goods liable to confiscation, documents,

books or things which in the opinion of the proper officer shall be useful for or relevant to any proceedings under that Act.

21. From the contents of the panchnama as referred to hereinabove, it is evident that the concerned officers remained at the residential premises of the petitioner with a view to extort confessions from the family members of the petitioner regarding the presence of the petitioner and the place where the petitioner might have secreted the documents regarding his business dealings. Section 348 of the Indian Penal Code provides that whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine. In the present case, it appears that the respondent

authorities had wrongfully confined the family members of the petitioner in the residential premises with a view to extort information from them about the whereabouts of the petitioners or the place where he might have secreted documents relevant for any proceedings under the GST Acts. Thus, the unauthorised action of the concerned officers may tantamount to an offence under the Indian Penal Code. In the opinion of this court what is not permissible in law cannot be done under the guise of discharge of statutory functions. The plea that the concerned officers were acting on the basis of past precedent also appears to be a specious plea, inasmuch as, even under the previous enactments such action was not permissible. Besides, no instance has been pointed out to show that at any point of time, a search case was converted to a search for a person and the officers concerned resided in residential premises of a dealer in the manner that has been done in this case. The action of the respondents, therefore, cannot be countenanced.

22. Besides, the GST Acts are new enactments. Officers acting under the relevant provisions are required to study the scope of their powers under the statutory provisions under which they are acting and cannot act on the basis of

presumptions or past precedents under a previous enactment. If the common man is supposed to know the law and face penalty for any infraction thereof, the officers enforcing such provisions are required to be well versed with the statutory provisions and the scope and limits of their power and cannot take shelter behind ignorance of law to justify their illegal actions.

23. As noticed earlier, it has come on record that throughout the search, an SRP constable was present in the residential premises of the petitioner. As pointed out by learned amicus curiae, the assistance of the police can be taken for the purpose of entry into the premises if there is some reason to believe that there may be any kind of obstruction in conducting the search. In the present case, there is nothing on record to indicate that there was any resistance by the family members during the course of search warranting the presence of an SRP constable during the entire search proceedings. Therefore, it appears that the idea behind taking assistance of the SRP constable appears to be to intimidate and shame the family members, more so, in view of the prolonged presence of the search party at the residential premises of the petitioner. On behalf of the respondents, it has been stated that the officers concerned had asked the SRP constable to

stand outside the premises, but it was the petitioner's father who requested that he may remain inside the premises. In the report dated 19.11.2019 submitted by the Chief Commissioner of State Tax, it has been stated that "*From the statement of SRP Constable Shri Savansinh Dabhi it is seen that on very first day SRP Jawan was requested by Nathalal Chauhan, father of the petitioner to stay within the residence as his staying outside the residence gate will give impression to their neighbours and will tarnish their image.*" It cannot be gainsaid that presence of a person in uniform outside the house throughout the day, more so, when the family members of the petitioner were literally under house arrest, would cause a loss of reputation and raise many questions in the neighbourhood. It would be with a view to salvage their prestige and reputation that the petitioner's father would have made a request that such person remain inside the house rather than outside. It may be noted that even the police, during the course of investigation, do not have the powers to reside at any residential premise and the officer concerned is required to carry out investigation and thereafter, leave the premises. The action of the respondents in continuing to reside at the residential premises of the petitioner without any valid reason despite the fact that search was

concluded is unwarranted and uncalled for. It may be that ultimately, the respondents might have been able to extract some material from the conversation recorded in the mobile phone regarding where some books of account and other documents were secreted, but the end does not justify the means and does not validate the unauthorised and illegal action of the concerned officers. The Allahabad High Court in ***Dr. Nand Lal Tahiliani v. Commissioner of Income-tax*** (supra) has held that the dwelling house of a person is a high fortress. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. Ransacking of the house and the act of taking away the property is an inroad on citizens' right of privacy, one of the values of civilization. Any unwarranted intrusion of it cannot be countenanced. Reasonable belief exists if the information is not only trustworthy, but reasonable and sufficient in itself to warrant the conclusion that the provisions of section 132 were being violated. Because if the exercise of power is bad or unlawful from its inception, then it is not validated or changes character from its success. It would not, therefore, be asking too much from the authorities to comply with the basic requirements of the section before they are

permitted to invade the secrecy of one's home.

24. At this juncture, reference may be made to the report dated 19.12.2019, that came to ultimately be submitted by the Chief Commissioner of State Tax pursuant to the directions issued by this court vide order dated 25.10.2019. The relevant extracts whereof are reproduced hereunder:

"Prior to 01/07/2017, the search and seizure proceedings were carried out under the provisions of Section 67 of the Gujarat Value Added Tax Act, 2003. As per the provisions of section 67(7), the provisions of the Code of Criminal Procedure, 1973 relating to search are applicable to the search proceedings under the Gujarat Value Added Tax Act, 2003. As per section 88 of the said Act, the Commissioner is empowered to authorise any officer or person subordinate to him to investigate offences and can exercise the power conferred by the Code of Criminal Procedure, 1973. The provision of section 88 of the said Act is reproduced below.

"(1) Subject to such conditions as may be prescribed, the Commissioner may

authorise either generally or in respect of a particular case or class of cases any officer or person subordinate to him to investigate all or any of the offences punishable under this Act.

(2) Every officer or person so authorised shall in the conduct of such investigation, exercise the powers conferred by the Code of Criminal Procedure, 1973 upon an officer in-charge of a police station for the investigation of a cognizable offence."

In view of the above, search, seizure and investigation proceedings were carried out under the provisions of Section 67(4)(5) (7) and Section 88 of the said Act read with the relevant provisions relating to search and investigation of Code of Criminal Procedure, 1973. Hence, accordingly under the VAT regime, the investigation was carried out and statement of witnesses were recorded during the search proceedings. The departmental authorities continued in that belief after implementation of the Gujarat Goods and Services Tax Act – 2007 and have been recording statements of concerned person during the course of search and seizure proceedings. The reasons for such continuation of that belief is also that under the Gujarat Value Added Tax Act, 2003,

search, seizure and investigation can be initiated even today in respect of certain commodities still covered under the Gujarat Value Added Tax Act, 2003 as well as for pre 01/07/2017 transactions.

After introduction of the Gujarat Goods and Services Tax Act - 2017, the department had carried out search and seizure proceedings in number of cases under the Gujarat Goods and Services Tax Act - 2017 in exercise of the power conferred under section 67 of the said Act till date. As per the provisions of section 67(1) of the Gujarat Goods and Services Tax Act - 2017, the provisions of the Code of Criminal Procedure, 1973, relating to search and seizure, apply to search and seizure under the said Section. For the sake of convenience section 67(10) of the Gujarat Goods and Services Tax Act - 2017 is reproduced here in below.

"The provisions of the Code of Criminal Procedure, 1973, (2 of 1974) relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it

occurs, the word "Commissioner" were substituted."

The said provision coupled with the last para of form GST INS-1 specified in rule 139(1) which is reproduced as below, has been relied upon to record statements of persons present in the premises where search is conducted.

"Any attempt on the part of the person to mislead, tamper with the evidence, refusal to answer the questions relevant to inspection/ search operations, making false statement or providing false evidence is punishable with imprisonment and /or fine under the Act read with section 179, 181, 191 and 418 of the Indian Penal Code."

Taking into consideration the above provisions, the departmental authorities have been recording statements during search. Further, for the purpose of ascertaining truth and real facts of the case, investigation is carried out as was done under the Gujarat Value Added Tax Act, 2003. In this case also the authorised officers have followed the past precedents considering that they have the power or investigation and acted accordingly in good faith.

So far as the issue of prolonged search in the instant case is concerned, I say that I have narrated all the reasons for such prolonged search in my report of inquiry dated 19/11/2019. I reiterate that the longer stay at the residential premise of the tax paper is not desirable and requires to be avoided as far as possible. I say that the time to complete search proceedings of the case depends on the facts and circumstances of the case which vary from case to case. It is noteworthy that collection, interpretation, co-relation and confrontation of the materials found during the search are required to be done prior to seizure, in order to have complete idea about the nature of transactions and its implication. This process itself requires considerable time depending upon the volume and nature of incriminating data found. In the present case, in the effort to recover incriminating documents which were secreted by the petitioner as per the information and in order to get a complete idea of the implication of digital data found in the form of pre-recorded call recordings, the authorized officers decided to stay for a longer period acting in good faith and in

the interest of the Government revenue.

Looking to the longer stay during search and seizure proceedings in the instant case and considering the provisions of law, it has been decided that henceforth all search and seizure proceedings at residential premise should be completed as soon as possible and in case of non-completion within twenty-four hours, stringent watch on such proceedings will be kept by higher authorities and a permission if higher authorities shall be obtained. Departmental instructions shall be followed during the search and seizure proceedings at the residential premises which have been issued vide letter outward no 2336 dated 09/12/2019 to the field formation. The department is open to issue such further instruction for search and seizure proceedings at residential premises as may be required."

25. Thus, the stand of the Chief Commissioner in the above report is that in view of past precedent under the Gujarat Value Added Tax Act, 2003, the officers under the GST Acts have recorded statements of the family members of the petitioner. On a perusal of the contents of the report it appears that according to the Chief

Commissioner under the GVAT Act, statements of persons present at the search premises were being recorded. The Chief Commissioner has placed reliance upon the provisions of section 88 of the Gujarat Value Added Tax Act, 2003 which relates to authorisation to investigate; overlooking the fact that in the present case the authorisation was for search and seizure and not investigation inasmuch as recording of statements under section 161 of the Code finds place in Chapter XII thereof which pertains to "Information to the police and their powers to investigate" and not under the provisions of the Code relating to search and seizure. Be that as it may. At best, giving benefit of doubt to the concerned officers, such defence may be accepted, namely that they were under the impression that statements of family members could be recorded during the course of search. That however, does not justify the stay at the residential premises of the petitioner for eight days, despite the fact that the search for documents, books and things was over on the very first day. Moreover, even after the search was over, it was always open for the concerned officers to summon any of the family members of the petitioner under section 70 of the GST Acts if they wanted to record their statements or confront them with any material found during the course of search. In

the opinion of this court, the last part of the report flies in the face of the panchnama of the search proceedings, wherein there is not even a whisper regarding any collection, interpretation, co-relation and confrontation of the materials found during the search. All that is stated is that the statements of the family members regarding the whereabouts of the petitioner were recorded at different times of the day in question - answer form and time and again they were asked as to whether they had any information about the petitioner. The statement in the report to the effect that in the effort to recover incriminating documents which were secreted by the petitioner as per the information and in order to get a complete idea of the implication of digital data found in the form of pre-recorded call recordings, the authorized officers decided to stay for a longer period acting in good faith and in the interest of the Government revenue, also does not inspire confidence, inasmuch as there is nothing recorded in the panchnama to show that the concerned officers were examining the pre-recorded call recordings. Also statements of the family members appear to have been recorded either in the morning or afternoon or at night and at times only once in a day. At all other times, the only query put to them is as to whether they had any news about the petitioner.

One fails to understand as to what the officers concerned were doing at the residential premises of the petitioner for a whole week, along with two panchas and an SRP Constable when the search was concluded on day one. Such action on the part of the respondents is abhorrent and cannot be countenanced. No provision of the Code of Criminal Procedure, for investigation, search or seizure, empowers a police officer to remain a moment longer at any premises once the search is over. At this juncture, it may be apposite to note that the Supreme Court in **Income-tax Officer v. Seth Brothers** (supra) has held that since by the exercise of powers of search and seizure a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorises it to be exercised. In the facts of the present case, the power under sub-section (2) of section 67 of the GST Acts has not only not been exercised strictly in accordance with law, but has also not been exercised for the purposes for which the law authorises it to be exercised, namely that though the power was to be exercised for carrying out search and seizure of goods liable to confiscation, documents, books or things at the place in respect of which the authorisation of search was given, the search was

converted to a search for the dealer and into an investigation to find out other places where documents, books or things could have been secreted, which was beyond the scope of the powers vested in the authorised officer.

26. Article 21 of the Constitution of India reads thus:

*"21. Protection of life and personal liberty—
No person shall be deprived of his life or
personal liberty except according to
procedure established by law."*

In the facts of the present case, the family members of the petitioner have been deprived of their personal liberty not only by being confined in the residential premises and being permitted to leave only with the consent of the authorised officer, and that too, at times with an escort; but also by an intrusion on their right to privacy by several strangers residing in their residential premises for eight days, that too, without any authority of law. One shudders to think of the plight of one's own grown up unmarried daughter if she were in the place of the petitioner's daughter. But unfortunately, the respondents have no regrets! All that is stated is that longer stay at the residential premise of

the tax payer is not desirable and requires to be avoided as far as possible.

27. It is a matter of deep regret that the Chief Commissioner of State Tax has attempted to justify such wrongful action on the part of the officers of the department by placing reliance upon the provisions relating to power of investigation under an earlier enactment to justify the actions of the concerned officers who were exercising powers of search and seizure under section 67(2) of the GST Acts. One would expect the higher officer to reprimand the subordinate officers for their unauthorised actions. But in this case, the higher ups, for reasons best known to them are trying to shield the actions of the subordinate officers though they are not in a position to show the relevant provisions of law under which such officers were empowered to act in this manner. All that the court can say at this stage is that the reports submitted of the Chief Commissioner in response to the orders dated 25.10.2019 and 20.11.2019, do not meet with the standards expected from an authority of his stature.

28. Lastly the court may sound a word of caution to the authorities exercising powers under the GST Acts. Sub-section (2) of section 157 of the

GST Acts says that no suit, prosecution or other legal proceedings shall lie against any officer appointed or authorised under the Act for anything which is done or intended to be done in good faith under the Act or the rules made thereunder. An action like the present one which is not contemplated under any statutory provision and which infringes the fundamental rights of citizens under article 21 of the Constitution of India may not be protected under this section. An action taken may be said to be in good faith if the officer is otherwise so empowered and he exceeds the scope of his authority. However, in a case like the present one where the authorisation was for search and seizure of goods liable to confiscation, documents, books or things and the concerned officer converted it into a search for a person and an investigation, which is not otherwise backed by any statutory provision, it may be difficult to accept that such action was in good faith. Protection of such action under section 157 of the GST Acts may unleash a regime of terror insofar as the taxable persons are concerned.

29. It is clarified that this court does not condone any alleged illegal acts on the part of the petitioner and in case he has indulged in any illegalities, the law should take its own course.

However, the court found it necessary to pass the present order to curb any further abuse of powers in this manner by the authorities under the GST Acts.

30. Before parting, this court would like to record its deep appreciation for the extremely valuable assistance provided by Mr. Tushar Hemani, the learned amicus curiae.

31. Let the matter be listed for hearing on merits on 23.01.2020.

(HARSHA DEVANI, J)

(SANGEETA K. VISHEN, J)

PRAVIN KARUNAN

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT

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