

Arbind Kumar Deb and Others Vs Rex.

Court: Allahabad High Court

Date of Decision: Dec. 21, 1948

Acts Referred: Contract Act, 1872 " Section 70

Citation: (1949) CriLJ 701

Hon'ble Judges: Wali Ullah, J; Raghubar Dayal, J; Mushtaq Ahmed, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Mushtaq Ahmad, J.

The questions referred to the Full Bench are set out in the referring order in these terms:

(1) Does the mere possession of cloth which was not to be possessed after 31st December 1944, in view of Clause 14, Sub-clause (1) (a),

Cotton Cloth and Yarn (Control) Order 1943, amount to so contravening the provisions of that Order as to be punishable under B, 81 (4),

Defence of India Rules or would it amount to such contravention if such possession be without lawful authority or lawful excuse?

(2) Whether the general consideration that the authorities did not, either in this Control Order or in directions issued thereunder, provide the mode

in which the dealers were to act in the event of such cloth remaining with them undisposed of, would itself amount to a "lawful excuse."

(3) Whether the existence of lawful excuse depends on the dealers taking some active step prior to 31st December 1944, for getting rid of the

cloth before or after 31st December 1944.

2. The full facts of the cases in which the questions mentioned above have arisen are given in the referring order. All that is necessary for us to do is

to indicate briefly, in outline, the salient features which have to be borne in mind in appreciating the points raised in these cases. All these cases, 25

in number, have been consolidated. In all of them admittedly retail dealers were found in possession of cloth after 31st December 1944, in

consequence, all these dealers have been prosecuted for an offence under E, 81 (4), Defence of India Rules, for contravening the provisions of

Clause 14, Cotton Cloth and Yarn (Control) Order, 1943. In none of these cases has any dealer denied the recovery of cloth from his possession.

Their defence, in the main, has been that they were, for one reason or another, quite unable to dispose of the cloth in their possession by the

specified date, i. e., 31st December 1944. In some of these cases, the plea taken in defence, in terms, was that the respondents had tried their best

to sell the cloth in their posses-

3. We have listened to prolonged arguments-, on the one hand, from the learned Government Advocate, who appears in support of the

Government appeals, and, on the other, from different counsel who appear for different respondents. In the course of their arguments, they have

invited our attention to a large number of rulings. They have also brought to our notice the relevant provisions of the Control Order as well as of the

Defence of India Rules relevant thereto, in support of their contentions. We shall revert to these rulings after considering the relevant provisions of

the Control Order as well as of the Defence of India Rules.

4. The relevant provisions of the Cotton Cloth and Yarn (Control) Order, 1943, as they stood on the relevant date, are these:

Clause 14 (1) "No dealer shall, after 31st December 1944, buy or sell or have, in his possession (a) any cloth or yarn manufactured in India before

1st August 1943, and (b) any cloth or yarn manufactured in India and packed after 31st July 1943, and before 1st January 1944.

Clause 15. "The Textile Commissioner may by general or special order, exempt any cloth or yarn, or any class of cloth or yarn, from all or any of

the provisions of Clauses 13 and 14.

Clause 15-A. "Notwithstanding anything contained in Clauses 14 (1) and 14 (2), cloth or yarn not disposed of within the period specified in these

clauses may be kept and sold by a dealer subject to the conditions notified in this behalf by the Textile Commissioner prescribing the special

markings to be made on such cloth or yarn, the agency by which the marking shall be made and the fee payable for such marking:

Provided, however, that no such cloth or yarn shall be kept undisposed of by any dealer, or by any person, holding on behalf of a dealer, for more

than six months after the date of such marking,

Clause 18-B. "The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance

with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers:

(a) to sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify;

(b) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile

Commissioner may specify, and may issue such further instructions that he thinks fit regarding the manner in which the direction is to be carried out.

N. B, The new Clause 18-B was inserted in the Control Order on 16th December 1944.

5-6. The respondents have been prosecuted for an offence under B. 81 (4), Defence of India Rules, in respect of an alleged "contravention" of

Clause 11, Cotton Cloth and Yarn (Control) Order, 1943. Rule 81 (4), Defence of India Rules, as amended, reads thus:

If any person "contravenes" any order made under this Rule, he shall be punishable with imprisonment for a term which may extend to three years

or with fine or with both and if the Order so provides any Court trying such contravention may direct that any property in respect of which the

Court is satisfied that the order has been contravened shall be forfeited to His Majesty.

The question that arises immediately for consideration is this ; What is the meaning of the word "contravention," or "contravenes," as used here? For

purposes of the Defence of India Rules, the word "contravention" has been used in a technical sense and the word, with its grammatical variations,

has been defined in B. 5, Defence of India Rules. Rule 5, as it stood at the relevant date, is this:

If any person to whom any provision of these Rules relates, or, to whom any order made in pursuance of these Rules is addressed or relates, or

who is in occupation, possession or control of any land, building, vehicle, vessel or other thing to which such provision relates, or in respect of

which such order is made

(a) fails without lawful authority or evades himself, or in respect of any land, building, vehicle, vessel or other thing of which he is in occupation,

possession or control, to comply, or to secure compliance, with such provision or order, or

(b) evades, or attempts to evade, by any means such provision, or order.

he shall be deemed to have contravened such provision or order ; and in these Rules the expression "contravention" with its grammatical variations

includes an; such failure, evasion or attempt to evade.

7. Possession of cloth (manufactured in India before 1st August 1943) by a dealer after 1st December 1944, clearly amounts to a failure to

comply with the requirements of Clause 14 of the Control Order. In other words, it is a violation of the mandatory provisions of Clause 14 (1) of

the Order. Till that date, the Textile Commissioner had not, in any way, authorised possession of such cloth after the due date. Prior to 1st

December-1944, it is common ground, that the Textile Commissioner had not passed any general or special order, under Clause 15, exempting

any cloth or yarn, or any class of cloth or yarn, from all or any of the provisions of cls. 13 and 14, Similarly, it is admitted on all hands that, under

Clause 15-a, also the Textile Commissioner had not till 1st December 1944, notified the conditions subject to which cloth or yarn not disposed of

within the period specified in Clauses 14 (1) and 14(2) of the Order might be kept and sold by a dealer. Farther it is clear that the Textile

Commissioner had not issued any direction to any dealer such as is specified in Clause 18 B of the Control Order which was promulgated only on

16th December 1944 about a fortnight before the expiry of the period specified in Rule 14 (1), i. e., 31st December 1944. Therefore on the expiry

of 31st December 1944, the position in which a dealer stood was this. His continued possession of cloth after 31st December 1944, amounted to a

violation of the provisions of Clause 14 of the Order and there were no directions from the Textile Commissioner issued under any of the

provisions of the Control Order which might authorise him to retain possession. The question, however, is whether mere non-compliance with the

provisions of Clause 14 of the Control Order i. e., mere possession of cloth after 31st December 1944 amounts to a "contravention" of the Control

Order. Rule 5, Defence of India Rules, makes it clear that a mere breach of Clause 14 of the Control Order is not a contravention of it but the

failure to comply with it would amount to a contravention of it only if it is without lawful authority or excuse. In this connection reference may be

made to the case of Chotey v. Emperor 1947 AwBh 89 : AIR 1947 ALL. 394 : 48 CrLJ 853 decided by two learned Judges of this Court. In

this case the learned Judges, after expressing their disagreement with the view expressed by the Nagpur High Court in the case of Provincial

Government, G. P. and Berar v. Sham-sherali and Anr. AIR 194 Nag. 249 : ILR (1945) Nag. 909, in regard to the applicability of R. S, observed

at p. 107:

In our judgment K. 5, Defence of India Rules is intended to enlarge the scope of contravention and not to limit or curtail it. Rule 5 is intended to

widen the field of contravention by including within its ambit an act which, though it may not be a prima facie breach of any provision, is yet an

evasion of or an attempt to evade that provision, The Rule has no application to an act which is clear and direct breach of a prohibitory provision.

It is important to note that B. 5, after referring to certain acts says that the person committing those acts "shall be deemed to have contravened

such provision or order," Where an Act. is a clear and direct breach of a prohibitory provision there is no question as to whether it has to be

deemed to be a contravention of that provision.

8. The provisions of B. 6, Defence of India Rules are divided into two sub-rules. Sub-rule (a) deals with a person's failure to comply with an order

passed in pursuance of any of the Defence of India Rules whereas sub-rule (b) deals with an evasion or attempt at evasion, of any rule or order

made thereunder. It is difficult to see how one's failure to comply with any provision of any of the rules, or with an order passed under any of the

rules, can be anything other than a direct breach of the prohibition or other provision of any of the rules" or of an order made thereunder, If B. 5

contained no provision like that comprised in sub-r. (a) and were confined merely to what is contained in sub-r. (b), the observations of the

learned Judges in the case noted above might undoubtedly have full force. But in the presence of Sub-rule (a) which deals with one's failure to

comply with any provisions of the Defence of India Rules or with an order passed in pursuance of those rules, it is difficult to see how a failure to

comply with a prohibitory provision or other direction should be considered, apart from the question of the existence of lawful authority or excuse

for such failure. With great respect therefore we dissent from the view expressed by the learned Judges in this case.

9. In the case of *Bam Sarup v. Emperor* (1916) AWEH 433 : AIR 1947 ALL. 250 : 48 LJ 91), Allsop J., accepted the decision of the Nagpur

High Court in the case of *Provincial Government, O. P. and Berar v. Shamslierali and Anr.* AIR 1945 Nag. 249 : ILR (1945) Nag. 909, in so far

as it was held there that person charged with the contravention of Clause 14, Cotton Cloth and Yarn (Control) Order, 1943, should not be

convicted for being in possession of cloth against the provisions of the order if they had a lawful excuse for such possession, To the same effect is

the view expressed by Sinha J., in Criminal Reference nos. 518 and 602 of 1916 decided on 5th August 1946, Sinha J. has expressed his

agreement with the views taken by the Nagpur High Court in *Shamsherali's* case, (AIE (32) 1945 Nag. 249 : ILB (1945) Nag. 909), as well as

by the Oudh Chief Court (as it then was) in the case of *Murli Dhar v. Emperor* AIB 1946 Oudh 234 : 47 OrLJ 609. It must, however, be noted

that in the cases decided by Sinha J., there was no application by the prosecution for a summary trial and the trial on that ground was held to be

illegal. The view expressed by us above to the effect that B. 5 itself makes it clear that a mere breach of Clause 14 of the Control Order does not

technically amount to a "contravention" of it, but the failure to comply with it would amount to a "contravention" of it only if it is without lawful

authority or excuse finds support from decisions of other High Courts as well. In the recent Full Bench decision of this Court in the case of *Laljee*

v. Emperor (1947) AWRHO 328 : AIB 1943 ALL. 38 : 48 OrLJ 955 P&H in which the leading judgment was delivered by Malik J. (now Malik

O. J.), it was observed at p. 541, that the question of lawful excuse did not arise in that case. The argument based on B. 5 which was urged in that

case before the Full Bench is, however, noticed, but as the point did not directly arise for decision, no opinion was expressed on it. The learned

Judge, however, went on to observe:

I am inclined to the view that the words "lawful excuse" mean an excuse which is recognised as a good excuse in law. The words are not "any

reasonable excuse" but "lawful excuse"; the excuse may be good in fact though not tenable in law." It seems to us that it was held there that the

defence of lawful authority or excuse contemplated by B. 5 might be available in the case of a prosecution for contravention of Clause 14 of the

Control Order.

10. In the case of Provincial Government P & Berar v. Shamsherali and Anr. AIR 1945 Nag. 249 : ILB (1945) Nag. 909, two learned Judges of

the Nagpur High Court dealt with the case of a prosecution for contravention of Clause 14, Cotton Cloth and Yarn (Control) Order, 1943. In this

connection they had occasion to consider the meaning of the word "contravention" of an order as used in Rule 81 (4), Defence of India Rules. At

p. 251, it was observed:

The prosecution was under B. 81 (4), Defence of India Rules, for contravention of Cl. 14, Cotton Cloth and Yarn (Control) Order, 1943.

Contravention of an order has a technical meaning in the Defence of India Rules. Rule 5 of which the relevant portion is given below defines it;

5. If any person ... to "whom any order made in pursuance of these rules is addressed or relates or who is in ... possession ... of any other thing...in

possession of which such order is made ... (a) fails without lawful authority or excuse ... himself, or in possession of any ... other thing of which he is in ...

possession ... to comply or to secure compliance with Such ... provision ... he shall be deemed to have contravened such order.

We have underlined (here italicized) a few words to bring out the full meaning of the rule. The failure to comply, or to secure compliance with

Clause 14 of the Order by the dealer without lawful excuse is contravention of the order which is made punishable and not a mere breach of

Clause 14 of the Order.

With regard to the other point decided by that Court in the same case, namely whether Clause 14-A of the Order overrides Clause 14 thereof, the

position is that the recent Full Bench decision of our Court in Laljee Vs. Emperor, , takes a different view and does not accept the Nagpur view.

That, however, is a matter with which we are not concerned in this case. On the facts of the case before them, the learned Judge came to the

conclusion that the dealers had lawful excuse for possession of cloth after 31st December 1944 and hence they had not contravened Clause 14

of the Order and were not punishable under Rule 31 (i), Defence of India Rules. To the same effect is the decision of a Bench of two learned

Judges of the Oudh Chief Court in *Murli Dhar v. Emperor* AIR 1946 Oudh 234 : 47 OrLJ 609). The decision in this case runs more or less on

parallel lines with the decision of the Nagpur High Court noticed above. In the case of a prosecution for contravention of Clause 14 of the Control

Order, in circumstances very similar to those of the cases before us, the learned Judges observed at p. 236 thus:

The dealers were therefore left in an impossible position for they could not keep the cloth themselves nor could they hand it over to any one to

keep on their behalf on account of Clause U (3) (1).

11. The learned Judges agreed with the view of the Nagpur High Court and in the circumstances of the case before them held that there was

lawful excuse for being in possession of cloth on 1st January 1943.

12. Next we may refer to the case of *Emperor Vs. Gokuldas Nensi*, decided by two learned Judges of that Court. The learned Judges were

concerned with the case of a prosecution for contravention of Clause 15-A, Cotton Cloth and Yarn (Control) Order, 1943. At p. 29 it was

observed:

Rule 81 (4), Defence of India Rules, makes it penal to contravene any order made under B. 81 and the Cotton Cloth and Yarn Control Order

1943, having been made under E. 81 (2), if, as is alleged, the appellant be proved to have contravened Cl. 15-A of that Order, he would be liable

to be convicted under B. 81 (4). "Contravention" of an Order has a technical meaning in the Defence of India Rules and is defined in Rules.

After referring to the provisions of Section 5 (a) of the Defence of India Rules, the learned Judges go on to observe:

This makes it clear that a mere breach of Cl. 15-A of the Order is not "contravening it but the failure to comply with it would amount to a

contravention of it only (It is without lawful excuse, and in this case we are satisfied that the appellant had a lawful excuse for keeping use

disposed of cloth . . . since the Textile Commissioner issued no directions or instructions under Clause 18-B with a view to securing compliance

with the various injunction) contained in the Cotton Cloth and Yarn (Control) Order, 1943.

13. In view of what has gone before, we have reached the conclusion that mere possession of cloth which was not to be possessed after 8th

December 1944 does not amount to a contravention of Clause 14, sub-Cl. 1 (a) of the Control Order so as to be punishable under Rule 81 (4),

Defence of India Rules. We are further of opinion that s. 5, Defence of India Rules, defines the word "contravention" as used in E. 81 (4) and it

makes it clear that a mere breach of Clause 14, Sub-Clause (1) (a) would not amount to a contravention of it but the failure to comply with it

would amount to a contravention of it only if it is without lawful authority or excuse.

14. It follows that the act or omission will be punishable only when it is without lawful authority or excuse. The onus would thus lie upon the

prosecution to prove not only the act or omission but also the absence of lawful authority or excuse, just as absence of a licence is to be proved by

the prosecution in a case under the Arms Act. This is the position, of course, in the absence of an express statutory provision to the contrary.

15. The next question which has to be considered is: What is the meaning of the expression "lawful authority or excuse" as mentioned in R, 5 (a),

Defence of India Rules? Unlike the word "contravention", this expression is not defined anywhere in the body of rules called the Defence of India

Rules. We must, therefore, look to other sources for assistance in the interpretation of this expression. At the outset, it may be noted that besides

Rule 5, this expression occurs in many other Rules, e. g., Rules 88 (1), 39 (I) and 48 (I). Rule 38 (I) deals with the prohibition of prejudicial acts,

etc., and the expression there is: "no person shall, without lawful authority or excuse (a) do any prejudicial Act. ...". Similarly B. 39 deals with

illegal possession of certain kinds of information and it reads thus:

Rule 39 (2): "No person shall, without lawful authority or excuse, have in his possession (a) any information likely to assist the enemy ... or (b) any

document containing any prejudicial report. ...". Rule 48 deals with improper use of official uniforms etc. Rule 48 (1) reads:

No person shall without lawful authority use or wear (a) any official uniform, Indian, British or foreign or.

It would appear from a consideration of the provisions of these Rules, that a distinction is drawn by the rule-making authority between different

kinds of prohibitions. The phrase "lawful authority" appears to be used in the case of some positive act being done i.e., that is being prohibited.

The phrase "lawful excuse", on the other hand appears to be used in connection with possession which indicates a negative aspect of prohibition.

16. At this stage it will be interesting as well as instructive, to note that the phrases, "lawful authority" and "lawful excuse" have been in use in

England for a long time and each has acquired a distinctive significance of its own. In the Coin Laws Consolidation Act. (1832) (2 and 8 w. IV 0.

84) by Section 10, "lawful authority" was required for doing a positive Act. i. e., making tools for coining. But "lawful excuse" was the expression

used in connection with the possession of such tools. Similarly in Sections 11, 12 13 and 14 of that Act, the distinction between the two

expressions was maintained. Similarly in the Forgery Act. of 1830 (II Geo. IV and 1 W IV, 0 66) in S3. 13, 14, 15, 16, 17, 18 and 19 there is a

sharp distinction drawn between the expression "lawful authority" on the one hand and "lawful excuse" on the other. The expression "lawful"

authority"" has been used generally in connection with the doing of a positive act e. g., making of foreign Bank notes, while ""lawful excuse"" has been

used in connection with the possession of a forged bank note, etc. From a study of the various provisions of these ancient statutes, it is clear that

the two expressions ""lawful authority"" and ""lawful excuse"" have been used in the sense indicated above. In more recent statutes, however, the two

expressions appear to be coupled together just as the subject, matters e, g., the making of tools for preparing forged articles and possession of the

same as well as of forged articles are dealt with together. Reference may be made to the Coinage Offences Act of 1961 (24 and 26 Viet. 0 99). In

S3. 6, 7 and 8 be to these expressions are used, but they are used in contradistinction with each other. ""Lawful authority"" refers to a positive act

which is prohibited whereas ""lawful excuse"" is generally used in connection with the possession etc., indicating what might be described as the

negative aspect of a prohibition. Similarly in the Forgery Act of 1870 (33 and 34 vict. o. 58), Section 5 which deals "with the engraving of plates

etc., for stock certificates uses the expression ""without lawful authority or excuse."" Again, in the Post Office (Protection) Act of 1884 (47 and 48

Vict. 0. 76) Section 7 shows that the two phrases viz., ""lawful authority"" and ""lawful excuse"" have been used each in its distinctive sense as in

the earlier statutes. Again, in Section 13 (9), Stamp Duties Management Act. 1891 (64 and 65 Vict, 0.38), which deals with certain offences in

relation to dyes and stamps the expression used is ""knowingly and without lawful excuse...has in his possession any forged dye or stamp."" Lastly

reference may be made to the Forgery Act. of 1913 (3 and 4 Geo. V, o. 27). In Sections 8 and 9 of the Act which deal with possession of forged

documents, seals etc, and the making or having in possession paper or implements for forgery the expression used is ""without lawful authority or

excuse.

17. In the Pull Bench case, Laljee v. Emperor 1947 AWRB 328 : AIR 1948 ALL. 88 : 48 CrLJ 955 (F.B.), as noted in an earlier part of this

judgment, Malik J. made an obiter dictum to the effect that "lawful excuse" means any excuse which is recognised as a good excuse in law. The

proposition as laid down there does not really help the question of interpretation of the expression ""lawful excuse"" because it merely paraphrases

the word ""lawful"" In the case of Kashi Nath Vs. Bhagwan Das and another, , our learned brother Mootham J. while dealing with the case of a

person prosecuted for a contravention of Clause 14 (I), Cotton-Cloth and Yarn (Control) Order, 1948, had occasion to interpret the expression

lawful excuse"" as it occurs in E. 5, Defence of India Rules, The learned Judge, however, only quoted with approval the opinion expressed by

Malik J. in the Full Bench case and said lawful excuse means an excuse which is recognised as a good excuse in law. He added that the word

used was "lawful" and not "reasonable" or "good" as an adjective which qualifies "excuse," On the facts of the case before him, he came to the

conclusion that the inability of an accused person to dispose of the cloth by 31st December 1944, did not afford a lawful excuse, but was merely a

circumstance to which full weight might be given in assessing the sentence. This again, it seems to us, with great respect to the learned Judge, is not

very helpful in determining the proper construction which has to be put on the words "lawful excuse." As mentioned already, there is no discussion

or indication as to what in his opinion would amount to a lawful excuse. What excuse would be recognised as a good excuse in law remains to be

examined.

18. The expression "without lawful authority or excuse" as it occurs in B. 38 (I), Defence of India Rules, was the subject-matter of decision in the

case of Emperor Vs. Kashinath Dayaram Chaudhari, decided by a Bench of two learned Judges of the Bombay High Court. It was a case in

which a communist had been prosecuted for instigating a strike among the labourers of a supply base depot. The question was whether he was

guilty under B. 88 (5), Defence of India Rules, inasmuch as he had contravened the provisions of E. 38 (I), Defence of India Rules. At p. 441 it

was observed by the learned Judges that the expression "without lawful authority" is distinct from "without lawful excuse." "With lawful authority

means sanctioned by some lawful authority, whereas "lawful excuse" means having an excuse which is not unlawful, that is to say, not prohibited

by law. It was further observed that B. 38 (I) prohibits the doing of a prejudicial act without lawful authority or excuse and does not require that the

excuse should be reasonable or just.

19. Similarly, in *Altai Appalaswamy and Anr.* AIR. 1942 Mad. 735 : 44 or L.J. 148), a learned Judge of the Madras High Court had to consider

the scope of Section 38 (I), Defence of India Rules. After stating that Section 88 (1) provided that no person shall, without lawful authority or

excuse (a) do any prejudicial act, the learned Judge proceeded to state that the simple question before him was whether the petitioners had a

lawful excuse for calling a strike. It was held that the calling of a strike was not illegal. It was not with the object of impeding the war effort but with

the object of remedying the real or supposed grievance of the union. In the circumstances, it was held that there was a lawful excuse for the strike.

20. In the case of *Bundoo and Others Vs. Emperor*, , a learned Judge of this Court, Mulla J., had to deal with the case of a person who had been

convicted under b. 38 (5), Defence of India Rules. In that case Bundoo and some others had sacrificed a cow on the occasion of the Bahrid

festival in the year 1941. Prior to the Bahrid festival of that year Bundoo had obtained a declaratory decree from a civil Court to the effect that the

Muslim residents of the village were entitled to perform cow sacrifice on the occasion of the Bakr-Id festival. Bundoo asserted the right given to

him by the civil Court decree and sacrificed a cow on the occasion of the Bakr-Id festival. The local authorities had not issued any prohibitory

order against cow sacrifice. The learned Judge observed at p. 532:

It is evident that the prosecution is bound to prove that the act was committed by the applicants which is the basis of the charge against them was

committed without lawful authority or excuse and upon the admitted facts of the case there can be no doubt that the prosecution cannot prove

that essential ingredient of the offence under B. 38 (1), Defence of India Rules.

It was held that Bundoo had lawful authority for performing the cow sacrifice which he did perform. The learned Judge went on to observe:

It may also be reasonably contended that he had lawful excuse because it was the occasion of the Bakr-Id festival and as a Muslim he was

performing a religious act.

21. Again in the case of Emperor V. Bhangda Fakir Alb. 1926 b.e.m. 30 : 27 criLJ 1182), a Bench of two learned Judges of the Bombay High

Court had to consider the meaning of the expression "lawful excuse" in Section 61 (a), Bombay District Police Act (Bombay Act IV [4] of 1890).

Pawcett J. observed at p. 531:

In my opinion the word "lawful" as used with the word "excuse", in Clause (a) of Section 61, Bombay District Police Act. conveys the idea of an

excuse that is (a) reasonable and (b) not opposed to any law or principle of law.

But Shah J. at p. 532 observed:

Without attempting to define what a lawful excuse is, it seems to me that it is a question, which must be determined on the facts and circumstances

of each case.

22. In the well known English case, Dinkins V. Gill (1896) 2 QB. 810 : 65 LJ 187), the question was whether possession of a dye for making a

false stamp known to be such to its possessor was possession without lawful excuse. This was with reference to the provisions of Section 7 (c),

Post Office (Protection) Act. 1884, which laid down:

A person shall not make, or, unless he shews a lawful excuse, have in his possession, any dye, plate, instrument, or materials for making an;

fictitious stamp.

It was held in effect that absence of knowledge might be a lawful excuse for the possession of a fictitious stamp, but innocence of motive was not.

Further, there could be no lawful excuse for the retention of a fictitious stamp or dye, after the proper authority had intervened.

23. Section 70, Contract Act provides:

Where a person lawfully does anything for another person ... and such other person enjoys the benefit thereof, the latter is bound to make

compensation to the former in respect of, . . . the thing so done or delivered.

In the case of Chedi Lai v. Bhagwan Das 11 ALL. 234 : 1889 AWN 67, decided by two learned Judges of this Court, Straight and Mahrnood

JJ., it was observed that the word "lawful" as used in that section had a wider significance than the word "legal". This case was followed by the

Bombay High Court in Punja-bhai v. Bhagwandas AIR 1929 Bom. 89 : 53 Bom 309, where it was observed:

The term "lawful" no doubt has a wider meaning than the terra "legal". "Legal" is what is in conformity with the letter or rules of the law as

administered in the Courts, "lawful" is what is in conformity with (or frequently not opposed to) the principle or spirit of the law whether moral or

judicial. In ascertaining whether an act is "lawfully" done for another the test to be applied should be as was laid down by Straight and Mahmood

JJ., in Chedi Lai v. Bhagwan Das 11 AU. 234 : 1889 AWN 67.

24. In the Law Lexicon of British India by Eamanatha Iyer the word "lawful" has been defined as meaning that which in its substance is sanctioned

or justified by law, as opposed to unlawful or illegal, "Lawful" implies conformable to or enjoined by law. A lawful act is defined as meaning an act

which is not forbidden by the Penal law.

25. On a consideration of the whole matter, it seems to us that the proper construction of the expression "lawful excuse" would be an excuse

which, though not expressly sanctioned by law, is reasonable and not prohibited by law, or opposed to any principle of law.

26. The next and the last question which it is necessary to consider, in view of the terms of reference, is: Would it be necessary for a dealer in

every case to prove that he took some active steps prior to Slat December 1944 for getting rid of the cloth in respect of which he is being

prosecuted or would a mere proof of the fact that the authorities concerned did not, either in the Control Order, or in directions issued

thereunder, subsequently provide the mode in which the dealers were to act in the event of such cloth remaining with them undisposed of itself

amount to "lawful excuse"? In this connection it may be noted that Allsop J, in the case of Bam Sarup v. Emperor 1946 AwBH. 433 : AIR 1947

ALL. 250 : 48 CrILJ 91 (ubi supra) and the Full Bench in the case of Laljee Vs. Emperor, appear to have held by implication that the mere

omission of authorities to issue directions regarding the mode in which the dealers were to act in the event of cloth remaining with them

undisposed of would not amount to "lawful excuse". But in some of the cases decided by other High Courts, referred to in an earlier part of this

judgment, it has been clearly held that the omission of authorities to issue necessary directions might itself constitute a "lawful excuse" e. g., in the

case of Emperor Vs. Gokuldas Nensi, and in the case of Provincial Government, O. P. and Berar v. Shamsheer Ali and Anr. AIR 1945 Nag. 249 :

ILR (1946) Nag 909 (ubi supra). In the case of Superintendent and Remembrancer of Legal Affairs, Superintendent and Remembrancer of Legal

Affairs Vs. Fate Chand Baid and Others, , the Court appears to have proceeded on the footing that the omission by the authorities to give

necessary directions or instructions to the dealers might constitute a "lawful excuse." In some cases e. g. the case of Emperor Vs. Bhangda Fakira,

it was definitely laid down by one of the learned Judges, at any rate, that what is a "lawful excuse" is a question which must be decided on the facts

and circumstances of each case. This might clearly include the difficult position of a dealer who might be genuinely anxious to avoid a contravention

of the law, but who might yet not know what he was to do with the cloth lying on his hands after the expiry of the due date simply because the

authorities concerned had omitted to issue necessary directions in the matter. The position of a dealer in such circumstance becomes an impossible

one. His possession which was lawful became unlawful on the stroke of 12 midnight of 31st December 1944. Even so late as the 16th December

1944, Clause 18B was newly added to the Control Order and the Textile Commissioner was expressly given power to issue directions with a view

to securing compliance with this order and yet he never moved in this matter. It may be legitimately urged that the dealers cannot be penalized for a

breach of Clause 14, Control Order because the Textile Commissioner did not think it fit to issue necessary directions according to which

undisposed of cloth or yarn could be possessed or dealt with after the midnight of 31st December 1944, We may note that after the insertion of the

new Clause 14, Control Order, on 4th November 1944 the Textile Commissioner appears to have issued a press note on 8th November 1944 to

the following effect:

The Government of India have by a notification in the Gazette of India, dated 4th November, 1944, amended O. 14, Cotton Cloth and Yarn

(Control) Order, 1943. Under clauses as amended it will be an offense for any Sealer to buy or sell or have in his possession after 31st December

1944 any cloth or yarn manufactured and packed before the 1st January 1944. The clause further lays down that any cloth or yarn whether

manufactured in India or imported must be finally disposed of within twelve months from the last date of the month marked on the goods; no such

cloth or yarn shall be kept in unopened bales after six months from that date.

The Textile Commissioner desires it to be known that no extensions will be given in the time for disposal now laid down unless for the most

compelling reasons, when the holder of the goods can show that they could not be sold due to causes entirely beyond his control

Sandlot cloth is exempted from the above provisions.

27. It will be noted that even this press note provides for an exception in the case of compelling reasons when the holder of goods can show that

they could not be sold due to causes entirely beyond his control.

28. On a careful consideration of all the relevant provisions as well as the existing case-law on the point, we feel that it is impossible to escape the

conclusion that, situated as they were, many of the dealers would find it impossible to know how to proceed in the emergency with which they

were suddenly confronted on 1st January 1945, It is difficult to accept the view that the framers of the Control Order intended to legislate in such a

way as to penalise dealers who, for reasons beyond their control, were not able to dispose of the cloth or yarn by 31st December 1944. We are

accordingly of opinion that the fact that the authorities did not, either in this Control Order or in directions issued thereunder, provide for the mode

in which the dealers were to act in the event of such cloth remaining with them undisposed of, would itself amount to "lawful excuse" does not

necessitate any active steps on the part of the dealers prior to 31st December 1944, for getting rid of the cloth either before the expiry of the

period or afterwards.

29. To sum up, our answers to the three questions referred to us are these:

(1) Mere possession of cloth which was not to be possessed after 31st December 1944 does not amount to a "contravention" of Clause U,

Control Order, so as to be punishable under B. 81 (4), Defence of India Rules. Further, a mere breach of Clause U, sub el. (I) (a) would not

amount to a contravention of it, but the failure to comply with it would amount to a contravention if it is without lawful authority or excuse:

(2) The fact that the authorities did not, either in this Control Order or in directions issued there, under, provide for the mode in which the dealers

were to act in the event of such cloth remaining with them undisposed of, would itself amount to lawful excuse.

(3) The existence of lawful excuse does not necessitate any active steps on the part of the dealers prior to 31st December 1944, for getting rid of

the cloth either before the expiry of the period or afterwards.

30. Let the record of these cases along with our answers be placed before the Bench concerned.