

(2001) 03 MP CK 0027

**Madhya Pradesh High Court**

**Case No:** Miscellaneous Criminal Case No. 814 of 2001

Balwant

APPELLANT

Vs

State of M.P.

RESPONDENT

**Date of Decision:** March 5, 2001

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 438, 438
- Essential Commodities (Amendment) Act, 1967 - Section 10
- Essential Commodities Act, 1955 - Section 3, 7, 7(1)

**Citation:** (2002) CriLJ 335 : (2002) ILR (MP) 183 : (2001) 2 LJ 126 : (2001) 3 MPHT 375 :  
(2001) 3 MPLJ 414 : (2002) 1 RCR(Criminal) 115

**Hon'ble Judges:** Mr. S.P. Khare, J

**Bench:** Single Bench

**Advocate:** Shri Manish Datt, for the Appellant; Ku. Alka Pandya, Government Advocate,  
for the Respondent

**Final Decision:** Dismissed

**Judgement**

@JUDGMENTTAG-ORDER

S.P. Khare, J.

This is an application u/s 438 of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as "the Code") for anticipatory bail. It relates to Crime No. 23/2001 of Police Station Multai, District Betul.

The case has been registered u/s 7 of the Essential Commodities Act, 1955 (hereinafter to be referred to as "the Act") for contravention of Clause 4 (c) of the Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993 hereinafter to be referred to as "the Control Order") issued u/s 3 of the Act. Applicant Balwant is said to have been found selling kerosene at the rate of Rs. 8.50 per litre. According to the prosecution retail price of kerosene fixed under Control Order was Rs. 7.90

per litre. This offence is punishable u/s 7(1)(a)(ii) of the Act. The punishment provided for this offence is imprisonment which may extend to seven years.

The first point which has been raised on behalf of the applicant is that the offence punishable u/s 7 of the Act is bailable. Reliance has been placed on the order dated 15-10-1999 (by Hon"ble Dipak Misra, J.) in M.Cr.C. No. 6111 of 1999, Nemchand Agrawal Vs. The State of M.P., and a reported decision Dinesh Kumar Dubey Vs. State of M.P. [2000(1) MPHT 213] (by Hon"ble R.S. Garg, J.). During the course of hearing two more decisions have been cited, one dated 30-12-99 (by Hon"ble S.S. Saraf, J.) and the other dated 20-11-2000 in M.Cr.C. No. 7681/2000 (by Hon"ble S.C. Pandey, J.). These decisions have also taken the view that offence u/s 7 of the Act is bailable.

Before considering the cases referred to above in default, it is necessary to look at the statutory provisions. Section 10A of the Act inserted by the Amending Act (No. 36 of 1967) provided that every offence punishable under the Act shall be bailable. By the Amending Act (Act No. 30 of 1974), the words "and bailable" were deleted from Section 10A of the Act. The effect of the deletion of these words from Section 10A was that there remained no specific provision in the Act on the point whether the offences punishable under it are bailable or non- bailable. This attracted the applicability of Schedule I - Part II "Classification of offences against other laws". A reference to this Schedule shows that if an offence is punishable with imprisonment for three years and upwards that would be "non-bailable". If the offence is punishable with imprisonment for less than three years or with fine only it would be bailable. According to Section 7(1) of the Act if any person contravenes any order made with reference to clause (h) or clause (i) of sub-section (2) of Section 3, he shall be punishable with imprisonment for a term which may extend to one year and in the case of any other order with imprisonment which may extend to seven years. The contravention of Clause 4 (c) of the Control Order issued u/s 3 of the Act is punishable with imprisonment which may extend to seven years.

Then came the Essential Commodities (Special Provisions) Act, 1981 (Act No. 18 of 1981) by which the words "and non-bailable" were added in Section 10A of the Act. This amendment was not a permanent feature of the Act. It was for a specified period and it was extended from time to time. The said amendment ultimately lapsed after the expiry of the period of the Essential Commodities (Amendment) Ordinance, 1998 which was promulgated on 25-4-1998. As the amendment which was incorporated in 1981 has come to an end by efflux of time, the words "and non-bailable" in Section 10A of the Act stand deleted. Therefore, Section 10A as amended in 1974 will hold the field now. As already discussed, the offences u/s 7(1)(a)(ii) and 7(2) of the Act which are punishable with imprisonment for seven years are non-bailable by virtue of the provisions of Schedule I Part II of the Code.

Now the cases relied upon by the learned counsel for the applicant should be considered. In Nemchand Agrawal Vs. State of M.P., the arguments mainly centred

round the point whether the amendment which was made in 1981 to Section 10A of the Act and which was extended from time to time still subsists. After tracing the steps taken to renew the life of 1981 Amendment it has been held that it has lapsed. It was not brought to the notice of the Bench that by an amendment made in 1974 the word "bailable" was deleted from Section 10A of the Act and therefore the Schedule I - Part II to the Code should be referred to for determining the question whether the offence punishable under the Act is bailable or non-bailable. It was assumed that once it is shown that the amendment made in 1981 ceased to remain in force the offence would become bailable. The question whether the offence in question is bailable or non-bailable was not considered in light of the relevant statutory provision in Schedule I (Part-II) of the Code.

In [Dinesh Kumar Dubey and another Vs. State of M.P.](#), the same point came up for consideration. In that case in Para 4 it has been observed : "in the absence of any other provisions showing the offence to be non-bailable, the offence would continue to be bailable in view of Schedule-II to the Code of the Criminal Procedure, 1973". But on reference to this Schedule it is clear that the offence punishable with imprisonment for more than three years is non- bailable. In the two other cases reliance was placed on the order in *Nemchand Agrawal Vs. State of M.P.*, M.Cr.C. 6111 of 1999.

As demonstrated earlier the statutory legal position, as it exists today, is that the offence u/s 7(1)(a)(ii) of the Act which is punishable with imprisonment for seven years is non-bailable. The question is whether the view taken in the four cases referred to above should be followed by this Bench or there is a scope for clarification without referring the matter to a larger Bench. It is axiomatic that a decision is an authority for the question of law which it decides and not for a question which was not raised or considered. A sub-silentio order or assumption in disregard of a clear and unambiguous statutory provision is not a precedent. If a provision in a statute is construed or interpreted one way or the other that would be a precedent for the future and would be binding on coordinate Benches. But something which has been assumed and not decided cannot be considered as authoritative binding precedent.

Where a certain point of law is not brought to the view of the Court in determining a cause, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the Court. (Law Lexicon by P.R. Aiyar edited by Justice Y.V. Chandrachud, 1997 edition page 1494). In [Goodyear India Ltd., Gedore \(India\) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another](#), it has been observed by the Supreme Court that the decision on a question which has not been argued cannot be treated as a precedent. If an ingredient of a section was neither argued nor was considered, the passing reference based on the phraseology of the section cannot be said to be the dictum.

Failure to consider a statutory provision is one of the clearest cases in which the Court is not bound to follow its own decisions. [Bonalumi Vs. Secretary of State (1985 1 All ER 797)]. In Young Vs. Bristol Aeroplane Co. Ltd. [(1944) 2 All ER 293] it has been observed by Lord Greene, M.R.: "Where the Court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam." It has been held by a Division Bench of this Court in United India Insurance Company Vs. Mahila Ramshree (1996 MPLJ 691) that a judgment is per incuriam if the relevant law has not been considered and it has no binding effect.

In view of the above discussion it must be held that the cases falling u/s 7(1)(a)(ii) of the Act being punishable with imprisonment which may extend to seven years read with Schedule I - Part II to the Code are "non-bailable". In the present case the alleged contravention of the Control Order is punishable u/s 7(1)(a)(ii) of the Act. The applicant who was found selling kerosene in excess of the price fixed under the Control Order does not on the facts and in the circumstances of the present case deserve anticipatory bail. The application for anticipatory bail is rejected.

A number of cases have come before this Court which go to show that there is confusion in the minds of the subordinate Courts whether the offences under the Act are bailable or non-bailable. Therefore, a copy of this order be immediately circulated amongst all the subordinate Courts.