

(1991) 10 CAL CK 0011

Calcutta High Court

Case No: Criminal Revision No. 842 of 1988

Samar Nath Paul

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Oct. 10, 1991

Acts Referred:

- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 100, 401, 482
- Essential Commodities Act, 1955 - Section 6A, 6B, 6B(1), 6C

Citation: (1994) 1 ILR (Cal) 507

Hon'ble Judges: Amal Kanti Bhattacharjee, J

Bench: Single Bench

Advocate: Amit Bhattacharji, for the Appellant; Manas Ranjan Chakraborty, for State of West Bengal, for the Respondent

Final Decision: Allowed

Judgement

Amal Kanti Bhattacharjee, J.

In this petition filed under Article 227 of the Constitution of India and/or under Sections 401/482 of the Code of Criminal Procedure the Petitioners have challenged a confiscation order passed by the Collector u/s 6A of the Essential Commodities Act, 1955, in respect of some seized essential commodities. The commodities seized were certain varieties of washing soaps and detergent powders. It appears that one Dhirendra Chandra Pandit, a Sub-Inspector of D.E.B. Dum Dum, searched the godown of a firm named S. Paul & Co. at 30/1 Sashi Bhusan Neogi Garden Lane, Baranagar, at about 11 a.m. on April 8, 1982, and finding discrepancies between the stocks mentioned in the Stock Board and the stocks actually found on verification, seized the articles and reported to the Subdivisional Officer, Barrackporc, acting as the Collector, about the seizure on April 12, 1982. The Collector issued the usual notices to the present Petitioners who are partners of the firm from whose godown

the articles were seized, but the articles were not served even after the expiry of more than three years. The Petitioners, however, appeared on December 23, 1985, and showed cause against the prayer for confiscation and the matter was finally disposed of on May 3, 1986, by allowing the prayer for confiscation. The order of confiscation was, however, stayed by this Court by an ad interim order.

2. On behalf of the Petitioners Mr. Amit Bhattacharjee attacked the order of confiscation on several grounds. His contentions are that there was no violation of the West Bengal Declaration of Stocks and Price of Essential Commodities Order, 1977 (hereinafter referred to as the Order) as alleged by the seizing officer and the Collector, that the search and seizure of the commodities concerned were illegal in the absence of any reasonable belief on the part of the searching officer that any of the provisions of the Order was contravened, that no reasonable opportunity of being heard was given to the owner of the seized commodities, that there was inordinate delay in disposing of the confiscation petition, that the Order was passed by the Collector without application of mind and that no notice was served on the firm which was the real owner of the goods. Mr. Bhattacharjee has cited a number of decisions in support of his contentions. I propose to examine the points raised by him one by one.

3. Mr. Bhattacharjee's first contention is that no notice to show cause was served on the Petitioners and that they appeared suo motu after coming to know about the notice from other sources. It is argued that appearance of the persons on whom a notice is purported to have been served but not actually served is of no avail as in the scheme of the Essential Commodities Act the entire procedure should be scrupulously followed in order to indict a person for a violation of any provision of any order issued under the Act. While in a pretrial confiscation of any offending commodity observance of all requisite procedure is essentially necessary, non-service of a notice cannot be deemed to be fatal to the exercise of any jurisdiction by the confiscating authority when the party actually appears and shows cause against the order proposed. It is true that from the copies of the order-sheet furnished, it transpires that there is no record of service of any notice upto November 21, 1985, but on December 23, 1985, the persons concerned appeared and prayed for time to show cause. Evidently no prejudice has been caused here for the non-service of notice and the party may be deemed to have waived notice when they have entered appearance and agreed to show cause. Moreover, in para. 3 of the petition filed in this Court the Petitioners have stated that the show-cause notice reached and/or served on them as late as in November 1985. In the face of such a categorical statement the plea of non-service of notice cannot be accepted.

4. Mr. Bhattacharjee very strongly argues that the Police officer concerned who made the search and seized the goods had failed to record his reasons to believe that any of the provisions of the Order had been or was about to contravene, as required under para. 5 of the Order. According to him, therefore, the search and

seizure were illegal. Paragraph 5 of the Order reads as follows:

5. Power of entry, search, seizure, etc. (1) Any officer of the Department of Food and Supplies of the Government of West Bengal not below the rank of Sub-Inspector or any Police officer not below the rank of Assistant Sub-Inspector may, with a view to securing compliance with the provisions of this Order, enter, inspect and search any premises, places, vehicles, or vessels and seize any stock of any essential commodity in respect of which he has reason to believe that any provision of this Order has been, is being or is about to contravene.

(2) The provisions of Section 100 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 paragraph.

4A. It has been held by the Supreme Court in [K.L. Subbayya Vs. State of Karnataka](#), while considering the provisions of Section 54 of the Karnataka Excise Act, 1966, that a search without a reasonable belief that an offence under the Act had been committed was not a valid search under the aforesaid section of the Karnataka Excise Act. The following observations of the Supreme Court in the said case may be noted.

The Inspector who searched the car of the Appellant had not made any record of any ground on the basis of which he had a reasonable belief that an offence under the Act was being committed before proceeding to search the car and thus the provisions of Section 54 were not at all complied with.

This, therefore, renders the entire search without jurisdiction and as a logical corollary vitiates the conviction. We feel that both Sections 53 and 54 contain valuable safeguards for the liberty of the citizen in order to protect him from ill-founded or frivolous prosecution or harassment. This point was taken before the High Court which appears to have brushed aside this legal lacuna without making any real attempt to analyse the effect of the provisions of Sections 53 and 54. The High Court observed that these two sections were wholly irrelevant. With due respect, we are unable to approve of such a cryptic approach to a legal question which is of far-reaching consequences. It was, however, suggested that the word "place" would not include the car, but the definition of the word "place" under the Act clearly includes vehicle which would include a car. Thus the ground on which the argument of the Petitioner has been rejected by the High Court cannot be sustained by us. We are satisfied that there has been a direct non-compliance of the provisions of Section 54 which renders the search completely without jurisdiction.

5. The aforesaid decision was followed in [P. Appavu Gounder Vs. Collector of South Arcot Dt. at Cuddalore](#), in In Re: M. Shivaraman L.W. Cr. (1980) 272. L.W. and in In Re: M. Perumal Pillai and ors. L.W. (1980) Cri. 222. In the instant case, it appears from the report of the Sub-Inspector who made the search that he has not indicated his belief in the probable commission of any offence under the provisions of the Order

before he undertook the search. It was after he made the actual search that he came to the conclusion that there was a violation of the Order. From the ratio of the aforesaid decisions it is clear that it is the reasonable belief that any provision of the Order was contravened or was likely to be contravened that gives jurisdiction to a Police officer to make a search. An unauthorised action followed by a belief as a result of such action does not make the search lawful. There is, therefore, no doubt that the search and consequent seizure were both unlawful in this case.

6. The next point which has been poignantly argued by Mr. Bhattacharjee is that there was no cause of taking any action either by the Police or by the Collector as there was actually no contravention of any of the provisions of the West Bengal Declaration of Stock and Prices of Essential Commodities Order, 1977. An order of confiscation of the seized goods even before the offence has been proved on trial is an extra-ordinary step and can be reported to only after scrupulously following the procedure prescribed by law. An order u/s 6A of the Essential Commodities Act can be passed only after the Collector "is satisfied that there has been a contravention of the Order". It is submitted by Mr. Bhattacharjee that from the report of the Police officer it is apparent that there was no contravention of any of the provisions of the Order. Paragraphs 3 and 4 are the only two operative provisions of the Order whose contravention is actionable. Contravention of para. 4 has not been alleged here. Paragraph 3 enjoins every producer and importer and every wholesaler and retailer to display conspicuously at a place as near to the entrance of his place of business as possible, a list in Form "A" or in Form "B", as the case may be, indicating the "opening stock" of each essential commodity held by him and a wholesaler or a retailer is also required to show in the list the wholesale or retail price of each such commodity. The display of the stock-board is not denied here. The allegation is that some discrepancy was found in the stock on actual verification, the actual stock being less than that displayed on the stock-board. The obvious implication is that the opening stock was not correctly displayed. Mr. Bhattacharjee argues that the search being held at 11 a.m., i.e. long after the opening of the godown, it cannot be expected that, the opening stock would remain the same even at that time. He further argues that there being no arrangement of recording the sale of each piece of the commodity by issuing a cash memo. On each sale, the actual stock shall naturally be less and less as the hours of the day run. The learned Advocate for the State has no answer to this argument. Mr. Bhattacharjee cites a decision in *State of Orissa v. G. Seetaram Swami* Cut. L.T. 107 in which a similar allegation of violation of the Orissa Declaration of Stocks and Prices of the Essential Commodities Order, 1973, was made by the Police. The Court held that by the time the search was made (between 10 a.m. and 12 noon) the opposite party had effected some sale of the relevant commodity and that any discrepancy found in the actual stock on search differing from the stock displayed on the stock-board did not necessarily prove that the opening stock was not correctly displayed on the board. Indeed the proposition is so obvious that one is not expected to be satisfied about the contravention of the

requirement of displaying the opening stock by merely getting a report that the stock was found less at a subsequent hour of the day.

7. Mr. Bhattacharjee also argues that the position could have been interpreted in a different way had the stock been found in excess of that shown on the Stock Board. In this connection he refers to a decision in *Shyam Sundar Khailan v. State of West Bengal* 1982 (2) C.H.N. 279 where the Court approved of confiscation of seven excess tins of Vanaspathi which were found on search. Even then the Court held that confiscation could not be made of the entire stock and that the extent of the stock mentioned in the Stock Board could not be involved in any contravention of the Order. Applying the same test it cannot be held that there was a contravention of para. 3 of the Order in this case inasmuch as the stock found by the Police was not in excess of that displayed on the board.

8. Right to carry on any occupation, trade or business is a fundamental right guaranteed under Sub-clause (g) of Clause (1) of Art of the Constitution of India, subject, however, to the reasonable restrictions, if any, imposed by the State in the interest of the general public under Clause (6) of the said Article. Restrictions imposed by different Orders issued under the Essential Commodities Act are, accordingly required to be reasonable restrictions on a fundamental right. Any curb on this right should, therefore, be jealously scrutinised and any vague allegation should never be mechanically endorsed without being satisfied about the offence alleged.

9. This brings us to the point of argument raised by the Petitioners' Advocate, if the order passed by the Collector was a proper one. Mr. Manas Ranjan Chakravorty representing the State cannot utter anything in support of the Collector's order in this respect. Prima facie, the report of the Police officer concerned did not show the contravention of any particular provision of the Order. The Collector, therefore, ought to have considered the matter objectively by taking evidence, if necessary. He has not taken any evidence. Neither has he discussed the "rulings" cited by the learned Advocate for the O.P. appearing before him. He has given no ground for his opinion that there was violation of the Order. u/s 6B of the Essential Commodities Act an owner of an essential commodity seized by the Police is required to be given "a reasonable opportunity of being heard" before a confiscation order is made. The scope of giving such reasonable opportunity came to be considered by the Patna High Court in [Dharmadeo Yadav and Another Vs. State of Bihar and Others](#), of the judgment throwing illuminating light in this regard is quoted below.

A question which arises is as to what will happen in case where representation is made under Clause (b) of Sub-section (1) of Section 6B of the Act by the concerned person denying the grounds of confiscation. In that event, can a Collector confiscate an essential commodity merely upon the ipse dixit of the facts stated in the report of the concerned authority under which the seizure was reported to the Collector? My answer to this question is emphatically in the negative. If the allegations in the

report of the seizure are denied on behalf of the concerned person in his representation, a Collector has no option but to make inquiry in the confiscation proceeding and thereafter only he can finally dispose of the same. In that inquiry, both the parties should be allowed to lead evidence which may be documentary or oral in the shape of affidavit or otherwise. Of course, the technical rules of evidence will not apply to such an inquiry. In a case where the allegations are denied and the State fails to produce any evidence or adduces such evidence which are not found satisfactory by the Collector, in that event, the confiscation proceeding has got to be dropped unless the Collector is of the opinion that the denial in the representation is such which even if taken at its face value and accepted in its entirety, cannot affect the grounds of confiscation disclosed in the show-cause notice and the report of seizure. The State or the concerned person who had filed representation may make a prayer before the Collector for giving them an opportunity of examining the affidavit swearer of the other party in relation to veracity or otherwise of the statements made therein. It may be further open to the parties to examine witnesses in support of their respective cases and, in that event, the other side shall have right of cross-examination. If any document, which is necessary to be produced in the confiscation proceeding for deciding the grounds of confiscation and the parties or any one of them has no access to the same, they or any one of them, may make a prayer before the Collector for taking steps for compelling production of that document. In my view, the expression giving reasonable opportunity of being heard used in Clause (c) of Sub-section (1) of Section 6B of the Act requires an inquiry postulated above as the provision of Section 6A of the Act is confiscatory and the confiscation proceeding is quasi-criminal in nature.

9A. In the light of the above observations it must be held that the Collector's order of confiscation was not a proper one and was passed on the basis of the report of the Police without being personally satisfied about the contravention of any positive provision of the Order,

10. It is next argued by Mr. Bhattacharjee that S. Paul & Co., which is a firm, is the owner of the seized goods and that the confiscation proceeding is bad as no notice was served on the firm. This point was also taken in the written cause shown by the Petitioners before the Collector who, however, has not touched the point in his order dated May 3, 1988. If the firm is the owner of the goods, a notice ought in all fairness to have been served upon it. But u/s 6B of the Essential Commodities Act the notice of a confiscation proceeding shall be served either on the owner or on the persons from whom the commodities were seized. So in this case the proceeding cannot be said to be bad for absence of any notice on the firm itself.

11. Some argument has been made on behalf of the Petitioners about the delay in disposing of the confiscation petition. It appears from the certified copies of the order-sheet that service of notice was delayed from June 1, 1982 to November 21, 1985, and that thereafter the Petitioners appeared voluntarily. The enormous delay

in the matter of serving of notice is depreciable and the Court disapproves it. It is a pity that the process serving department of the Collector was hopelessly negligent in the matter. But I also find that after the appearance of the opposite parties (the present Petitioners) they liberally contributed to the delay and took unusually long time to show cause. The Court was also busy on some occasions for executive works. In the circumstances, though I am in agreement with the argument that protracted delay in disposing of a confiscation petition defeats the purpose for which such a provision was made in the Act. I do not think that the order of the Collector is liable to be set aside in this case on that ground alone.

12. Mr. Manas Ranjan Chakravorty, speaking for the State O.P, does not try to defend the Collector's order on merits. He also fails to point out which provision of the Order was actually contravened. He raises only one point against the present petition, namely, the point of maintainability. He cites a decision of this Court in *In Re: Satish Chandra Banik* 87 C.W.N. 221: 1983 Cri.L.J. 367 and argues that an order of confiscation u/s 6A of the Essential Commodities Act being appealable u/s 6C of the said Act no application under Art, 227 of the Constitution is maintainable. In this case a single Judge held that although the jurisdiction under Article 227 of the Constitution was available in exceptional cases, a proceeding u/s 6A of the Essential Commodities Act was not such an exceptional case and as such the provisions of the said Article would not apply in such a case.

13. The above view was, however, dissented from in other judgments passed by other Benches of this Court. Thus in *Hiralal Shaw and Ors. v. State of West Bengal and Anr.* 87 C.W.N. 355 (367). para. 16 a single Judge Mrs. Nag J. held that the test for invoking the jurisdiction of the High Court under Article 227 was not the mere existence of an appellate forum or an alternative forum, but the test "was how the High Court reacted to the facts and circumstances of the particular case. It was further stated in the judgment that if the information given to the High Court by way of an application satisfies the Court that there has been a jurisdictional error, then the mere existence of an Appellate Court or Tribunal will not take away jurisdiction of the High Court under Article 227 of the Constitution. In another case in *Raj Kumar Mondal v. State of West Bengal* 87 C.W.N. 534 (536. para. 4) Amitabha Dutta J. also held the same view. In this case also an application under Article 227 of the Constitution and Sections 401 and 482 of the Code of Criminal Procedure was filed challenging an order of the Collector u/s 6A of the Essential Commodities Act. The view of the Court was that the order of the Collector suffered from the vice of lack of jurisdiction on his part as he could proceed u/s 6A of the Act only after being satisfied prima facie that the person concerned had violated an order made u/s 3 of the said Act. As there was no record of the Collector's prima facie satisfaction recording violation of the order made u/s 3 of the said Act by the Petitioner the impugned order was wholly without jurisdiction.

14. The above views of three learned Judges of this Court about the applicability of Article 227 of the Constitution in a case in which an alternative remedy by way of appeal lay should be considered in connection with this case also. It seems that the views taken by Mrs. Nag J. and Amitabha Dutta J. are proper ones. When the question of jurisdiction arises, the High Court has the supreme authority to consider the question under Article 227 of the Constitution. This being a constitutional power is not subject to any other law enacted by the Legislature. I strongly rely on the views expressed in Raj Kumar Mondal's case" and am of the opinion that the High Court has ample power to exercise its superintendence under" Article 227 of the Constitution in case there is a jurisdictional error made by a Tribunal.

15. In the result this application succeeds and the impugned order of the Collector is quashed. The essential commodities in question seized by the Police officer be returned to the persons from whom those were seized. A copy of this order be sent to the Collector concerned for immediate necessary action.