

Raj Kumar Gupta Vs. State

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Court : Delhi

Decided On : May-17-1994

Reported in : 1994(2)Crimes668; 54(1994)DLT565; ILR1995Delhi506; 1994RLR343

Judge : Jaspal Singh, J.

Acts : [Essential Commodities Act, 1955](#) - Sections 3(2); Delhi Kerosene Oil (Export and Price) Control Order, 1962

Appeal No. : Criminal Revision Appeal No. 133 of 1993

Appellant : Raj Kumar Gupta

Respondent : State

Advocate for Pet/Ap. : A.K. Srivastava and; A.K. Singh, Advs

Judgement :

Jaspal Singh, J.

(1) The entire controversy in this case revolves around the Delhi Kerosene Oil (Export and Price) Control Order, 1962 (hereinafter called the Order) and more precisely around its Clause 9(c) which runs as under :

'9.Power of entry, seizure etc.-The Commissioner or any other officer authorised by him in writing in this behalf may with a view to secure compliance with this order or satisfying himself that this order has to (sic) complied with :- (a) (b) (c) enter and search any premises or place or vehicle, and seize any article in respect of which the Commissioner or the authorised officer suspects that any permission of this order has been, is being or is about to be contravened.'

(2) Before I spell out the points involved I do feel that a short comment on the facts would be called for.

(3) The petitioner was a kerosene oil licensee. On July 31, 1981 two Inspector from the Food and Supply Department, Delhi Administration searched his business premises, inspected the account books and physically verified he available stock of kerosene oil. On said inspection 231 liters of kerosene were found short. Some irregularities with regard to issuance of cash memos were also detected. This led to the prosecution of the petitioner and ultimate conviction under Section 7 of the [Essential Commodities Act, 1955](#) (hereinafter called the Act). The petitioner preferred an appeal but with no success. Hence, this petition.

(4) One more fact needs to be mentioned. In the Departmental proceedings which were separately initiated, the Assistant Commissioner. Food and Supplies, Delhi Administration called for the Explanationn of the petitioner but finding it to be uasatisfactory, confirmed charges so made against him. However he did held that the Explanationn so tendered had 'decreased the seriousness of the charges' and for that reason revoked the order of suspension of license and instead ordered the forfeiture of the 'entire security of the licensee'.

(5) Coming back to the petition, three contentions were raised. They are enumerated as under :

(I)In view of the order of the Assistant Commissioner referred to in the preceding paragraph, the petitioner stood exonerated of the charge and consequently his conviction and sentence could not be sustained. (ii) The entry, search or seizure, was vocative of the sub- section 4 of section 100 of the Code of Criminal Procedure inasmuch as the Inspectors did not even make an effort to join any

witness from the public. (iii) The Inspectors had no authority to conduct search etc. and as such the entire proceedings were illegal.

(6) First point first. My attention was drawn to the following observations made by a learned single Judge of this court in Ramesh Kumar v. State 1985 Cri L.J. 681.

'THE argument of the learned counsel for the respondent that the jurisdiction of a departmental officer to scrutinise the facts of a case for proceeding under the provision of the Order for alleged contravention of the license etc. is absolutely distinct from the jurisdiction of a criminal court and as such the criminal court must arrive at an independent finding with regard to the complicity of the petitioner in the commission of crime is not at all tenable because basically it is the department which is to be satisfied whether there is any contravention of the Order issued under Section 3 of the Act or the license issued there under and once the department is satisfied that no prima facie infraction of the conditions of the license or the provisions of the order is made out it will be Just an exercise in futility to put the alleged offender on trial. Indeed, the very bedrock of the prosecution is knocked out in a case like the present.'

(7) I cannot possibly have any quarrel with the observations made in Ramesh Kumar's case. The problem is that the said judgment has no application to the facts of the case before me. As would be discernible to even a lay eye, in the judgment so cited the department had found that there was no prima facie infraction of the conditions of the license or the provisions of the order'. Unfortunately for the petitioner this is not so in his case. Rather, as far as his case is concerned, the Assistant Commissioner has confirmed the finding with regard to violation of the provisions of the Order. It is this which deprives the petitioner the benefit of the dictum in Ramesh Kumar's case. This much on the first contention.

(8) Coming to the second contention, sub-sections 1 and 4 of section 100 of the Code of Criminal Procedure may be noticed first. They are :

'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)..... (3)..... (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 such order in writing to them or any of them so to do.'

(9) It was argued, and as already noticed above, that as not even an effort was made to join witnesses from the public, sub-section 4 of section 100 of the Code stood violated, vitiating the entire proceedings. In support, my attention was drawn to *Nilratan Sircar v. Lakshmi Narayan Ram Niwas* : 1965 CriLJ100 ; *Siddanna v. State of Mysore* and *Prem Lata v. State of Himachal Pradesh* . No reference was made by either side to any other judgment.

(10) *NILRATAN'S* case (supra) was under Foreign Exchange Regulation Act, 1947 and dealt with the scope of its sections 19 and 19A. Sub section. 3 of section 19 of the Act runs as under :

'(3)If on a representation in writing, made' by a person authorised in this behalf by the Central Government or the Reserve Bank a District Magistrate, Sub-Divisional Magistrate, Presidency Magistrate or Magistrate of the first class, has reason to believe that a contravention of any of the provisions of this Act has been, or is being or is about, to be, committed in any place; or that a person to whom an order under sub-section (2) of this section has been or might be addressed, will not or would not produce for information, book or other document; or where such information book or other document is not known to the Magistrate to be in the possession of any person; or where the Magistrate considers that the purposes of any investigation or proceeding under this Act will be served by a general search or inspection; he may issue a search warrant and the person to whom such warrant is directed may search or inspect in accordance therewith and seize any book or other document, and' the provisions of the Code of Criminal Procedure, 1898 relating to searches under that Code shall, so far as the same are applicable,

apply to searches under this sub-section Provided that such warrant shall not be issued to any police officer below the rank of sub-inspector. Explanationn.-In this sub-section, place includes a house. building, tent, vehicle, vessel or air-craft.'

On the basis of sub-section (3) reproduced above, it was held by the Supreme Court that the provisions of sections 101, 102 and 103 of the Code applied to searches under sub-section (3) of section 19. Is this judgment attracted to the case before me I think not. The reason is that in the Order in question there is no provisions like sub section (3) referred to above. The absence of any such provision lands support to the argument that it was not the intention of the legislature to extend the special provisions relating to searches held under the Order. Even the Essential Commodities Act does not contain any provision making applicable all the provisions of the Code of Criminal Pro

(11) Assuming argued that section 100 of the Code of Criminal Procedure applies or that, in any case, it should be observed in order to ensure that no harm or wrong is done to the accused, much cannot be allowed to be made out of it since it is neither shown nor was it urged even by way of a passing reference, that by its non- observance prejudice had been caused to the petitioner. The evidence on the record clearly establishes that the provisions of the Order had been violated. This being the position irregularity of search is no bar to conviction. After all evidence found in illegal search is not inadmissible in evidence (See : Sunder Singh v. State of U.P. Air 1956 Sc 401.

(12) In *Khandu Sonu v. State of Maharashtra* : 1972 CriLJ593 , the Supreme Court was dealing with a submission that the investigation of that case had not been done in accordance with law, and therefore, the whole trial was violated. It was observed;

'IT is well established that where cognizance of a case has, in fact, been taken by the Court on a police report following investigation conducted in breach of provisions of Section 5A the result of the trial, cannot be set aside unless the illegality in investigation can be shown to have brought about a miscarriage of justice. The underlying reason for the above dictum is that an illegality committed in the course of investigation does not affect the competence and jurisdiction of

the court to try the accused. Where the trial of the case has proceeded to termination, the invalidity of the preceding investigation would not violate the conviction of the accused as a result of the, trial unless the illegality in the investigation has caused, prejudice to the accused.'

(13) Similarly, in *Radha Kishan v. State of Uttar Pradesh* : (1963) IILLJ667SC , the convention was that the search and seizure had not been in conformity with the provisions of the Code of Criminal Procedure and that illegality in the search and seizure had vitiated the trial. The Supreme Court negated the said contention and observed:

'WE will deal with the last four points first. So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the Seizure of the articles is not vitiated. It may be that where the provisions of sections 103 and 165, Code of Criminal Procedure are contravened the search would be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the court, may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues.'

(14) For what has been noticed above even if the provisions of Section. 100 of the Code of Criminal Procedure are held applicable much cannot be allowed to be made out of it more so when on account of their non-compliance no prejudice is shown to have been caused.

(15) It is the third point which invites serious thought.

(16) As Would be borne out from a bare reading of Clause 9(c) of the Order it is only the Commissioner or an officer authorised by him in writing who can affect search or seizure and that too only when he suspects some infraction of the order. The language of the Clause clearly spells out the intention and it is to ensure that the officers charged with the duty of conducting searches, conduct them properly and do no harm or wrong to dealers, licensees etc. In the instant case the Inspectors who searched the place and seized the record have nowhere claimed either in their complaint to the Station House Officer or in their statements before

the Court, the vesting of authority on them or the existence, of any ground on the basis of which they suspected violation of any condition or Clause of the Order.

(17) Be it as it may be I do feel that Clause 9(c) contains valuable safeguards for the liberty of the citizen in order to extend protection to him from ill-founded or frivolous prosecution or harassment. Any cavalier approach to such a statutory safeguard may lead to far-reaching consequences. It is probably on account of acute awareness of such fall-out that the Clause makes it clear that besides the Commissioner himself, the power to conduct searches etc. would be exercised by such officers only who have been so authorised in writing by him. Unfortunately, in the case in hand no such authorization has been placed on the record. The statement made in this regard by the concerned Inspector namely, D. P. Singh (Public Witness -1) is most revealing. It reads :

'WE have received a permission from my senior officers to get inspected the shop. I do not remember that if the permission was sought orally or in writing. It is correct that this fact is not mentioned (sic.) in Ex. Public Witness 1 F (First Information Report).'

Can this solitary bald statement be taken to mean that he had been authorised in writing by the Commissioner to conduct the search To my mind to hold so would not be wise but otherwise. We see neither the, substance nor even the shadow. Such a casual may callous disregard of a salutary provision is neither fair to the accused nor to the State nor even to the vast mass of the people for whose protection such laws are made and administered.

(18) Since by the exercise of power conferred by Clause 9(c) a serious invasion is made upon the rights, privacy and freedom of a person, it must necessarily be exercised strictly and in conformity with the dictates of law and only by one who is authorised by law to so exercise. It is not a case of error of judgment on the part of the Inspector concerned. It is also not a case of irregularity in the course of entry, search and seizure committed by an officer acting otherwise in pursuance of the authorization. It is a case where the officer acted sans authority. He exercised power which was not there. And he exercised it when even the conditions for its exercise were not satisfied. It is this which vitiates the entire proceeding.

(19) This still is not the end of 'he matter. I am adverting to a point which has not been pleaded but to which attention was drawn by me during arguments.

(20) Let us have another look at Clause 9(c). Under it as already noticed above, the Commissioner or any other officer authorised by him in writing in this behalf may with a view to secure compliance with the Order or satisfying himself hat the Order has been complied with, enter and search any premises or place or vehicle and seize any article in respec', of which the Commissioner or the authorised officer 'suspects 'hat any provision of the Order has been. is being or is about to be contravened.'

(21) To my mind Clause 9(c) of the Order is bad, it being in excess of the powers conferred on the Central Government by Section 3(2)(j) of the [Essential Commodities Act, 1955](#). Section 3(2)(j) of the Act reads as under :

'3.Powers to control Production, supply, distribution, etc. of essential commodities :- (1)..... (2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made there under may provide :- (j) for any incidental and supplementary matters including in particular, the entry, search or examination of premises, aircraft vessels, vehicles or other conveyance and animals, and the seizure by a person authorised to make such entry, search or examination.,- (1) of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be, committed and any packages, coverings or receptacles in which such articles are found; (ii) of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if such person has reason to believe that such aircraft, vessel, vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act; (iii) of any books of account and documents which in the opinion of such person, may be useful for, or relevant to, any proceeding under this Act and the person whose custody such books of accounts or documents are seized shall be entitled to make copies thereof or to take extracts there from in the presence of an officer having the custody of such books of accounts or documents.'

The controversy revolves around the use of word 'suspects' in the Order and the words 'reason to believe' in section 3(2)(j)(i) of the Act. and the question is : Has not the Central Government exceeded its power by using the word 'suspects' as against the words 'reason to believe'

(22) It was contended by the learned counsel for the State that the word 'suspects' is neither contrary nor inconsistent with the words, 'reason to believe' since suspicious circumstances may constitute a ground for forming a reasonable belief. The learned counsel for the petitioner, however, had nothing much to contribute and no authority was cited by either side.

(23) True, in a given case, suspicious circumstances may help in or lead to formation of a reasonable belief but that would not bring 'suspect' at par with 'reason to believe'. The word 'suspect' undoubtedly requires a degree of satisfaction but not necessarily amounting to belief. 'Suspect' does extend beyond speculation but for it the thought of belief remains unattained. In Words And Phrases, Permanent Edition 36, this is how the words 'reason to Believe' are dealt with :

'MERES uspicion that an individual is afflicted with an isolable disease is not sufficient to give a health officer 'reason to believe' that such person is so afflicted, under Pol. Code ..'

(24) In Commonwealth v. Certain lottery Tickets 59 Man. 369, it was observed :

'THE words 'suspect' and 'believe' are not technical words, and have not by the approved use of the language the same meaning. Suspecting is not believing. That may be a ground for suspicion which will not induce belief.'

(25) In a judgment coming from Canada. Gifford v. Kelson (1943) 51 MR 120 it was observed by Dysart J :

'A suspicion or belief may be entertained, but suspicion and belief cannot exist together. Suspicion is much less than belief; belief includes or absorbs suspicion.'

When, we speak of 'reason to believe' we mean a conclusion arrived at as to the existence of a fact. Of course 'reason to believe' does not amount to positive knowledge nor does it mean absolute certainty but it does convey conviction of the mind founded on evidence regarding the existence of a fact or the doing of an act. Suspicion, on the other hand rings uncertainty. It lives in imagination. It is inkling. It is mistrust. It is chalk. 'Reason to believe' is not. It is cheese.

(26) What then, is the effect? As would be clear, the protection to the citizen from search which is a process exceedingly arbitrary in character, by insisting as pre-requisite that the Commissioner or the authorised officer should have reason to believe that a contravention of the Order has been, is being, or is about to be committed is not to be found in clause 9(c). 'Reason to believe' has given way to 'suspects'. This deliberate change invests the Commissioner and the authorised officer with power which is highly arbitrary and drastic in character. The power so assumed is surely in excess of the delegated authority to issue Orders since it clearly reduces that protection granted by the Act and enlarges the arbitrariness of the power of searches and seizures etc. exercised by the Commissioner and the authorised officers. It is this what makes Clause 9(c) bad.'

(27) The petition is accepted with the result that the judgment of conviction and the order of sentence stand set aside.