The State of Rajasthan

Vs

Rehman

Criminal Appeal No. 39 of 1958

(P. B. Gajendragadkar, K. Subba Rao JJ)

14.10.1959

JUDGMENT

SUBBA RAO J. –

This is an appeal by certificate granted by the High Court of Judicature for the State of Rajasthan, under Art. 134(1)(c) of the Constitution against its judgment dated September 20, 1957, confirming that of the Munsif-Magistrate, Hinduan, acquitting the appellant of the charge under s. 353 of the Indian Penal Code.

The material facts lie in a small compass. The Deputy Superintendent of the Central Excise, having his head-quarters at Bharatpur, received information that one Sulled and his son, Rehman, the respondent herein, had cultivated tobacco but had not paid the excise duty payable thereon. On September 9, 1953, the Deputy Superintendent, accompanied by an Inspector of Central Excise, a sepoy, a chowkidar and two motbirs went to the house of Rehman at 2 p.m., with a view to search his house to find out whether he had stored tobacco there. When they declared their intention to do so, the respondent and one Dhamman, it is alleged, obstructed the making of the search; with the result that the Deputy Superintendent fell down and received some injuries. The respondent and Dhamman were prosecuted, and the Munsif-Magistrate, Hinduan, discharged Dhamman but convicted the respondent under s. 353 of the Indian Penal Code and sentenced him to undergo three months' rigorous imprisonment. On appeal, the Additional Sessions Judge came to the conclusion that on the material then available the search had not been conducted in accordance with s. 165 of the Criminal Procedure Code and remanded the case for fresh enquiry. On remand, the Munsif-Magistrate found that the search was made by the Deputy Superintendent without recording the reasons as he should under s. 165 of the Criminal Procedure Code and that the respondent in obstructing him from making the illegal search did not commit any offence, and, on that finding, the acquitted the respondent. On appeal, the High Court agreed with the view expressed by the Munsif-Magistrate and confirmed the order of acquittal. The State of Rajasthan preferred the present appeal questioning the correctness of the decision of the High Court.

Learned Counsel for the State raised before us two points : (1) The Central Excise and Salt Act (1 of 1944) (hereinafter called "the Act") and the Rules framed thereunder (hereinafter called "the Rules") and the Criminal Procedure Code (hereinafter called "the Code"), maintain a distinction between the power to make a search and the manner of making it, and collate a specified power with a particular procedure. As the Deputy Superintendent of the Central Excise, in the present case, exercised his power to make a search only to gather information about the quantity of tobacco stored in the house of the respondent for imposing excise duty on the said article and not to make any investigation with a view to prosecute the respondent, the mode of search prescribed under s. 103 of the Code which

applies generally to all searches, has to be followed and not that provided under s. 165 of the Code which applies to a search made by a police officer during the investigation of an offence. (2) Assuming that s. 165 of the Code applies, the said section confers a power or jurisdiction on a police officer to make a search and prescribes the procedure to be followed in making the search. The recording of the reasons relates to jurisdiction and therefore the excise officer, who has already derived his power to make the search under r. 201 of the Central Excise Rules, need only follow the procedural part of s. 165 of the Code.

The respondent's counsel has not appeared before us.

To appreciated the contentions of the learned Counsel for the appellant it would be convenient at this stage to notice the relevant provisions of the Act, the Rules framed thereunder and the Code.

Under s. 18 of the Act, all searches made under the Act or the Rules made thereunder shall be carried out in accordance with the provisions of the Code relating to searches under it. Section 37 empowers the Central Government to make rules for carrying into effect the purposes of the Act, and, in particular and without prejudice to the generality of the foregoing power, to make rule authorising and regulating the inspection or search of any place in so far as such inspection or search is essential for the proper levy and collection of duties imposed by the Act. The Central Government in exercise of the power conferred by that section framed r. 201 authorizing itself to empower any officer of any department under its control to enter and search at any time by day or night any land, building, enclosed place, premises, vessel, conveyance or other place upon or in which he has reason to believe that excisable goods are processed, sorted, stored, manufactured or carried in contravention of the provisions of the Act or the Rules. There are provisions in the Act and the Rules regulating the production, manufacture and processing of excisable goods, prescribing a machinery and a procedure for imposing duties on the said goods, and collection thereof, and, in particular, providing a special procedure for unmanufactured tobacco in respect of the said matters : see ss. 3, 6, and 8 of the Act and Ch. IV of the Rules. Section 9 imposes penalties for the contravention of the provisions mentioned therein which include the provisions regulating the production of excisable goods and the supply of any information in respect thereof. Rule 210 provides that the breach of the Rules shall, where no other penalty is provided, be punishable with a penalty which may extend to one thousand rupees and with confiscation of the goods in respect of which the offence is committed. It is manifest from the aforesaid provisions that the officer empowered by the Central Government can only make a search when he has reason to believe that excisable goods are processed, sorted, stored, manufactured or carried in contravention of the provisions of the Act or the Rules. The object of the search is, therefore, only to ascertain whether there is a contravention of the provisions of the Act or the Rules; and, as we have already noticed, the contravention of the said provisions is an offence under the Act. To put it differently, r. 201 enables the authorized officer to make a search only for the investigation of an offence.

Now we shall look at the provisions of the Criminal Procedure Code to ascertain which of its provisions regulating the mode of search are appropriate to the power conferred on the Deputy Superintendent under r. 201 of the Rules. In the Criminal Procedure Coded there are four groups of sections regulating the searches authorised under it. Sections 47, 48, 51 and 52 appear in Ch. V of the Code which provides for the arrest, escape and retaking of persons. Section 47 provides for the search of a place entered by persons sought to be arrested; s. 48 for procedure where ingress is not obtainable; and ss. 51 and 52 for the search of the arrested persons. The second group consists of ss. 100, 101, 102 and 103 of Ch. VII of the Code. Section 100 deals with the search for persons wrongfully confined, and the other sections are general provisions relating to search warrants, duties

of persons in charge of closed places and the requisitioning of persons to witness searches. Section 153 forms the third group and it falls under Ch. XIII of the Code which provides for the preventive action of the police. Under s. 153, a police officer can make a search without a warrant for the purpose of inspecting or searching for any weights or measures or instruments for weighing used or kept within the limits of his station, if he has reason to believe that the weights etc. are false. The fourth group of sections appear in Ch. XIV which provides for searches by a police officer during the investigation of a cognizable offence. The power of search given under this chapter is incidental to the conduct of investigation the police officer is authorized by law to make. Under s. 165 four conditions are imposed : (i) the police officer must have reasonable ground for believing that anything necessary for the purposes of an investigation of an offence cannot, in his opinion, be obtained otherwise than by making a search, without undue delay; (ii) he should record in writing the grounds of his belief and specify in such writing as far as possible the things for which the search is to be made; (ii) he must conduct the search, if practicable, in person; and (iv) if it is not practicable to make the search himself, he must record in writing the reasons for not himself making the search and shall authorize a subordinate officer to make the search after specifying in writing the place to be searched, and, so far as possible, the thing for which search is to be made. As search is a process exceedingly arbitrary in character, stringent statutory conditions are imposed on the exercise of the power. A comparative study of the aforesaid provisions with the provisions of r. 201 of the Rules indicates that searches made by a police officer during the course of an investigation of a cognizable offence can properly be approximated with the searches to be made by the authorized officer under r. 201 of the rules; for, in the former case, the police officer makes a search during the investigation of a cognizable office and in the latter the authorized officer makes the search to ascertain whether a person contravened the provisions of the Act or the Rules which is an offence. There is also no reason why conditions should be imposed in the matter of a search by the police officer under s. 165 of the code, but no such safe-guard need be provided in the case of a search by the excises under the Rules. We think that the legislature, by stating in s. 18 of the Act that the searches under the Act and the Rules shall be carried out in accordance with the provisions of the Code relating to searches, clearly indicated that the appropriate provisions of the Code shall govern searches authorized under the Act and the Rules. We therefore hold that the provisions of s. 165 of the Code must be followed in the matter of searches under s. 201 of the Rules.

There are no merits in the second contention either. The recording of reasons does not confer on the officer jurisdiction to make a search, though it is a necessary condition for making a search. The jurisdiction or the power to make a search is conferred by the statute and not derived from the record of reason. That apart, s. 18 of the Act in express terms states that searches shall be carried out in accordance with the provisions of the Code of Criminal Procedure. Section 165 of the Code lays down various steps to be followed in making a search. The recording of reasons is an importing step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches. If that can be ignored, it cannot be said that the search is carried out in accordance with the provisions of the Code of Criminal Procedure : it would be a search made in contravention of the provisions of the Code.

For the reasons mentioned, we hold that the search made by the Deputy Superintendent in the present case in contravention of the provisions of s. 165 of the Code was illegal.

Even so, the learned Counsel attempted to argue that even if the reasons were not recorded by the Deputy Superintendent, it was only an irregularity and the respondent had no right to prevent the officer from making the search. This contention has not been raised till now and we are not justified to allow it to be raised before us for the first time.

In the result, we agree with the conclusion arrived at by the High Court and dismiss the appeal.

Appeal dismissed.

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