

ALLAHABAD HIGH COURT

Bullion and Agricultural Produce Exchange Private Limited

Vs.

Forward Markets Commission, Bombay

Civil Misc. Writ No. 4144 of 1966

(Satish Chandra, J.)

19.05.1967

ORDER

Satish Chandra, J.

1. This petition under Article 226 of the Constitution prays that the proceedings consequent on the search and seizure of the petitioner's premises made on 18th May, 1966, be quashed and the respondents be directed to return the seized documents and the account books and not to launch any prosecution of the petitioner on the basis of the seized documents.

2. The petitioner is a private limited company incorporated in 1946. It carried on the business of commission agents in respect of forward trading in various goods. The Forward Contract (Regulation) Act (No. 74 of 1952) was passed by the Parliament to regulate trading in forward contracts. This Act established the Forward Markets Commission. Under Section 14-A of the Act an association could not carry on business in forward contracts except in accordance with the conditions of a certificate of registration granted to it by the Commission. The petitioner made an application for registration on 15th December, 1962. A registration certificate was granted to the petitioner. By an order issued on 1st June, 1964, the Central Government banned forward trading in many kinds of goods including groundnut oil. The petitioner company was carrying on business in Arhar ki Chuni. This was also one of the goods, forward trading in which was prohibited by the Central Government. The petitioner states that its business came to a standstill and it commenced business again from 4th January, 1965, in forward trading in non-transferable specific delivery contracts in

groundnut oil.

3. It appears that on or about 15th May, 1966, the Forward Markets Commission made a complaint to the Deputy Superintendent of Police, C.I.D., Lucknow, stating that the petitioner was carrying on illegal forward trading business in Vanaspati, linseed oil and mustard seed oil and options in goods at Agra. The Deputy Superintendent of Police, Crimes Branch, C.I.D. entrusted the investigation of this matter to the Inspector, Criminal Investigation Department, respondent No. 2. The respondent No. 2 has in his affidavit stated that on receipt of this report and believing that a cognizable offence was being committed by the petitioner's firm, he along with the Deputy Superintendent of Police, C.I.D., Deputy Superintendent of Police-in-charge, City Agra, and the Officer-in-charge of Police Station Chhata, organized a raid of the petitioner's premises. He has stated that it was apprehended that the petitioner's exchange would have done away with the incriminating evidence had they got any scent of the proposed raid. The offences which were being committed were of a cognizable nature and in the circumstances it was not advisable to obtain a warrant for making search. The raid was actually made on 18th May, 1966. The staff of the petitioner's company was arrested and a large number of books and documents of the petitioner's company were seized and taken away. The arrested persons were later on enlarged on bail. The search and seizure of the petitioner's books and documents have been challenged on the following grounds :-

- (1) That it violated the mandatory provisions of Sections 157 and 165, Criminal Procedure Code, and
- (2) That the proceedings contravened the provisions of Section 22-A of the Forward Contracts (Regulation) Act, 1952 and as such the entire proceedings were null and void.

4. In respect of the first point it is alleged that the mandatory requirements of Section 157 (1), Criminal Procedure Code, that the investigating officer shall forthwith send a report of the information received by him on the basis on which he had reason to suspect the commission of an offence, were not complied with. No such report was forwarded to the Magistrate. This averment in para 35 of the petition has been sworn on the advice of counsel. The averment is one of fact arid cannot appropriately be sworn from legal advice. The foundation of fact not having been made appropriately, the question does not arise.

5. It has also been alleged that the provisions of Section 165, Criminal Procedure Code, have also been contravened. Sub-Section (1) of Section 165 requires an investigating officer to record in writing the ground of his belief that anything necessary for the purpose of an investigation may be found in any place and that such thing cannot in his opinion be otherwise obtained without undue delay. It is alleged that the second respondent did not record in writing such grounds. This allegation has been made in para 37 of the petition. This paragraph has also been sworn on the advice of counsel and is inadmissible.

6. In the counter-affidavit, the second respondent has specifically stated that he made the requisite note in writing mentioning the grounds of his belief. Paragraph 9 has been sworn on personal knowledge as well as on perusal of relevant records. The swearing clause cannot be held inappropriate. I am hence unable to find that the requisite grounds were not recorded.

7. It was then urged that under Sub-Section (5) of Section 165, copies of any record made under Sub-Section (1) have to be forthwith sent to the nearest Magistrate empowered to take cognizance of the offence and the owner of the place searched is entitled to be furnished with the copy of the same by the Magistrate. There is no averment to the effect that the copies of the record were not sent to the nearest Magistrate. Para 43 only states that the respondent No. 2 did not comply with any provisions of Section 165, Criminal Procedure Code, in making the search. This, in my opinion, is not an allegation requisite for the point urged by the learned counsel. It does not mean that the copies of the record were not sent to the nearest Magistrate. Moreover, this vague allegation has been denied in para 14 of the counter-affidavit. This point hence cannot succeed.

8. The second submission of learned counsel was that Section 22-A of the Act has been contravened. It was urged that in view of Section 22-A only a Police officer who has been authorized by a Magistrate by warrant can search any place. In the present case the second respondent had not been empowered by warrant of any Magistrate. He hence had no authority to enter the petitioner's premises and search it or seize the petitioner's books of account and documents. It has not been disputed that no warrant authorizing the second respondent or his companions was issued. In para 14 of the counter-affidavit, the second respondent has stated that the offence under Section 23

of the Forward Contracts (Regulation) Act, 1952, being cognizable search, seizure and arrest could be carried out without a warrant. It is apparent that the raid and the search in the instant case were conducted for investigating the offence under Section 23 of the Forward Contracts (Regulation) Act. This section enumerates the offences falling under other provisions of the Act which will be deemed to be cognizable within the meaning of Criminal Procedure Code. Section 22-A of the Act reads as follows :-

"22-A. (1) Any presidency magistrate or a magistrate of the first class may, by warrant, authorize any police officer not below the rank of sub-inspector to enter upon and search any place where books of account or other documents relating to forward contracts or options in goods entered into in contravention of the provisions of this Act, may be or may be reasonably suspected to be, and such police officer may seize any such book or document, if in his opinion, it relates to any such forward contract or option in goods.

(2) The provisions of the Criminal Procedure Code, 1898, shall, so far as may be, apply to any search or seizure made under Sub-Section (1) as they apply to any search or seizure made under the authority of a warrant issued under Section 98 of the said Code."

Under Section 22-B of the Act the books of account or other documents seized from any place shall be admitted in evidence without witnesses having to appear to prove the same and the entries therein shall be prima facie evidence of the matters therein recorded. Section 24 of the Act provides that no Court inferior to the Court of a Presidency Magistrate or a Magistrate of the first class shall take cognizance or try any offence punishable under this Act. Sections 20, 21 and 22 of the Act lay down the penalties for various offences under the Act.

9. It is thus clear that the Act makes certain provisions with respect to matters relating to search and seizure as well as trial of offences punishable under this Act. Sub-Section (2) of Section 22-A makes the provisions of the Criminal Procedure Code applicable to search or seizure under Sub-Section (1) so far as they may be applicable; but it has to be noticed that only such provisions of the Criminal Procedure Code have been made applicable as are applicable to any search or seizure made under the authority of a warrant issued under Section 98 of the said Code. This is a provision of limitation. Other provisions of the Criminal Procedure Code relating to search or seizure will hence not be attracted.

10. The Criminal Procedure Code contains four groups of sections to regulate searches contemplated by it. Section 47 in Chap. V of the Code provides for the search of a place entered by person sought to be arrested. Sections 51 and 52 provide for the search of arrested persons. Chap. VII consisting of Sections 100 to 103 deal with search under search warrants issued by Magistrates. Section 100 deals with search of persons wrongfully confined. Section 101 makes the provisions of Sections 43, 75, 77, 79, 82, 83 and 84 applicable to search warrants issued under Sections 96, 98, Section 99A or Section 100, Section 102 deals with search of a closed place. Section 103 provides the procedure for the search. Under it two respectable inhabitants of the locality have to be present to witness the search. In Chap. XIII Section 153 is another provision where a Police officer can make a search without a warrant. The fourth group of provisions is in Chap. XIV which provides for searches by a Police officer during the investigation of a cognizable offence; Sec 165 is in this chapter. It enables a Police officer to make a search without a warrant. For it a warrant under Section 98 of the Criminal Procedure Code is not a condition precedent. Section 98, Criminal Procedure Code, deals with search of houses suspected to contain stolen property, forged documents, etc. Under it a search can be made only if the relevant Magistrate by his warrant, authorizes any Police officer to make the search. In view of specific provision of Sub-Section (2) of Sec 22-A only the provisions in Chap. VII including Secs. 98 to 103 will be applicable to searches made for investigating into offences under the Forward Contract (Regulation) Act. The provisions in Chaps. XIII and XIV will not be applicable.

11. Section 5, Criminal Procedure Code, leads to the same conclusion. Sub-Section (1) of Section 5 provides that an offence under Indian Penal Code shall be investigated, enquired into and tried and then dealt with according to the provisions hereinafter contained. Sub-Section (2) deals with trial of offences against other laws. It says that all the offences under any other law shall be investigated, enquired into and tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. Thus in respect of offences against other laws the provisions of the Criminal Procedure Code are subservient to the provisions of any enactment providing for regulating the manner or place of investigating, etc. The provisions of Chap. V of the Forward Contracts (Regulation) Act containing, inter alia, Section 22-A, will prevail in so far as they deal with the

manner or place of investigating, inquiring, trying, etc., and the provisions of the Criminal Procedure Code will apply subject to those provisions. If there is any specific provision in the Forward Contracts (Regulation) Act in respect of the applicability of the Criminal Procedure Code in matters relating to the manner or place of investigation, etc., that will also prevail. Sub-Section (2) of Section 22-A will apply and exclude the provisions of the Criminal Procedure Code mentioned or intended by it.

12. It was urged that Section 22-A(1) does not make provision for regulating the manner or place of investigating. It only confers a power on the mentioned Magistrates to authorize any Police officer by warrant to make search and seizure. I am not impressed by this submission.

13. The Forward Contracts (Regulation) Act provides for regulation of matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. It constitutes a Forward Markets Commission. It provides for registration of recognized associations. The Central Government is authorized to ask for periodical returns relating to affairs of the association and to enquire into its affairs, vide Section 8. The Central Government can, under Section 14, direct the recognized association to suspend its business for a period that may be specified if in the opinion of the Central Government the interest of the trader or public interest so requires. Under Section 15 the Central Government can declare illegal forward trading and options in goods that may be notified. Sections 20, 21 and 22 impose penalties for the contravention of the provisions mentioned therein. Under Section 22-A the authorized officer can search any place and seize books of account or documents relating to forward contracts or options in goods entered into in contravention of the provisions of this Act. It is manifest that the officer empowered by the Magistrate can only make a search when contravention of the provisions of the Act is suspected. The object of the search is only to ascertain whether there is a contravention of the provisions of the Act. Section 22-A hence enables the authorized officer to make a search only for the investigation of an offence under the Act. Sub-Section (2) of Section 22-A providing for the applicability of the relevant provisions of the Code effectuates that intention. The applicable provisions of the Code of Criminal Procedure provides for searches by a Police officer during the investigation of an offence. The power of search provided for by Section 22-A is incidental to the conduct of investigation by the authorized Police officer. The provisions in Section 22-A provide a condition precedent to the validity of

a search for suspected contravention of the provisions of this Act Section 22 A relates to the manner or place of investigation spoken of by Sub-Section (2) of Section 5 of Criminal Procedure Code. It is not a provision conferring jurisdiction. It provides safeguards and protection to the person whose place is intended to be searched or whose books are sought to be seized. There is, in my opinion, no justification for the submission that search and seizure for suspected contravention of the provisions of Forward Contracts (Regulation) Act can be earned out independently of Section 22-A of the Act or without complying with its provisions.

14. It was urged that Section 22-A is directory in nature and non-compliance with its provisions will not render the proceedings void. In *State of Rajasthan v. Rehmani*,¹ it was held that search under the Central Excises and Salt Tax Act to which Section 165, Criminal Procedure Code, is applicable must be conducted after complying with the four conditions imposed by Section 165, Criminal Procedure Code and contravention of Section 165 of the Code made the search illegal. Their Lordships did not countenance the submission that the contravention was only an irregularity. The effect of search and seizure and arrest is not merely to invade a person's right of privacy but also to deprive him of his fundamental rights of property guaranteed under Articles 19 and 31 of the Constitution. A provision or proceeding violating such guaranteed rights must fully comply with the statutory limitations on the exercise of such powers. The provisions of limitation having as their object protection or safeguarding the rights of the victim, will in law be mandatory in character and their contravention will render the proceedings illegal and void.

15. In *Collector of Monghyr v. Keshav Prasad*,² the Supreme Court in para 12 ruled that the employment of the auxiliary verb "shall" is inconclusive and, similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance, sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof. It would, inter alia, depend on whether the requirement is insisted on as a protection for the safeguarding of the right of liberty of person or of property which the action might involve. These observations are apposite. Judged from this point of view, the requirement of Section 22-A is mandatory.

16. For the respondents, reliance was placed upon *Dhirendra Nath v. Sudhir Chandra*,³ There the Supreme Court held that Order 21, Rule 91, Civil Procedure Code, was directory and their Lordships observed that the safest rule to determine what is an irregularity and what is nullity is to see whether the party can waive the objection, if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. Their Lordships further held that an objection to jurisdiction cannot be waived. Where such jurisdiction is not wanting, a directory provision can be waived but mandatory provision can only be waived if it is not conceived in the public interest but in the interest of the party that waives it. In the instant case, the objection is to the very jurisdiction or authority of the officer conducting the search and seizure. There is no averment that the petitioner waived his objection. The point really does not arise because the petitioner has come to Court at the earliest opportunity. The provisions of Section 22-A are mandatory in nature and they have been, in my opinion, conceived in the larger public interest and not merely for the benefit of an individual person. They are conditions precedent to the exercise of power of search. They are incapable of being waived. The contravention of Section 22-A cannot in either view of the matter be held to be a mere irregularity.

17. For the respondents my attention was invited in the decision of Bombay High Court in Criminal Appeal No. 753 of 1963 decided on 3rd April, 1964 (Bom.). There it was held that contravention of Section 22-A in investigating a cognizable offence of the Forward Contracts (Regulation) Act did not vitiate the search. Their Lordships held that Section 165 of Criminal Procedure Code would in any event apply and validate the proceedings. The matter has not been discussed in detail and I am with respect unable to endorse this viewpoint.

18. In the instant case the search was conducted without the requisite warrant from a Magistrate. The proceedings were hence ab initio void. They are quashed. The respondents are directed to forthwith return the documents and the account books seized by them in the course of the search conducted on 18th May, 1966. The respondents are further directed not to launch any prosecution of the petitioner on the basis of the account books and documents seized during the course of the search. The petitioner will be entitled to his costs, which are assessed at Rs. 350.

Petition allowed.

Cases Referred.

1. AIR 1960 SC 210
2. AIR 1962 SC 1694
3. AIR 1964 SC 1300