

(1954) 01 OHC CK 0003

In the Orissa High Court

Case No : First Appeal No's. 18 and 23 of 1946

Babulal Agarwalla

APPELLANT

Vs

Province of Orissa and Others

RESPONDENT

Date of Decision : 21-01-1954

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 4(1), 5(2), 523(1), 550
Defence of India Act, 1939 — Section 17(1)
Defence of India Rules, 1939 — Rule 124, 128, 81, 81(2), 81(4)
Evidence Act, 1872 — Section 101, 102, 103
Food Grains Control Order, 1942 — Section 3(1)
General Clauses Act, 1897 — Section 3(20)
Limitation Act, 1908 — Article 2

Citation : AIR 1954 Ori 225

Hon'ble Judges : Narasimham, J; Mohapatra, J

Bench : Division Bench

Advocate : M.S. Rao, in F.A. No. 18/46 and A.G. in F.A. No. 23/46, for the Appellant; A.G. in F.A. No. 18/46 and N. Mukherji in F.A. No. 23/46, for the Respondent

Judgement

Narasimham, J.—These two appeals arise out of the judgment and decree passed by the Subordinate Judge of Puri in a suit brought by one Babulal Agarwalla, a merchant of Faridpur district in East Bengal, claiming damages for alleged illegal and malicious seizure of several bags of rice on various dates in June and July, 1943. The learned Subordinate Judge decreed his claim for damages in respect of seizure of some bags of rice on three dates (16-7-1943, 22-7-1943 and 27-7-1943); but dismissed his claim in respect of seizure on other dates.

F. A. No. 18 of 1946 was filed against that portion of the judgment of the Subordinate Judge which disallowed his claim and P. A. No. 23 of 1946 was filed by two of the police officers against whom the learned Subordinate Judge had given a decree for damages for unlawful seizure. Both the appeals were heard together for the convenience of all concerned and will be dealt with in one judgment.

2. During the year 1943 the second world war was going on with great intensity and the provisions of the Defence of India Act, the Defence of India Rules and the various Control Orders in respect of essential commodities were applied with full rigour in all the States of the territory formerly known as British India. The Control Order with which the Court is concerned in the present litigation is the Foodgrains Control Order, 1942 made by the Central Government in exercise of the powers conferred by Sub-rule (2) of Rule 81 of the Defence of India Rules. That Order prohibited any person from engaging in any undertaking in respect of purchase, sale, or storage for sale, in wholesale quantities of any foodgrain except under and in accordance with a licence issued in that behalf by a Provincial Government.

The Order defined "purchase or sale in wholesale quantities" as meaning "purchase or sale in quantities exceeding 20 maunds in any one transaction" and there was a further provision to the effect that any one "who stores foodgrain in quantities exceeding 50 maunds may, unless the contrary is proved, be deemed to store the foodgrain for purposes of sale". There are other provisions in the Order dealing with the conditions under which licences would be granted by the Provincial Governments and the terms of such licences.

In pursuance of this Order various Provincial Governments restricted the export of rice from one Province to another by the issue of licences. But during the great Bengal famine of 1942-43 when there was acute shortage of rice in Bengal the Government of India inserted a second proviso to Sub-rule (2) of Rule 81, Defence of India Rules by an amending notification No. 5-DC (28)/ 43, dated 18-5-1943 by which the Provincial Governments of Assam, Bengal, Bihar and Orissa were, in effect, prohibited from restricting movement, transport, distribution, disposal etc. of foodgrains within those four Provinces with effect from 18-5-1943.

By another notification No. C. G. IV(2)/43 dated 29-5-1943 a second proviso was added to clause 3 of the Foodgrains Control Order, 1942, to the following effect:

"Provided further that any licence issued, or deemed to have been issued, under this clause in any of the four provinces of Assam, Bengal, Bihar and Orissa and for the time being in force in the province of issue shall be as valid in each of the other three provinces as if it had been issued by the Provincial Government of that province."

It is a notorious fact that this privilege of unrestricted inter-provincial movement of foodgrains amongst the said four Provinces though welcomed by Bengal was keenly resented by Orissa and Bihar and after some agitation the Government of India withdrew that privilege by notification No. C. G. 604/2 dated 16-8-1943. The period from 18-5-1943 to 16-8-1943 may conveniently be described as the "free trade period" during which the various acts of seizure of the rice of the plaintiff took place.

The eagerness of the then Provincial Government of Orissa to bring about a

speedy termination of the "free trade period" will be apparent from the fact that on 16-8-1943 as soon as the Government of India issued the aforesaid notification the Provincial Government sent an urgent telegram (see (Ext. E-8) to the Collector of Puri informing him about the notification of the Government of India and directing him to take necessary steps to prevent all export of foodgrains and their products to any place outside the province of Orissa except under a permit to be issued by the Provincial Director of Food Supplies, It seems thus a fair inference to say that the Provincial Government and its subordinate officers did not want free trade of foodgrains between Orissa and Bengal and were keen on retaining power to regulate export from Orissa to Bengal by issuing licences.

During the "free trade period" their Hands were tied inasmuch as by virtue of the amendments made by the Government of India to the Defence of India Rules and the Foodgrains Control Order any trader who obtained a valid licence under that Order from a competent authority in Bengal was entitled to purchase rice in Orissa and export it to Bengal without any restriction whatsoever. The allegation of the plaintiff is that during the "free trade period" though the Provincial Government could not directly prevent the transport of rice from Orissa to Bengal it encouraged its subordinate officials to prevent such export by indirect means by harassing the merchants in various ways, illegal seizure of various quantities of rice and deliberate delay and refusal to pass any orders on the various petitions filed by the merchants for redress against such illegal seizure.

3. On 10-6-1943, plaintiff Babulal Agarwalla was granted a licence by the Supply Officer of Goalundo in Faridpur district to carry on the business of purchase, sale, storage for sale etc. of rice, paddy and other foodgrains. Another merchant of the same district named Makhanlal Sharma (P. W. 1) also obtained a similar licence and both these licensees came to Orissa for the purpose of purchasing rice at cheap rates and exporting it to Bengal for sale at high profits. The plaintiff opened a godown at Khurda and through various agents purchased rice from several cultivators in the mofussil. Several bags of rice thus purchased by him were seized by the police of Khurda and Jatni on 28-6-1943, 7-7-1943, 16-7-1943, 22-7-1943 27-7-1943 and 12-9-1943.

The plaintiff contended that these seizures were unlawful as they were done in pursuance of a preconcerted conspiracy on the part of the Provincial Government and its local officials to flout the orders of the Government of India regarding the free movement of foodgrains from Orissa to Bengal and that though he had shown his licence to the Subdivisional Magistrate of Khurda before commencing his business in Khurda sub-division yet he was put to much unnecessary harassment and huge loss by being entangled in several criminal cases for offences under the Defence of India Rules which were eventually withdrawn. Hence he claimed damages from the Government of Orissa (defendant No. 1), the then Sub-divisional Magistrate of Khurda (defendant No. 2), the then Assistant Price Control Officer, Khurda (defendant No. 3) and various subordinate

police officials (defendants 4, 5, 6, 7, 8, 9 and 10) who actually seized his bags of rice.

The main defence of the Government of Orissa was that they were not responsible for the tortious act, if any, committed by their subordinate officials and that there was no conspiracy between them and their officials as alleged by the plaintiff. The Sub-divisional Magistrate of Khurda took the plea that he had acted bona fide in exercise of the powers conferred on him by the Defence of India Rules and that in any case his action was protected by Section 17(1), Defence of India Act. The police ameers also have taken a similar plea. The Assistant Price Control Officer took the plea that he had nothing to do with the seizure of any of the bags and that consequently he was not liable in any view of the case.

4. Before discussing the various questions of law that arise in these appeals I may discuss the evidence regarding the circumstances under which various acts of seizure took place and give my finding thereon.

5. "1st seizure". -- Admittedly on 28-6-1943 nineteen bags of rice were seized by A.S.I. Lokanath Misra (D. W. 1 and defendant No. 4) at Khurda, about 300 yds. off from the office of the Sub-divisional Magistrate. This A. S. I. has, in his written statement & in his evidence in Court, taken the plea that he found two cartmen named Ramnarayan Ram and Fakir Behera in charge of the said nineteen bags of rice and that on demand they could not produce before him any licence. Hence he suspected that there was contravention of the provisions of the Foodgrains Control Order which was punishable under Rule 81 (4) of the Defence of India Rules and that he seized the rice bags.

The plaintiff, on the other hand, has examined his companion from Faridpur named Makhanlal Sharma (P. W. 1) to show that the plaintiff himself was present at the time of the seizure and that he actually showed his licence to the police officer and also showed the receipts in support of his statement that he had purchased the quantity of rice from various persons. It was alleged that without any justification the police officer seized the goods even though in view of the production of the licence by the plaintiff there could be no question of even a suspicion of his having contravened the provisions of Rule 81 (2), Defence of India Rules. The crucial point for decision, therefore, is whether the plaintiff was present at the time of the seizure of these bags and whether he produced his licence (Ext. 1) before D. W. 1 as stated by P. W. 1 (After discussion of evidence His Lordship proceeded:) I would, therefore, hold that the plaintiff showed his licence at the time of the seizure of the bags by the police officer and there was no ground even for suspicion that there was a contravention of the Foodgrains Control Order.

6. In this connection it should be further pointed out that it was during the cross-examination of P. W. 1 by the defendants' Advocate that the presence of the plaintiff at the time of the seizure and his production of the licence before the

Police Officer were brought on record. In his examination-in-chief P. W. 1 did not care to say anything about this matter and similarly in the plaint also there was no mention about these facts. This itself is an important circumstance to show that the plaintiff was not overzealous to concoct a false story of his presence at the time of the seizure and his showing the licence to the police officer. Apparently, the plaintiff's Advocate also did not realise the importance of these facts. But the defendants' Advocate by questioning P. W. 1 on these points brought out answers which undoubtedly support the plaintiff's case to the effect that there was absolutely no justification for seizure.

7. I may further state that in respect of this seizure a criminal case under Rule 81 (4) of the Defence of India Rules was started against the plaintiff (No. 34 C of 1943) in the Court of Sri N. Sahu. But on 16-5-1944 (Ext. A-5) the case was withdrawn under the orders of the District Magistrate and the plaintiff was acquitted. The learned trying Magistrate directed that the rice bags seized should be returned to the plaintiff. There is, however, no evidence to show what happened subsequently to those rice bags.

8. "2nd seizure", -- Admittedly on 7-7-1943 A. S. I. Purusottam Mohapatra (D. W. 2 and defendant No. 2) who was officer-in-charge of Khurda police station seized 299 bags. On 3-7-1943 the plaintiff had filed a complaint (Ext. E-1) under Sections 147 and 341, I. P. C. against several persons alleging that they wrongfully restrained him from despatching rice in bullock carts to the railway station. The complaint was sent by the Sub-divisional Magistrate to the local police for instituting F. I. R. and investigation. The police officer (D. W. 2) stated that while investigating that case he seized the said 299 bags which were pointed out to him by the complainant (plaintiff) himself and that he kept them in the custody of one Brajaki-shore Naik.

After completing investigation he submitted Final Report (Ext. E-3) in that case. Then the Sub-divisional Magistrate on 5-8-1943 directed the release of these bags to the plaintiff. But on 12-9-1943 after the expiry of the "free trade period" these bags and one more bag were seized by another police officer of Khurda (D. W. 4 and defendant No. 9) under the orders of the Sub-divisional Magistrate. There is no reason to disbelieve the evidence of D. Ws. 2 and 4 regarding the circumstances under which 299 bags of rice were seized on 7-7-1943, released on 5-8-1943 and again seized on 12-9-1943. The plaintiff's witness (P. W. 1) has not been able to say anything which would contradict the evidence of these two police officers regarding this seizure. I would, therefore, accept their evidence on this point.

It further appears that on 14-3-1944 (see Ext. E-7) the Sub-divisional Magistrate directed the release of these bags as the zimadar Brajakishore Naik (see Ext. E-6) reported that the bags were being damaged by white-ants and were deteriorating. But as the plaintiff took no steps to take possession of these bags they were sold and the sale-proceeds were deposited in the treasury.

9. 3rd seizure: On 16-7-1943, A. S. I. Biswanath Patnaik (defendant No. 7) seized 35 bags of rice at Khurda. On 27-7-1943 a prosecution report was filed against one Bimbadhar Samantra (Ext. D) on the allegation that he transported these bags of rice for sale without a licence. The case against Bimbadhar Samantra proceeded in the Court of Sri N. Sahu (see G.R. case No. C/36 of 1943) and on a petition filed by him (see Ext. D-2 dated 6-11-1943) the learned Magistrate on 15-1-1944 (Ext. D-3) discharged him u/s 253, Criminal P. C.

In the meantime, the plaintiff had filed a petition before the trying Magistrate (Ext. D-1) stating that the bags may be restored to him as he was their owner. The learned trying Magistrate, however, directed the restoration of the rice bags to the said Bimbadhar Samantra and directed the plaintiff to establish his claim in the Civil Court. The plaintiff, however, did not implead Bimbadhar as a defendant in the present suit. Doubtless, his witness (P. W. 1) stated that the plaintiff was present when these 35 bags of rice were seized and that he showed his licence to the police officer. He totally denied any knowledge about the said Bimbadhar Samantra.

The seizure list in respect of these rice bags has not been proved and neither the police officer Biswanath Patnaik nor any other person who was present at the time of the seizure has been examined as a witness. But the unexplained omission on the part of the plaintiff to implead Bimbadhar or to file a separate suit against him though the trying Magistrate who delivered the rice bags to Bimbadhar by his order dated 15-1-1944 (see Ext. D1) directed the plaintiff to seek his redress against Bimbadhar in the Civil Court, must lead to an adverse inference against him. Bimbadhar is undoubtedly a necessary party so far as the recovery of damages for seizure of these 35 bags of rice is concerned. He had to stand in the dock as an accused in the criminal case (G. R. No. C/36 of 1943) brought by the police in respect of his unauthorised possession of these bags.

If the plaintiff was really present at the time of the seizure and had shown his licence to the police officer it is not likely that the police would have omitted to send him up also as one of the co-accused, if not as the only accused. I am therefore not inclined to accept the uncorroborated testimony of P. W. 1 regarding the presence of the plaintiff at the time of the seizure of these bags or the production of his licence before the police officer concerned.

I would agree with the learned lower Court that the bags were in the possession of Bimbadhar and as he could not produce any licence before the police officer the latter had reasonable grounds to suspect that there was contravention of the provisions of the Foodgrains Control Order and was justified in seizing the same. The question as to whether Bimbadhar was acting as the agent of the plaintiff at the time of the seizure cannot obviously be determined in the present litigation in the absence of Bimbadhar.

10. 4th seizure: On 16-7-1943, A. S. I. Biswanath Patnaik (defendant No. 7) seized 41 bags of rice at Khurda. The seizure list has not been proved nor has

the A. S. I. given evidence regarding the circumstances under which the seizure took place. His written statement was to the effect that the seizure took place for suspected contravention of the provisions of the Defence of India Rules and the Foodgrains Control Order. The plaintiff's witness (P. W. 1) however stated that the plaintiff was present at the time of this seizure also and that he showed his licence to the police officer. In the absence of any rebutting evidence on the defendant's side I am inclined to accept the plaintiff's evidence on this point.

As to what happened to these rice bags subsequently we have to rely on the written statement of defendant No. 7 to the effect that no prosecution was launched and the plaintiff was given notice to take back the bags. But he took no steps and the bags were, therefore, kept in police custody.

11. 5th seizure: On 22-7-1943, S. I. A. Rauf (D. W. 3 and defendant No. 5) seized 90 bags of rice at Khurda. He stated that the bags were in the possession of some cartmen who could not produce any licence or permit and that he, therefore, seized them as he suspected contravention of the Foodgrains Control Order. But the evidence of P. W. 1 is to the effect that the plaintiff was present on that occasion and that he showed his licence to the S. I. The question for decision is whether the evidence of P. W. 1 should be believed or that of D. W. 3 on this point.

(After discussion of evidence his Lordship proceeded) I would, therefore, believe the evidence of P. W. 1, disbelieve the evidence of D. W. 3 regarding the circumstances under which this seizure took place and hold that the plaintiff was present and showed his licence to the police officer.

12. 6th seizure: On 27-7-1943 the same police officer (D. W. 3 and defendant No. 5) seized another consignment of 90 bags of rice at Khurda. As in respect of the previous seizure there is a sharp conflict in the testimony of P. W. 1 and P. W. 3 regarding the circumstances connected with this seizure, the former saying that the plaintiff was present and that he showed his licence and the latter asserting that though the plaintiff was present he was not able to produce either his licence or his daily account register. (After discussion of evidence his Lordship proceeded). In view of these circumstances I would disbelieve the evidence of D. W. 3, accept the evidence of P. W. 1 and hold that the plaintiff was present and that he showed his licence to this police officer at the time of this seizure also.

13. In respect of these two seizures of 22-7-1943 & 27-7-1943 two criminal cases under Rule 81(4) of the Defence of India Rules were started against the plaintiff (Nos. 47 & 48 of 1943) in the Court of Sri N.M. Patnaik. But both of them were withdrawn on 15-5-1944 (see Exts. B-1 & B-2) and the Magistrate directed that the property should be restored to the owner. But it appears that the rice bags were not taken possession of by the plaintiff.

14. 7th seizure: On 27-7-1943, S. I. Sri Budhinath Dalai of Jatni police station (D. W. 5 and defendant No. 10) assisted by his A. S. I. Sri B. Mohanty (defendant No. 6) seized 151 bags of rice from some cartmen close to Khurda Road Railway

Station. The cartmen were unable to produce any licence. As the quantity of rice was more than 20 maunds and no licence was produced the S.I. seized the goods for contravention of the provisions of the Foodgrains Control Order. In the personal diary (Ext. C) this fact was also stated. The plaintiff's witness (P. W. 1) also admitted that at the time of seizure of these 151 bags of rice the plaintiff was not present nor any licence was shown to the police officer.

At that time the plaintiff was at Khurda, several miles away. The plaintiff came to Jatni police station three hours after seizure and produced his licence before the S. I. But the latter would not release the goods. Even if his evidence be believed on this point it seems clear that at the time of the seizure of these 151 bags the cartmen could not show any licence to the police officer. As the quantity of rice was more than 20 maunds the police officer was entitled to seize the goods for contravention of the provisions of the Foodgrains Control Order. The legal effect of the subsequent production of the licence by the plaintiff before the police officer three hours after seizure will be discussed later on.

15. To sum up, therefore, my finding is as follows :

At the time of the 1st, 4th, 5th and 6th seizures (28-3-1943, 16-7-1943, 22-7-1943 and 27-7-1943) the plaintiff was present and showed his licence to the police officers who notwithstanding the production of the licence seized the goods and subsequently came forward with a false story that no licence was produced. The 2nd seizure of 299 bags Of rice on 7-7-1943 was made by D. W. 2 during the investigation of a cognizable offence under Sections 147 and 341, I. P. C. The same bags along with another bag were seized by defendant No. 9 on 12-9-1943 under the orders of the Sub-divisional Magistrate. The third seizure of 35 bags was made from one Bimbadhar, to whom they were subsequently restored after an unsuccessful prosecution. The seizure of 151 bags of rice on 27-7-1943 was made by defendants 10 and 6 from cartmen who were unable to produce any licence. The plaintiff was not there then but he appeared three hours after seizure at Jatni police station and produced his licence; but the police officer refused to release the goods.

16. By virtue of the second proviso to Sub-clause (1) of Clause 3 of the Foodgrains Control Order, 1942 if any person is found in possession of more than 50 maunds of foodgrains he may be presumed to have stored them for the purpose of sale unless the contrary is proved. The definition of "storage in wholesale quantities" in Clause 2(e) shows that storage for purposes of sale of more than twenty maunds of foodgrains, requires a valid licence. Such storage for the purpose of sale without a valid licence would amount to contravention of Clause 3(1) of that Order and would thus be punishable under Rule 81(4) of the Defence of India Rules. Hence, arises the necessity on the part of a person keeping in his possession more than fifty maunds of foodgrains to produce a valid licence when demanded by any of the competent authorities.

Rule 128 of the Defence of India Rules specified the various offences under those

Rules which are of a cognizable nature. Rule 81 is not specified in that Rule and consequently it is clear that an offence under Rule 81(4) is a non-cognizable offence, that is to say, a police officer cannot arrest a person suspected to have committed that offence without a warrant from a Magistrate. Rule 124 of the Defence of India Rules confers power on certain classes of Magistrates to issue warrants authorising the search of any place and the seizure of any article where there is a reasonable suspicion of contravention of any provision of the Defence of India Rules.

It is admitted that when the police officers seized the rice bags of the plaintiff on all the specified dates except 12-9-1943 they did not purport to act under any authority given to them by the Sub-divisional Magistrate of Khurda. But u/s 550, Criminal P. C. any police officer may seize any property which may be found under circumstances which create suspicion of the commission of "any offence". The words underlined (here into " ") show unmistakably that even though there may be the commission of a non-cognizable offence a police officer may seize any property found under suspicious circumstances. Doubtless u/s 523 (1), Criminal P. C. he is bound to report the seizure forthwith to the Magistrate concerned and await his orders regarding its disposal.

The suspicion of the commission of an offence in the present case would arise only if the person in possession of the rice bags could not produce any licence when demanded by the police officer. If, however, as found by me, it be held that the person in possession of the rice bags above the permissible limit actually showed his licence to the police officer concerned there would be absolutely no question of even a suspicion of his having committed any offence under the Defence of India Rules and the police officer will have no authority to seize the rice bags while purporting to exercise his powers u/s 550, Criminal P. C.

17. The learned lower Court has misconceived the powers of the Sub-divisional Magistrate and the police officers as regards search and seizure of suspected articles where contravention of any provision of the Foodgrains Control Order is believed to exist. It thought that unless there was a special provision in the Foodgrains Control Order empowering either the Sub-divisional Magistrate or the police officer to enter and inspect premises and to seize articles in respect of which there was a reasonable suspicion of contravention of any provision of that Order those officers have no such powers at all and that the provisions of the Criminal Procedure Code giving them such powers should be deemed to have been impliedly taken away.

In taking this view the learned lower Court relied mainly on the fact that under Clause (f) of Sub-rule (2) of Rule 81 of the Defence of India Rules express power was conferred on the appropriate Government to provide in an Order made under Rule 81(2) of the Defence of India Rules for entering, searching and inspecting premises with a view to secure compliance with the Order and to seize suspected articles.

By way of analogy it relied on -- "Purushottam Devji v. Emperor", AIR 1944 Bom 247 (A) & "In re Appukutti Chettair", AIR 1945 Mad 23 (B), and other decisions where it was held that the power of a trying Magistrate to forfeit goods in respect of which contravention of an Order under Rule 81 (4) of the Defence of India Rules was proved, arose only if in the relevant Order express power was conferred on a trying Magistrate to direct such forfeiture. In those decisions the reasoning adopted was that in view of the express provision in Rule 81(4) regarding forfeiture of goods the provisions of Section 517, Criminal P. C. should be deemed to have been to that extent abrogated in respect of offences under Rule 81(4) and that a trial Court cannot rely on Section 517, Criminal P. C. for directing forfeiture. The learned Judges applied the well-known principle that penal statutes have to be strictly construed in favour of a subject.

18. The learned lower Court should not have applied this principle as regards search and seizure which are merely procedural matters. Any provision dealing with search cannot be said to be a penal statute so as to justify such a strict construction. It is true that in Rule 81(2) (f) of the Defence of India Rules provision was made for search and seizure. But this is a mere enabling provision and if in the Foodgrains Control Order made under Rule 81(2) no such provision is made for search and seizure it will be unreasonable to hold that the general powers conferred on Magistrates and police officers under the Criminal Procedure Code are taken away. An offence under Rule 81(4) will be an offence under a "special law" and by virtue of Sub-section (2) of Section 5, Criminal P. C. the procedure for investigation of such offences will be regulated by the Criminal Procedure Code subject of course to any provision in the special law regulating the manner of such investigation. Hence if there is any clear provision in the Defence of India Rules regarding the circumstances under which search and seizure of articles in respect of which an offence under Rule 81(4) is suspected that provision will undoubtedly override the powers of the police u/s 550, Criminal P. C. or those of the Magistrate under the Criminal Procedure Code. .

But where, as in the present case, there is no provision in the Defence of India Rules abrogating the powers of the police u/s 550, Criminal P. C., either expressly or by implication, it will not be proper to hold that that section cannot be resorted to merely because in the Food-grains Control Order advantage was not taken of the provisions of Rule 81(2)(f) and no special clause was inserted dealing with search and seizure.

I do not wish to elaborate this point except to cite -- AIR 1944 366 (Nagpur) where it was held that the police could seize articles for contravention of Rule 90(2) of the Defence of India Rules relying on this section and that Rule 124, Defence of India Rules had not even impliedly taken away that right. The Sub-divisional Magistrate's power under the Criminal Procedure Code to direct search and seizure where there is a reasonable suspicion of contravention of any provision of the Defence of India Rules is equally clear not only by virtue of the general provisions of the Criminal Procedure Code but also by virtue of the

express powers conferred by Rule 124 Defence of India Rules.

19. I may now deal with Section 17(1), Defence of India Act on which much reliance has been placed by the defendants. That section is as follows:

"Section 17(1) : No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder."

The expression "good faith" used in this section should be construed in the light of the definition given in Section 3(20), General Clauses Act, 1897 which is as follows :

"A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not."

This definition differs fundamentally from the definition of "good faith" in Section 52, Penal Code where it is stated that if a thing is not done with due care and attention it is not done in good faith. Hence, if from the proved facts of this litigation it can be inferred that the public officials acted honestly even though they might have acted negligently it must be held that they acted in good faith within the meaning of Section 17(1), Defence of India Act. But to seek protection under that section it must be further established that the act impugned was either "done" or "intended to be done" in pursuance of any provision of the Act or of the Defence of India Rules. Some argument was advanced before us as to where the burden of proof lay to establish that Section 17(1), Defence of India Act has no application.

On behalf of the public officials it was urged, relying on -- "Scammell & Nephew, Ltd. v. Hurley", (1929) 1 KB 419 (D) and the observations of the Chief Justice of India in -- The State of West Bengal Vs. Anwar Ali Sarkar, that there was a presumption that public officials would act honestly and reasonably in exercise of their statutory powers and it was the duty of a party challenging the action of the public officials to establish that they did not act honestly.

On behalf of the plaintiff, however, reliance was placed on some observations in -- Pt. Shiam Lal Vs. Abdul Raof where it seems to have been indicated that the burden in some circumstances may lie on the public officials to establish their good faith. This point however seems to be of academic interest in the present case. Both parties have led evidence and the question in the end turns on preferring the evidence of one party to that of the other. Moreover, even if it be assumed that the public officials acted honestly it cannot be held in respect of some of the seizures that they either acted in pursuance of any provision of the Defence of India Rules or intended to act in pursuance of any such provision.

20. The English decisions construing a similar language in the Public Authorities Protection Act, 1893 are to the effect that

"the benefit of that statute can be claimed even by an officer who has acted

under a mistaken view as to his duty whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty" (1929) 1 KB 419 (D)" and -- "Newell v. Starkie", (1919) 89 LJ PC 1 (G).

These decisions were noticed in the well-known decision reported in -- AIR 1944 41 (Federal Court) where statutory protection u/s 270(1), Government of India Act, 1935 was held to be available to public officials acting under a mistaken view of fact as to their duty. The question as to how far that protection will be applicable where the mistake was in respect of law as to their duty was left open.

21. Applying the aforesaid principles to the present case we have to see whether any of the various acts of seizure by the public officials was either done or intended to be done in pursuance of any provision of the Defence of India Rules. So far as the 1st, 4th, 5th and 6th seizures are concerned, I have already disbelieved the evidence of the police witnesses to the effect that the plaintiff was present at the time of those seizures and that he showed his licence (Ext. 1) to the police officers concerned (Sic). Hence there was not even a suspicion of contravention of Rule 81(4) of the Defence of India Rules so as to justify the seizure of those articles u/s 550, Criminal P. C.

The police officers' statement to the effect that they seized the articles because the licence was not produced when demanded has not been accepted and consequently, on the facts of the case, it cannot be held that they intended to act in pursuance of any provision of the Defence of India Rules. Though in some of the seizure lists, it was stated that the seizure was made due to the failure of the plaintiff to produce books of account, this reason for seizure was given up in the written statements of these police officers and in their evidence in Court. Hence it is unnecessary to discuss whether the police officers were under a mistaken view of law about their powers to call upon a licensee to produce his books of account.

The Court cannot attribute to them, an intention which they have not put forward, especially when the intention alleged by them has been disbelieved. They seem to have acted in a high-handed way and seized the goods with a view to prevent them from being exported from Orissa and they did not care in the least as to whether there was any authority in them to make such seizures. They neither acted nor purported to act under the provisions of any statute. Hence the protection of Section 17(1), Defence of India Act will not be available to these police officers who are liable to pay damages to the plaintiff for the loss sustained by him due to their illegal seizures.

22. The second seizure, however, stands on a different footing. Two hundred & ninety-nine bags of rice of the plaintiff were seized by D. W. 2 on 7-7-1943 during the course of his investigating a cognizable case under Sections 147 and 341, Penal Code started on a complaint petition (Ext. E-1) filed by the plaintiff himself before the Sub-divisional Magistrate on 3-7-1943. It was on the plaintiff's allegation that a mob of rioters prevented him from despatching 299 bags of rice

to Bengal that, the police of Khurda under the directions of the Sub-divisional Magistrate instituted F. I. R. and commenced investigation. During such investigation they had ample powers under Sections 550 and 165, Criminal P. C. to search and seize any of the articles in respect of which an offence was alleged to have been committed. The seizure was therefore lawful under the provisions of the Criminal Procedure Code.

Doubtless, subsequently under the orders of the Sub-divisional Magistrate they were released from custody on 5-8-1943. They were again seized by defendant No. 9 on 12-9-1943 under the orders of the Sub-divisional Magistrate. Free trade period had already expired as early as 16-8-1943 and consequently when the plaintiff was in possession of 300 bags of rice on 12-9-1943 in contravention of the provisions of Clause 3 of the Foodgrains Control Order, 1942, (having no valid licence with him then) the Sub-divisional Magistrate was fully justified not only by Rule 124 of the Defence of India Rules taut also by the provisions of the Criminal Procedure Code to direct the seizure of those bags of rice. Hence, the Sub-divisional Magistrate and the police officer who acted under his directions are both fully protected.

23. As regards the seventh seizure, I have already found that 151 bags of rice were seized on 27-7-1943 by D. W. 5 near about Jatni Railway Station and brought to Jatni police station. The plaintiff was then at Khurda several miles away and none produced any licence before the police officer at the time of the seizure. The police officer had, therefore, reasons to believe that a contravention of clause 3 of the Foodgrains Control order had taken place and he was, therefore, justified in seizing the goods in exercise of the powers conferred on him by Section 550, Criminal P. C.

It is true that three hours after the seizure the plaintiff went to Jatni police station and showed his licence. But the police officer had no authority to release without the orders of a Magistrate any goods that were seized by him. Section 523 (I), Criminal P. C. confers this power of release of such seized articles only on the Magistrate concerned. Hence, the police officer appears to have acted within his authority in respect of this seizure and he cannot be held liable for damages.

24. The Assistant Price Control officer of Khurda Sri S.S. Misra was impleaded as defendant No. 3. But he seems to have done nothing that was unlawful. He played no part in the seizure of any of the goods. He merely called upon the plaintiff to produce his account books and scrutinised the same. This power was conferred on him by an order of the Sub-divisional Magistrate dated 9-4-1943 (Ext. H). His action was throughout performed in pursuance of a valid order issued to him by his superior and the suit against him is misconceived.

25. Coming to the case against defendant No. 1 who is the Government of Orissa, the plaintiff's allegation throughout was that the subordinate officials at Khurda committed these high-handed actions in pursuance of a conspiracy

between them and the Government of Orissa to somehow prevent the export of rice from Orissa to Bengal notwithstanding the imposition of free trade by the Government of India. There is, however, no direct evidence of such conspiracy and we were asked to infer such conspiracy from the fact that most of the seizures took place under no authority whatsoever notwithstanding the production of a valid licence by the plaintiff before the police officers, concerned. It was also urged that various criminal cases were started against the plaintiff vexatiously and subsequently they were all withdrawn.

We were asked to take judicial notice of the fact which was then notorious that the free trade was imposed by the Government of India in the interests of Bengal where acute famine was then prevailing and the Government of Orissa and the other Governments such as the Government of Bihar did not relish the idea of free trade and they eventually succeeded in persuading the Government of India to re-impose the ban on inter-provincial movement of foodgrains from 16-8-1943. Though there is much force in this argument of the learned Counsel for the plaintiff it will be difficult to infer from these meagre circumstances: that the Government of Orissa either conspired, with their local officials to prevent the plaintiff from exporting rice to Bengal or else that they connived at the actions of the local officials and subsequently ratified the same.

It may be that the local officials, knowing the attitude of the Provincial Government on the question of free trade, acted with excessive zeal on their own initiative in the hope that by preventing the removal of rice from Orissa they were doing a great service to the people by preventing the drain of such an essential commodity as rice.

The Sub-divisional Magistrate of Khurda. (D. W. 6) stated in his cross-examination that whatever he did in connection with the seizure of the goods of the plaintiff was done by him bona fide in discharge of his official duties and in accordance with the instructions received by him from the District Magistrate and the Government. From this statement of the Sub-divisional Magistrate we were asked to infer that the Government were either conniving party to all the seizures or else that they subsequently ratified the same.

But the only part played by the Sub-divisional Magistrate of Khurda was connected with the seizure of 299 bags of rice in respect of which he acted on a complaint petition filed by the plaintiff himself. Doubtless, in respect of the other seizures made by the police regular criminal cases, were started on the police report. But there is absolutely no evidence to show that the Sub-divisional Magistrate either instigated the police to make such, illegal seizures or subsequently ratified their action. He proceeded in accordance with the provisions of the Criminal Procedure Code and when subsequently it was found that the criminal cases would not stand the District Magistrate of Puri himself directed the withdrawal of those cases.

It was further urged that on 29-7-1943 (see Ext. 3) the District Magistrate of

Puri requisitioned all the rice bags that were seized in exercise of his powers under Rule 75A (1) of the Defence of India Rules and that this order of requisition would itself justify the finding that the Government ratified the action of the police in unlawfully seizing these rice bags. I am, however, unable to accept this argument. The requisition was made by the District Magistrate in exercise of the statutory power conferred on him by Rule 75A (1) of the Defence of India Rules because he was satisfied that the bags of rice were required for maintaining supplies essential to the life of the community. It has nothing to do with the illegality of the previous seizures by the police. The connection between the bags requisitioned and the bags that were illegally seized has also not been established. It is thus no piece of evidence to prove the conspiracy charged against the Government. I am, therefore, unable to hold that there was a conspiracy between the Government and their officials to unlawfully seize the goods of the plaintiff. It is well settled that the Government are not liable for the tortious act of their servants.

26. Mr. M.S. Rao cited a recent decision of the Assam High Court reported in -- Union of India (UOI) Vs. Ram Kamal Bezbarua and Others, in support of his contention that the Government of Orissa would also be liable to pay damages for unlawful seizures of the rice bags in the circumstances disclosed in the present litigation. That decision, however, is clearly distinguishable on facts and, moreover, there are certain observations therein which would go against the contention of Mr. Rao. There the facts found were that certain troops occupied the fisheries of a party and damaged the fish that had been reared in the fish nurseries constructed thereon.

The learned Judges of the Assam High Court, after a full discussion of the law regarding the liability of the State for the tortious acts of its servants, held that the occupation of the fisheries by the troops was for the purpose of efficient and successful prosecution of the war and that the Govt. should therefore have requisitioned the fisheries under Rule 75A of the Defence of India Rules and paid compensation to the owner for such requisition. Having failed to do so requisition the property the Government were liable for trespass by their servants on the property of an individual where such trespass took place for Government purposes. But they declined to hold the Government liable for the wanton acts of waste and destruction committed by the troops in the fish nurseries, observing that these acts were not for the purposes of efficient and successful prosecution of the war and hence not for Government purposes. They were neither authorised by the State nor done under the sanction of any municipal law nor did the State derive any benefit from them.

The ratio of the decision, therefore, seems to be that where the servants of the Government commit trespass on the property of an individual for the purposes of the Government or while acting under the sanction of any municipal law or when the State derives any benefit from their action or subsequently ratifies the same the Government may be liable. But the present case is of a different nature. It

cannot be held that the unwarranted seizure of the goods of the plaintiff by the police officers was either authorised by the State or was done under the sanction of any municipal law nor was it done for the purposes of the Government. The State also neither ratified the same nor derived any benefit from such seizure.

27. Issue No. 3 dealt with the question of limitation. On behalf of the defendants reliance was placed on Article 2, Limitation Act and it was urged that the special period of limitation of six months would apply. But in view of my finding that the illegal seizures were not either done or even intended to be done in pursuance of any provision either of the Defence of India Rules or of the Criminal Procedure Code it is obvious that that Article would not help those police officers who are responsible for such illegal seizures.

28. Next comes the question of quantum of damages. The learned lower Court fixed the price per bag of rice (82 standard seers) at Rs. 20/13/2 1/2 pies on the basis of the price lists published in the Orissa Gazette dated 3-9-1943 and 17-9-1943 and also awarded interest at 12 per cent, per annum from the date of seizure till either the date of the suit or the date on which the order was passed by the Magistrate directing the plaintiff to take possession of the bags. Defendant No. 5 was one of the police officers against whom a decree was passed on that basis. The plaintiff did not file a cross appeal against the decree on the ground that the price per bag fixed by the trial Court was too low.

Doubtless, in his appeal he impleaded defendant No. 7 though he had obtained a decree against him also and urged that the price allowed by the lower Court was too low. But as against defendant No. 5 the plaintiff's failure to file an appeal must be construed to mean that he accepted the decision of the Court to the effect that the prevailing price per bag at that time was only Rs. 20/13/2 1/2 pies and that the reasonable compensation that he was entitled to for unauthorised seizure was only 12 per cent per annum. Defendant No. 5 is one of the appellants in F. A. No. 23 of 1946. But the learned Government Advocate who appeared for him was not able to satisfy me that either the price fixed by the lower Court or the rate of interest allowed by way of compensation was abnormally high.

I think that, on the whole, the lower Court took a reasonable view taking as the basis the price-list published by the Government themselves in the Orissa Gazette at that time. I would, therefore, affirm the damages fixed by the lower Court against defendant No. 5 for unlawful seizure of 180 bags of rice and against defendant No. 7 for unlawful seizure of 41 bags.

29. In view of my finding, in disagreement with the lower Court, that as regards the first seizure also the police officer concerned (defendant No. 4) was bound to compensate the plaintiff the quantum of damages payable for that unlawful seizure should be calculated on the same basis as that adopted by the learned lower Court. Nineteen bags of rice were seized unauthorisedly on 28-6-1943 By defendant No. 4. He should pay compensation to the plaintiff at the rate of Rs.

20/13/2 1/2 pies per-bag with interest at 12 per cent from 28-6-1943 till 16-5-1944 (see Ext. A-5) on which date the trying Magistrate directed the return of the seized rice bags to the plaintiff. He should pay Rs. 437/ 12/- as total damages. The plaintiff should get interest at 6 per cent per annum pendente lite and also till the date of realisation in respect of damages awarded against defendants Nos.. 4, 5 and 7.

30. I would also confirm the direction of the lower Court regarding the right of these three defendants Nos. 4, 5 and 7 to adjust the price of 19, 180 and 41 bags of rice respectively at the rate fixed by it if they are still in police custody or sold already. No evidence has been led as to what happened to these bags and it will be open to these defendants to take appropriate proceedings if they are so advised.

31. As regards the 300 bags of rice which were seized on 12-9-43, it appears that due to the failure of the plaintiff to take possession of the same though he was given notice (see Ext. E-7) the bags were sold and the sale proceeds were deposited in the treasury. This fact has been admitted by the then Sub-divisional Magistrate of Khurda (D. W. 8) and from Ext. I-1 it appears that the sale proceeds of those 300 bags amounted to Rs. 5,494/4/6. The plaintiff is clearly entitled to this amount.

Similarly, the 151 bags of rice of the plaintiff which were seized on 27-7-1943 (7th seizure) were sold and the sale proceeds deposited in the treasury under the orders of the Sub-divisional Magistrate of Khurda (see Exts. C-3 and C-4) due to the failure of the plaintiff to take possession of these bags when they were released. From Ext. I it appears that the sale proceeds of these 151 bags amounted to Rs. 2,642/5/6. It is not denied by the defendants that the plaintiff is entitled to this sum. We would, therefore, direct defendant No. 1 to refund to the plaintiff the sum of Rs. 5,494/4/6 and Rs. 2,642/5/6 being the sale proceeds of the aforesaid bags.

32. I would, therefore, dismiss P. A. No. 23/46 with costs. F. A. No. 18/46 is allowed as against A. S. I. Lokanath Misra (defendant No. 4 and respondent No. 4) with proportionate costs. It is dismissed as against the remaining respondents with costs.

Mohapatra, J.

33. I agree.