

(1984) 01 PAT CK 0038

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 218 of 1983

Jhabarmal Mukim

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 03-01-1984

Acts Referred:

Essential Commodities Act, 1955 — Section 3, 3(4), 6A

Citation : (1984) PLJR 568

Hon'ble Judges : R.N. Pd., J; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : Satya Narayan Sharma, Jawahar Prasad Karn and Rajeeva Sharma, for the Appellant; G.P. Jaiswal, for the Respondent

Judgement

Nagendra Prasad Singh, J.—This writ application has been filed on behalf of the petitioner for quashing a notice issued to the petitioner by the Deputy Commissioner, Santhal Parganas, in purported exercise of the powers conferred on him by section 6A of the Essential Commodities Act (hereinafter to be referred to as "the Act"). The Deputy Commissioner has required the petitioner to show cause as to why the foodgrains mentioned in the said notice be not confiscated in accordance with the provisions of section 6A of the Act. A copy of that notice is Annexure-1 to the writ application. Section 6A of the Act vests powers in the Collector to pass an order confiscating the essential commodity which has been seized, for contravention of an order made u/s 3 of the Act.

2. On behalf of the petitioner it was submitted that an order of confiscation u/s 6A aforesaid amounts to punishment or penalty, and, as such, any such order can be passed by a Judicial Magistrate and not by an Executive Magistrate, in view of section 3(4) of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as "the Code"). Section 3(4) of the Code is as follows:--

(4) Where, under any law, other than this Code the functions exercisable by a Magistrate relate to matters--

(a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution; they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

According to the petitioner whenever any essential commodity is confiscated in exercise of the powers u/s 6A aforesaid it amounts to inflicting a punishment or penalty against the person concerned, and, as such, it should be exercised by a Judicial Magistrate and not by a Executive Magistrate like the Deputy Commissioner. It was pointed out that clause (a) of sub-section (4) of section 3 of the Code has been framed while implementing Article 50 of the Constitution which is one of the directive principles of the State policy, i.e., step towards separation of Judiciary from Executive.

3. The expression "confiscate" according to the Shorter Oxford English Dictionary, means "appropriated to the use of the State, adjudged forfeited." It also means according to the said Dictionary "to appropriate (private property) to the Public Treasury by way of penalty." An article of a private individual can be confiscated by way of penalty, but the question is as to whether when the Collector passes an order of confiscation u/s 6A it is by way of punishment or penalty. From a bare reference to the statement of the object of the Act it will appear that the Act has been enacted "to provide in the interest of the general public for the control of the production, supply and distribution of, and trade and commerce in certain commodities." For achieving that object, section 3 empowers the Central Government, and the State Government on basis of delegation by the Central Government, to make orders for the purposes mentioned in Section 3 of the Act including regulating the distribution of essential commodities and controlling their price. Whenever there is a contravention of any order made u/s 3 of the Act, two proceedings can be initiated against the person concerned; one for confiscation of the essential commodity concerned in accordance with section 6A, the order for prosecution of such person in view of section 7 of the Act. To avoid any conflict between the orders passed by the Collector u/s 6A and the original court where the prosecution is initiated, a provision has been made under sub-section (2) of section 6C of the Act saying "where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made u/s 6A, the person concerned is acquitted.....it is not possible for any reason to return the essential commodity seized, such person shall except as provided by sub-section (3) of section 6A be paid the price therefor as if the essential commodity had been sold to the Government with reasonable interest calculated from the day of the seizure of

the essential commodity.....". In view of sub-section (2) of section 6C it has to be held that any order of confiscation u/s 6A is not final in the sense that if the criminal court holds that the person concerned has not contravened any order framed u/s 3 of the Act and he is acquitted of the charge levelled against him, then either the essential commodity which has been seized and confiscated or price thereof has to be paid to the person concerned along with reasonable interest.

4. u/s 7 of the Act, the court which imposes the punishment after trial has also been vested with the power to forfeit the property in respect of which the order has been contravened. In other words, there is one more provision in the Act under which the property in respect of which the order has been contravened can be forfeited to the Government. In my opinion, because of sub-section (2) of section 6c and section 7(1)(b) it has to be held that the power of confiscation u/s 6A is not in the nature of penalty or punishment. This power has to be exercised for the purpose of controlling the supply and distribution of essential commodities; of course, the forfeiture u/s 7(1)(b) or section 7(1)(c) shall be in the nature of punishment or penalty. In this view of the matter, it is difficult to accept the contention made on behalf of the petitioner that power u/s 6A can be exercised only by a Judicial Magistrate in view of section 3(4) of the Code. Apart from that, section 5 of the Code is relevant in the present case, which is as follows:--

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

Section 5 of the Code says in clear and unambiguous terms that nothing contained in the Code shall affect any special or local law for the time being in force, or any special jurisdiction or power conferred or any special forum or procedure prescribed by any other law for the time being in force "in absence of a specific provision to the contrary". In other words, section 3(4)(a) of the Code, shall not affect any special law or any special jurisdiction or any special forum or procedure by any law unless there is a specific provision to the contrary. The Act is a special law for achieving the objects mentioned above and it prescribes a special forum of confiscation by section 6A of the Act vesting the power in the Collector to exercise that power. In view of section 5 of the Code that power and forum remains unaffected by section 3(4)(a) of the Code. There is nothing in the Act from which it can be inferred that the framers of the Act while saying that the power u/s 6A shall be exercised by the Collector meant that the said power shall be exercised by a Judicial Magistrate, If there was any such specific provision in the Act then it could have been held that section 3(4)(a) of the Code is attracted even in respect of such proceeding.

5. Although I have held that section 3(4)(a) of the Code is not attracted when the Collector is hearing a confiscation proceeding u/s 6A of the Act because any

order passed in such a proceeding cannot expose any person to any punishment or penalty, but even if it is assumed that the order of confiscation is penal in nature, still because of section 5 of the Code the power of the Collector u/s 6A of the Act remains unaffected. A similar question had arisen for consideration before this Court in the case of Smt. Sarla Devi Agarwala v. The State of Bihar and others (1979 Bihar Bar Council Journal 213), in connection with hearing of an application by the authority constituted under the Minimum Wages Act u/s 20 of that Act. The Sub-divisional Magistrate has been appointed as the authority to hear and decide claims arising out of the payment of less than the minimum rates of wages fixed under that Act. It was urged that any dispute which involves the appreciation or shifting of evidence or formulation of any decision which exposes any person to any punishment or penalty, should be decided by a Judicial Magistrate in view of section 3(4) of the Code. It was held that in view of section 5 of the Code, and the Minimum Wages Act being a special law regarding payment of minimum wages and it having prescribed a special jurisdiction for the purpose of adjudication of any claim in respect thereof, sub section (4) of section 3 of the Code was not applicable.

6. On behalf of the petitioner it was also submitted that section 3(4)(a) of the Code should be held to be "specific provision to the contrary" within the meaning of section 5 of the Code. In other words, according to the petitioner, section 3(4)(a) of the Code shall have overriding effect over section 6A of the Act. It is difficult to accept this submission. Section 3(4)(a) of the Code cannot be held to be specific provision to the contrary within the meaning of section 5 of the Code, otherwise for all practical purposes section 5 shall become redundant. The very purpose of section 5 of the Code, which is a saving section, is to keep the special jurisdiction or any special forum or special procedure prescribed in any other law unaffected by the provisions of the Code in absence of specific provision to the contrary.

7. It was then submitted that in the instant case the notice which has been issued to the petitioner is not in accordance with the requirement of section 6B of the Act inasmuch as the grounds on which it is proposed to confiscate the essential commodities mentioned in the notice have not been mentioned in the notice. Section 6B of the Act requires the Collector, before passing an order of confiscation in respect of any essential commodity to give notice in writing to the person from whom such article has been seized "informing him of the grounds on which it is proposed to confiscate the essential commodities.....". The scope of sub-section (1) of section 6B has been considered by a Bench of this Court in the case of M/s. Md. Ayub Bismillah Rice and Oil Mills Vs. Collector of West Champaran and Others, where it has been pointed out that in view of the provision of section 6B itself it is incumbent on the authorities concerned to set out the grounds on which essential commodity is proposed to be confiscated in the notice.

In that connection it was observed:

If the grounds are not mentioned in the notice it will not only be against the provision of section 6B of the Act, but also against the principles of natural justice.

8. I may point out that after the aforesaid decision of this Court sub-section (3) in section 6B was inserted by Act No. 92 of 1976 with effect from 2.9.1976. Sub-section (3) of section 6B of the Act is as follows:--

No order confiscating any essential commodity, package, covering, receptacle, animal, vehicle, vessel or other conveyance shall be invalid merely by reason of any defect or irregularity in the notice given under clause (a) of sub-section (1), if, in giving such notice, the provision of that clause have been substantially complied with.

On a plain reading, this sub-section (3) is applicable to cases where there has been a substantial compliance of clause (a) of sub-section (1) of section 6B. It cannot salvage a notice if there has been no compliance of clause (a) of section 6B(1). In any case, sub-section (3) is attracted after a final order of confiscation is passed. The petitioner in the instant case has filed the present writ application for quashing the notice itself having been issued in contravention of the requirement of clause (a) of section 6B(1). In the notice there is no mention of any contravention of an order by the petitioner. It has been stated in the notice that petitioner should show cause as to why the article seized be not confiscated. This shall not amount to a substantial compliance of requirement of section 6B(1) (a) of the Act.

In the circumstances aforesaid, I am left with no option but to quash the notice impugned. Accordingly, I allow the writ application and quash the notice Annexure 1. It is made clear that it will be open to the learned Deputy Commissioner to issue a fresh notice to the petitioner giving the details of the contravention of the order in question, and, thereafter, the proceeding shall be disposed of in accordance with law. If the learned Deputy Commissioner issues a fresh notice to the petitioner, then he shall also consider the question of disposal of the foodgrains which have been seized and which are said to be perishable in nature, in accordance with law.