
(2001) 08 BOM CK 0039

In the Bombay High Court

Case No : Criminal Application No. 1034 of 2001

Laxmikant Shankarlal Sarda

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 31-08-2001

Acts Referred:

Bombay Police Act, 1951 — Section 5
Criminal Procedure Code, 1973 (CrPC) — Section 10A, 110, 41(2), 438
Essential Commodities Act, 1955 — Section 10AA, 14, 3, 7

Citation : (2002) BomCR(Cri) 170 : (2002) CriLJ 1040 : (2002) 2 MhLj 471

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : J.M. Gandhi, for the Appellant; Assistant Public Prosecutor, for the Respondent

Judgement

R.K. Batta, J.—The applicant apprehending arrest in connection with the offences under, Section 3 read with Section 7 of the Essential Commodities Act, 1955, sought anticipatory bail which was rejected by the learned Additional Sessions Judge, Nagpur, vide order dated 30th July, 2001.

2. In order to appreciate the contentions advanced by the learned counsel for the applicant and the learned Assistant Public Prosecutor, it is necessary to enumerate the facts of the matter.

3. According to the prosecution the crime branch received information that blue kerosene had been illegally unloaded at Ramsons Castings Pvt. Ltd. Nagpur, (for short to be referred as "Ramsons casting"). Accordingly, the crime branch police staff went near the factory yard of Ramsons Casting. One tanker bearing No. MH 31 M 2541 had entered into the said company at about 4 p.m. on 23-7-2001. After about 15 minutes the raiding party along with the Panchas went inside the premises of said Ramsons casting and found that kerosene from the said tanker was being unloaded into the steel tank of the said Company and at that time the accused persons namely the driver, cleaner of the truck and the others were

present doing the illegal act. The raiding party seized the tanker along with 11,000 liters of kerosene, plastic pipe which was connected with the tanker and the steel tank as also chemical (LDO) measuring 15 ltrs. The police took sample of the kerosene from the tanker and the steel tank and the said chemical i.e LDO and has forwarded the said sample to the chemical analyser. The spot Panchnama was prepared. The photographs of the spot were taken and video recording was done. The police seized the papers i.e. invoice challan, Octroi receipt, and other things from the cabin of the said tanker. The crime branch police, thereafter reported to the MIDC police station as the said area comes under the jurisdiction of the said police station. According to the prosecution, the applicant is wholesale dealer for distribution of rationed kerosene for specified area that is to say Gadchiroli and the applicant and other accused persons have illegally sold the said rationed kerosene to accused No. 3 - Ramsons Casting. The prosecution case further, is that the license issued in favour of the applicant under the Maharashtra Kerosene Dealers Licensing Order, 1966 (hereinafter referred to as "the Licensing Order"), is only for the specified area, Gadchiroli and the kerosene could be sold only within the limits of Gadchiroli and in the case under consideration the applicant and the accused have sold the kerosene outside the specified area to unauthorised person, namely Ramsons Casting. The prosecution case further is that accused Nos. 1 and 2 have loaded kerosene of 12,000 liters from the Hindustan Petroleum Corporation, Khapri Depot on 23-7-2001 at 2 p.m. and took the said tanker as per the direction of the applicant to Ramsons Casting for unloading the same there. It is further case of the prosecution that the driver and cleaner of the said tanker had fabricated invoice challan which was for Gadchiroli substituting the same as Nagpur district so as to take the tanker through the check post to Nagpur. In the invoice, the place is mentioned as Gadchiroli. Statement of number of witnesses have been recorded in order to point out that the tanker was brought to Ramsons Casting as per the direction of applicant No. 1 on phone. The statements of some persons working in Ramsons Casting have already been recorded to show the process of unloading. When police party reached the said place where the kerosene was being unloaded, it was found that the tanker was having 11,000 liters as against 12,000 liters and that the balance had been already emptied into the steel tank and the process was still going on. The driver, conductor and the Executive Director Rajendrasingh of Ramsons Casting were arrested and they have been released on bail.

4. The case of the applicant is that the said tanker had taken delivery of the kerosene from the Hindustan Petroleum Corporation Ltd.; Khapri for distribution at Gadchiroli, but the said quantity of kerosene was received late in the evening and since the same was to be carried to Gadchiroli district, which is declared as Naxalite area, the driver and cleaner found it improper to leave for Gadchiroli in the evening. It is also alleged that there was continuous rain for past three days and driving of the vehicle in night was not only impossible, but, could have been fatal and as such the vehicle was carried in the premises of Ramsons Casting,

MIDC which is officially declared as safe area by the Explosives Department and accordingly the said tanker was stationed in the premises of Ramsons Casting. According to the applicant at about 8 p.m. PSI Gorhe of the Crime Branch, Nagpur, came and in spite of the driver having shown all requisite papers he seized the said tanker with kerosene and arrested the driver, cleaner and the Executive Director Rajendra Singh of Ramsons Casting. The unloading of any part of kerosene from the tanker or that the tanker was found in the process of unloading kerosene from the tanker into the tank of Ramsons Casting has been denied. A specific plea which has been taken is that the search, seizure and the investigation is being carried out by the officer of the rank of police sub-Inspector, who is not authorised to either search, seize or investigate into the crime u/s 3 read with Section 7 of the Essential Commodities Act and as such the seizure is illegal.

5. In respect of the aforesaid case, put up by the applicant, the case of the prosecution is that there was hardly any rainfall on 23rd July, 2001 and in this respect reliance has been placed on the letter from India Meteorological Department, Nagpur. According to the prosecution the raid was conducted at 4 p.m. and not at late hours as represented by the applicant and that the tanker in question had been filled in at 2 p.m. at the Hindustan Petroleum Corporation Ltd., Khapri Depot, Nagpur and not in the late evening as represented by the applicant in the application.

6. Learned counsel for the applicant enumerated the facts as related to by the applicant in the application, substance of which has been recorded above. According to him there is no material to suggest that any part of the kerosene was unloaded from the tanker. However, the main plank of the argument of the learned counsel for the applicant is that the PSI Gorhe is not empowered to either search, seize or investigate into the matter and in this connection my attention has been drawn to Clause 12 of the Licensing Order, 1966, wherein the licensing authority or any officer authorised by him in this behalf may with a view to secure compliance under the said order or to satisfying himself that this order has been complied with and satisfying himself that this order has complied with, and with such assistance as he thinks fit may enter, inspect or break down and search any place or premises vehicle or vessel which he has reason to believe has been or is being used for the contravention of this order. It is further pointed out that under the Kerosene (Restriction on use and fixation of ceiling price) Order, 1993, hereinafter referred to as "Order, 1993", the power of entry, search and seizure is vested with some officer mentioned therein or any other officer authorised and notified by the Central Government etc. He then drew my attention to S.O 509 (E), issued in exercise of the powers conferred by Sub-clause (a) of Clause 9 of the Order, 1993, under which certain officers in Maharashtra have been notified. The said standing order reads as under :

"In exercise of the powers conferred by Sub-clause (a) of Clause 9 of the Kerosene (Restriction on Use and Fixation of Ceiling Price) order, 1993, the

Central Government hereby notifies the following officers of the State Governments, Union Territories and Government, Oil Companies mentioned below to take necessary actions under provisions of the said order within their respective jurisdictions, namely : Maharashtra

- (1) All Collectors of the Districts.
 - (2) All Additional Collectors of the Districts.
 - (3) The Controller of Rationing, Bombay,
 - (4) The Deputy Commissioner, (Supply)
 - (5) All Deputy/Assistant Collectors in Districts
 - (6) All District Supply Officers
 - (7) The Deputy/Assistant Controller of Rationing, Bombay.
 - (8) All Tahsildars
 - (9) All supply Inspecting Officers/Supply Inspector of Civil Supplies Organisations
 - (10) All Officers not below the rank of Rationing Inspector or Rationing Organisation.
 - (11) AH Police Officers not below the rank of Inspectors.
- (Signed) Devi Dayal Jt. Secretary"

Therefore according to him PSI Gorhe of Crime Branch (Urban) is not an empowered officer to carry out the search and seizure as also the investigation on account of which the search, seizure as also the investigation are illegal and cannot relied upon for any purpose. In support of his submissions, he has placed reliance upon number of authorities, namely, Santa Kumar Das and Another Vs. The State, Rohanlal Arjunlal v. State of Bihar, 1993 (2) Crim 656 State of Punjab Vs. Balbir Singh, , Suresh Kumar v. State of Haryana, 1996 Cri.LJ. 4216 M. Kathiresan v. State, 2000 1 CCR 154 and Roy V.D. v. State of Kerala, 2001 Criminal 119.

7. It is also urged by the learned counsel for the applicant that the place where the tanker has been seized falls under the jurisdiction of the MIDC police station and within the jurisdiction of the crime branch rural and that the PSI Gorhe being from the Crime Branch-Urban has no authority to effect search and seizure and to carry out the investigation into the crime.

8. Learned counsel for the applicant urged before me that no offence under the Licensing Order, 1966 is disclosed and on the facts 1993 order may apply, in view of Clause 3 of the said order. He also pointed out to the overriding effect of the order contained in Clause 10 of the said order as also Clause 12, which deals with repeal and saving clause. Lastly, it was urged that even mere unloading of kerosene would not be sufficient to make out an offence since mens rea is

essential ingredient for commission of the offence u/s 3 read with Section 7 of the Essential Commodities Act and there has been no complaint whatsoever from any card holders who are entitled to receive kerosene from the Gadchiroli district.

9. In view of the above submissions, learned counsel for the applicant, urged that the applicant be granted anticipatory bail.

10. Learned Assistant Public Prosecutor on the other hand urged before me that on merits there is sufficient evidence to show that kerosene which was meant for distribution to card holders at Gadchiroli was diverted to Ramsons Casting at the instance of the applicant by forging challan by erasing Gadchiroli and substituting the same by Nagpur District and with the help of forged document the tanker crossed the octroi post from where also the documents have been attached showing tampering with the Challan and the passage of this tanker through the check post and that ultimately the tanker was found in the premises of Ramsons Casting for unloading kerosene into the steel tank by connecting the tanker and the said steel tank by the pipe and the unloading process was started with the help of electric pump. He has placed before me photographs of the tanker and the pipe connected to the steel tank of Ramsons Casting. He referred to number of statements which have been recorded by the police to show that the tanker was taken to Ramsons Casting at the instance of the applicant for the purpose of unloading kerosene there.

11. According the learned Assistant Public Prosecutor, in view of Clause 3(F) read with Clause 3 of the Licensing Order, 1966, whereunder license is issued for Gadchiroli area read with Petroleum Products Supply and Distribution Order, 1972, (hereinafter referred to as "1972 Order"), the offence u/s 7 of the Essential Commodities Act, 1972, is disclosed. It is further urged that under the 1972 order, Clause 4 empowers the Sub Inspector to enter, search and seize any petroleum products which includes kerosene superior and inferior. He also relied upon the circular issued by the Additional Commissioner of Police, Nagpur dated 21-8-1998 suggesting actual action under the provisions of Essential Commodities Act to be taken by the Officer of the rank of the Police Sub Inspector or the officer superior to him and the Police Inspectors were informed that they should take action on the complaint. Learned Assistant Public Prosecutor also placed before me standing order dated 11-4-1967 in which it is stated that in exercise of the power conferred by Section 5 of the Bombay Police Act, the Government of Maharashtra hereby directs that whenever the officer of the Maharashtra State falling within any of the following categories investigates at any place in the State any offence, he shall be deemed to be an officer-in charge of the police station within the limits at which such place is situated and in this category of the officers under Clause B are the officers of and above the rank of Sub Inspectors of Crime Branch and Special Branch of Nagpur Police force. He, therefore, contends that the Sub Inspector of Crime Branch is thus empowered to investigate the offence in question. At any rate according to the learned Assistant Public Prosecutor the raid and investigation is being done under

the supervision of the Assistant Commissioner of Police, who is an officer superior to the rank of the police inspector and the said ACP was also present at the time of raid. Therefore, according to the learned APP the search, seizure or investigation cannot prima-facie be said to be illegal. Learned Assistant Public Prosecutor has relied upon State of Punjab Vs. Baldev Singh, etc. etc., and State of Orissa v. S. Mohanty and Ors., AIR 2000 SC 3494. He has also cited some other rulings on anticipatory bail. According to the learned Assistant Public Prosecutor completely false story has been presented by the applicant in the application for anticipatory bail and it is prima facie falsified by the material on record. He, therefore, contends that the bail application be rejected.

12. In reply the learned Advocate for the applicant urged before me that the Circular dated 29-8-1998 has no sanction in law nor can the same override the express provision contained in the Act and the order in question. According to him it is not known whether the standing order dated 11-4-1997 is still in force. It is also pointed out that even though according to the prosecution 1000 ltrs. of kerosene had been emptied into the tank, there is no such seizure of the kerosene to that extent in order to corroborate the prosecution version. According to him for the first time during the course of argument plea has been put forward that the raid and investigation is supervised by the ACP and this fact was not even disclosed in the reply which is filed by the Additional Police Inspector. It is further urged by him that jurisdiction over the place where the tanker was seized is of MIDC police station and the jurisdiction of the crime branch over the said area is that of rural crime branch and not urban crime branch as urged by him. Learned Advocate for the applicant respect of the ruling of the Apex Court in State of Orissa v. S. Mohanty, AIR 2000 SC 3494 pointed out that the investigation therein is by the empowered officer.

13. The allegations are that the kerosene which was meant for public distribution for Gadchiroli district for which the applicant had the license has been diverted at the instance of the applicant to Ramsons Casting, that is to say to a person or a company other than the person for whom the said kerosene was meant. In this connection, further allegation is of forgery of challan by erasing Gadchiroli and by substituting the same with Nagpur district and this according to the prosecution was done at the instance of the applicant so that the tanker could pass through the Octroi Check Post in order to go to Ramsons Casting. Admittedly, Ramsons casting does not fall on the way from the place where the tanker was filled in and Gadchiroli district where it was to be taken. However, the main plank of the argument put up on behalf of the applicant is that PSI Gorhe who has seized the truck is not empowered to do so and as such the seizure is illegal. In order to appreciate the submissions it is necessary to refer to the relevant provisions of the Act and the relevant orders. Section 3 of the Essential Commodities Act, 1955, provides that without prejudice to the generality of the powers conferred by Sub-section (1), an order made thereunder may provide --

(a) for regulating by licences, permits or otherwise the production or

manufacture of any essential commodity;

(b) -----

(C) -----

(d) for regulating by licences, permits or otherwise supply, distribution etc; of the essential commodities.

(e) -----

(f) -----

(g) -----

(i) -----

(j) for any incidental and supplementary matters, including in particular, the entry, search or examination of premises, aircraft vessels, vehicles or other conveyances and animals and the seizure by a person authorised to make such entry search or examination.

Kerosene is an item which is regulated under the said Act insofar as licenses, permits, search, transport, distribution, disposal, or use of the same. Learned Assistant Public Prosecutor has referred to Clause (f) of Sub-section (2) of Section 3 of the said Act, but, in my opinion, in the facts and circumstances of the case this clause has no application. Section 7 of the Act provides for penalties for contravention of any order made u/s 3 as also forfeiture of the property, vehicle, vessels etc;

14. Clause 3 of the Maharashtra Kerosene Dealers, 1966 order deals with prohibition against carrying on business as dealers without license. It provides that no person shall carry out business as dealer except and in accordance with the terms and conditions of the license issued in this behalf by the licensing authorities. Clause 5 provides for forum of licenses, Clause 2(o) defines kerosene and Clause (f) defines licensing authority who has to perform duties in any specified area. Under Clause 12, the power of entry, search and seizure is with licensing authority or any officer authorised by him in this behalf who may with a view to securing compliance with this order or to satisfying himself that this order has been complied with and with the assistance of as he thinks fit may enter, inspect, search, seize and remove stocks of kerosene.

15. According to the learned Assistant Public Prosecutor, the license which has been granted to the applicant under the licensing order 1966 is for Gadchiroli district alone and as such the applicant has breached the conditions of license by taking the tanker to Ramsons Casting for unloading the same there and as such the offence u/s 3 read with Section 7 of the said Act read with Clauses 3 and 5 of to Licensing Dealers Order, 1966, has been committed.

16. Learned Assistant Public Prosecutor has relied upon Clause 4 of the Petroleum Products (Supply and Distribution) Order, 1972. Clause 4 provides for

power of entry, search and seizure and lays down that any police officer not below the rank of sub-Inspector or any other officer of the Government of or above and equivalent rank authorised in this behalf by the Central Government or State Government may, with a view to securing compliance with this order or to satisfy himself that this order or any order made thereunder has been complied with search any vehicle or vessel used or capable of being used for transport of any petroleum products and enter and search any place, seize stocks of any petroleum products, in respect of which he has reason to believe that any contravention of this order has been or is about to be made. Clause 2(3) defines "dealer" and Clause (f) defines "petroleum products" which includes kerosene, superior and Inferior. Clause 3 provides for regulation of supply and distribution of petroleum products. Provisions of this order prima-facie in my opinion would not at all be attracted to the facts and circumstances of this case.

17. Coming now to 1993 order, Clause 3 of the same provides for restriction on use of kerosene, supply under public distribution system. Clause 3 reads as under:

"Restriction on use of kerosene supplied under public distribution system. -- (1) No person shall use kerosene supplied under the public distribution system for any purpose other than cooking and illumination : Provided that the Central or State Government may by order permit any person to use kerosene for such other purposes as it may specify in that order.

(2) No dealer appointed under the public distribution system or a transporter shall sell, distribute or supply kerosene under the public distribution system to any person other than the person to whom the supplies are meant for." Clause 9 provides for power of entry, search and seizure and reads as under :

"Power of entry, search and seizure (a) An officer of the department of food and civil supplies of the Government not below the rank "of an Inspector authorised by such Government and notified by the Central Government or any officer authorised and notified by the Central Government, or any officer not below the rank of a Sales Officer of a Government Oil Company authorised by the Government and notified by the Central Government may with a view to ensuring compliance with the provisions of this Order, with such assistance as may be required, for the purpose of satisfying himself that this Order or any Order made thereunder has been complied with :--

(i) stop and search any vessel or vehicle or any other conveyance which the officer has reason to believe, has been or is being or is about to be used in contravention of this Order.

(ii) enter or search any place with such aid or assistance, as may be necessary; and

(iii) seize and remove with such aid or assistance, as may be necessary, books, registers and other records pertaining to kerosene business, along with vehicle,

vessel or any other conveyance used for carrying such stock, if he has reason to believe that any provision of this order has been or is being or is about to be contravened and thereafter take or authorise the taking of all measures necessary for securing the production of the kerosene at the office of the Government Oil Company and the vehicle, vessel or other conveyance so seized before the Collector having jurisdiction under the provisions of Essential Commodities Act, 1955 (10 of 1955) for their safe custody pending such procedures, (b) The provisions of Section 100 of the Code of Criminal Procedure 1973 (2 of 1974) relating to search and seizure shall so far as may be, apply to searches and seizures under this. Order."

18. Standing order 509(E), which has already been quoted above and issued in exercise of powers under Clause (a) of Clause 9 of 1993 Order, notifies the officer empowered to enter, search and seize petroleum products as well as the vehicles involved in contravention of the said order. The power thereunder is given to various officers including all police officers not below the rank of Inspectors. It is on the basis of 1993 order that it has been urged by the learned counsel for the applicant that the search and seizure which has been effected by PSI Gorhe is illegal and the same cannot be used against the applicants.

19. The conclusions which follow on the basis of the provisions already referred to above and seizure by PSI Gorhe is concerned, *prima facie*, the facts disclose violation of Section 3(2) (a)(d) and (f) of the said Act, read with Clauses 3, 5, 2(f) of the Licensing Order, 1966, Clause 3 of 1993 order read with Section 7 of the Essential Commodities Act. Section 10C of the Essential Commodities Act, provides for presumption of culpable mental state. It provides that in any prosecution for any offence under this Act, which requires culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but, it shall be defence for the accused to prove that he had no such mental state with respect to the act charged as offence in that prosecution. Explanation appended to Section 10-C(1) states that in the section, culpable mental state includes intention, motive, knowledge of the act or any reason to believe the fact. Sub-section (2) of Section 10C of the said Act states that for the purpose of this section a fact is said to be proved when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by preponderance of probabilities. Section 14 of the Act provides for burden of proof on the prosecution for contravention of orders made u/s 3, The material which has been produced by the investigating agency shows that the tanker got the essential commodity, that is, kerosene from the Hindustan Petroleum Corporation Ltd; Khapri depot, Nagpur, for the purpose of distribution to Gadchiroli district for which the applicant had the license. Instead of taking the truck to Gadchiroli by tampering the Challan by replacing word Gadchiroli with Nagpur district, the tanker passed through the check post of Octroi and was taken inside the premises of Ramsons Casting. It is pertinent to note that Gadchiroli does not fall on the way from the place where the tanker was loaded and the premises of Ramsons Casting where it was taken. It was found by the

raiding party that pipe had been connected with the tanker and the tank of Ramsons Casting and with the help of electric motor the contents that is to say kerosene were being emptied into the tank. Besides this during the course of the investigation number of statements have been recorded which prima facie go to show that diversion of the essential commodity kerosene from the public distribution system to Ramsons Casting was at the instance of the applicant. In this state of affairs presumption of culpable mental state in terms of Section 10C comes into play and the defence put forward by the applicant that it was heavily raining and the tanker was loaded late in the evening will have to be examined in the light of the letter from the India Meteorological Department, Nagpur, wherein it is stated that on 23-7-2001, Nagpur had 00.33 mm of rain and Gadchiroli had 0.02 mm of rain as also the fact that the tanker had in fact been loaded with essential commodity kerosene at about 2 p.m. Therefore, prima facie it appears that offence is committed under the Act and the orders referred to in this paragraph.

20. Be that as it may, crucial question is as to whether the seizure and search conducted by the PSI Gorhe is illegal as contended by the learned Advocate for the applicant. Section 10AA of the Essential Commodities Act, deals with power to arrest and provides that notwithstanding anything contained in the code of criminal procedure, 1973, no officer below the rank of an officer incharge of a police station or any police officer authorised by him in this behalf in writing shall arrest any person accused of committing an offence punishable under this Act. It is pertinent to note that Section 10AA starts with non obstante clause. u/s 41 of the Criminal Procedure Code any police officer may without an order from the Magistrate and without warrant arrest any person if one of the clauses thereunder are attracted which includes Clause (a), which provides who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; The offences in question are cognizable offences but, for Section 10AA of the Essential Commodities Act, any police officer could have arrested a person contravening the provisions of the Essential Commodities Act or the orders passed thereunder. Sub-section (2) of Section 41 of the Criminal Procedure Code provides that any police officer incharge of the police station may in the like manner arrest or cause to be arrested any person belonging to one or more of the categories of the persons specified in Section 109 or Section 110. However, Section 10A empowers an officer of the rank of the officer in charge of the police station or any police officer authorised by him in this behalf in writing shall arrest any person accused of doing any offence punishable under the Essential Commodities Act. Therefore, power under Essential Commodities Act, can be exercised only by the officer of the rank of incharge of the police station or any officer in this behalf in writing. The learned Assistant Public Prosecutor on enquiry being made informed that the police officer incharge of the MIDC police station which otherwise has normally jurisdiction over the place where the tanker was loaded is the Police Inspector.

Therefore, according to Section 10AA, the power to arrest thereunder can be exercised only by the Police Inspector. Learned APP has placed before me Gazette Notification dated 11th April, 1967, which is as under:

"In exercise of the powers conferred by Section 5 of the Bombay Police Act, 1951, (Bom. XXII of 1951), the Government of Maharashtra hereby directs that whenever any officer of the Maharashtra State falling within any of the following categories investigates at any place in the State any offence, he shall be deemed to be an officer in charge of the police station within the limits of which such place is situated, namely :--

(a) Officer of and above the rank of a Sub Inspector of the Crime Branch, Special Branch I and Special Branch II, Criminal Investigation Department, Greater Bombay.

(b) Officer of and above the rank of Sub Inspector of the crime branch and special branch of Nagpur Police force.

(c) Officer of and above the rank of a sub Inspector of crime Branch and Special Branch of the Poona Police Force.

(d) Officer of and above the rank of a Head Constable of Intelligence Branch, Criminal Investigation Department, M. S.

(e) Officer of and above the rank of Head Constable of crime and Railways Branch, Criminal Investigation Department Maharashtra State,

(F) Officer of and above the rank of Head Constable of Local Intelligence Branches in the districts and the two Railways Special Police Districts viz. Central, Southern and Western Railways and Central South Eastern and Western Railways."

21. No affidavit has been filed by the respondent to show that this Gazette notification is still in force or that there has been no amendment in this Gazette Notification subsequently. Be that as it may, this notification empowers the officer of and above the rank of Sub Inspector of Crime Branch and Special Branch of Nagpur Police Force to conduct investigation at any place in the State for any offence and for that purpose he shall be deemed to be an officer in charge of the police station within the limits of which the place is situated. I have already pointed out that the police station in charge of the MIDC police station is stated to be Police Inspector. By virtue of this notification dated 11th April, 1967, PSI of Crime Branch can by no stretch of imagination be equated to Police Inspector and probably realising this contingency in the said notification the powers to investigate were given to the Sub Inspector and Officer of the rank above the Sub Inspector, In other words if officer incharge of police station is Sub-Inspector investigation can be done by Sub inspector of Crime Branch and if the officer in-charge of police station is police inspector, the investigation could be done by Police Inspector of Crime Branch. Moreover, Clause 10 of 1993 order provides for overruling effect over earlier orders. Therefore, prima facie PSI

Gorhe is not an empowered officer to conduct the investigation into the offences.

22. Under Clause 12 of 1966 order power to enter, search and seizure is restricted to the licensing authority or any officer authorised by him in this behalf. PSI Gorhe obviously does not fall in this category. Insofar as 1993 order is concerned, the power of enter, search and seizure is provided under Clause 9 of the said order and by S.O. 509 which has already been quoted above besides other officers empowered thereunder are Police Inspectors not below the rank of Inspector. PSI Gorhe does not come under the category of Police Officer under the said standing order who has to be not below the rank of Inspector.

23. Number of authorities were placed before me on the question of legality of search by an officer not empowered to do so. I shall, therefore, refer to the said authorities one by one. In *Santa Kumar v. The State*, 1990 Cr.L.J. 1559 . Inspector of Fertilizers and enforcement Branch, Calcutta was an empowered officer under the Fertilizer (Control) Order, 1957 but the search was conducted by the Sub Inspector of Police, attached to the District Enforcement Branch. It was held that he was not authorised to act as Inspector of the Fertilizers and the proceedings taken by the Sub Inspector were without jurisdiction. It was further observed by the Division Bench of the Calcutta High Court that any Sub Inspector of Police or any officer above the rank of the Sub Inspector who at the material time was attached to the District Enforcement Branch could not act as Inspector of Fertilizers. The proceedings were, therefore, held to be without jurisdiction and were quashed.

24. In *Rohan Lal v. State of Bihar*, 1993 (2) Crim 656 Clause 30 of Bihar Trade Articles (Licences Unification) Order, 1984 gave power of entry, search and seizure only to officers specifically authorised to do so by the State Government. In this case the seizure was effected by the District Supply Officer who was not authorised to search and seize the stock of food grains and it was held that the criminal prosecution lodged by him on the basis of such search and seizure is illegal. It was held that neither the proceedings under the Essential Commodities Act, 1955 for commission of any offence or confiscation of the property were legal. It was pointed out therein that a valid seizure by the authorised competent person was a sine qua non for giving jurisdiction to a Collector for starting proceedings for confiscation of essential commodities under the Act. Accordingly, the proceedings initiated against the petitioner under the Essential Commodities Act before the Special Judge and confiscation proceedings before the Collector were ordered to be quashed.

25. In *State of Punjab Vs. Balbir Singh*, the Apex Court while dealing with the provisions of Narcotic Drugs and Psychotropic Substances Act, has laid down that if a police officer without any prior information as contemplated under the provisions of the Narcotic Drugs and Psychotropic Substances Act, makes a search or arrests any person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Criminal Procedure Code and when such search is completed at that stage Section 50 of the NDPS

Act would not be attracted and the question of complying with the requirements thereunder would not arise. However, if during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer who is not empowered should inform the empowered officer who should thereafter proceed in accordance with the provision of the NDPS Act. It is further pointed out that if he happens to be an empowered officer then from that stage onwards, he should carry out investigation in accordance with the provisions of the Narcotic Drugs and Psychotropic Substances Act. It is relevant to reproduce below conclusions recorded by the Apex Court in paragraph 26 :

"Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for search in respect of offences punishable under chapter IV of the Act; etc., when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal."

26. It may be pointed out that in the instant case before us raid was conducted on prior information and it was not a case of chance recovery and the raid was conducted by PSI Gorhe who prima facie is not an officer empowered to do so. The seizure Panchanama does not show that the raid was conducted under the supervision of ACP. The case diary dated 23-7-2001 only states that ACP came to the spot after the raid and gave guidance, though the complaint dated 23-7-2001 states that legal action was ordered by the ACP.

27. In *Suresh Kumar v. State of Harayana*, 1996 Cr.L.J. 4216 the Punjab and Harayana High Court while dealing with liquified Petroleum Gas (Regulation of Supply and Distribution) Order and particularly Clause 7, in fact Clause 11 relating to search and seizure has held that the person authorised thereunder is an officer of the department of food and civil supplies who shall not be below the rank of Inspector and as such the search and seizure conducted by the Sub Inspector of Police is without jurisdiction. In fact Clause 11 of the said order is *pari materia* word by word insofar as Clause 9 of the Kerosene conditions Restriction On Use and Fixation of Selling Price Order, 1993 is concerned. The proceedings u/s 7 of the Essential Commodities Act were, therefore, quashed by the Punjab and Harayana High Court.

28. In *Mohan Choudhary v. State of Bihar and Ors.*, 2000 Cri.L.J. 1891 the Patna High Court was dealing with the question of taking cognizance of the offences under the scheduled castes and scheduled tribes (Prevention of Atrocities Act) and it was held that the investigation by the Deputy Superintendent of Police not legally appointed by the State Government by issuing notification would be illegal and consequently cognizance taken.

29. In *M. Kathiresan v. State*, 2000 (1) CCR 154 the Madras High Court was dealing with the investigation conducted by the Inspector of Police and not by the authorised officer Dy. S .P. under the Scheduled Caste and Scheduled Tribes

(Prevention of Atrocities) Act, 1989 and it was held that the investigation done by the Inspector of Police relating to case u/s 3 of the Act was bad in law and the prosecution was liable to be quashed.

30. In *Roy V.D. v. State of Kerla*, 2001 Criminal 119 the Apex Court while dealing with the Narcotic Drugs and Psychotropic Substances Act, found that the recovery of Ganja by the Excise Inspector was not authorised under the Act. It has been laid down by the Apex Court that any collection of material, detention or arrest of a person or search of building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer u/s 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such material by the prosecution vitiates the trial.

31. Learned Assistant Public Prosecutor has placed reliance on the Judgment of the Apex Court *State of Orissa v. S. Mohanty*, AIR 2000 SC 3494 . In this case search admittedly was carried out by the empowered officer. Though the strict compliance of the provisions of the Criminal Procedure Code had not been done and it is in this circumstance the Apex Court held that the search would not be illegal on that ground.

32. Learned Assistant Public Prosecutor had also placed reliance on the Judgment of the Apex Court in *State of Punjab v. Baldev Singh*, 1999 Cr.L.J. 3672. In this case the Constitution Bench of the Apex Court was dealing with conflict of opinion in the Judgment of the Apex Court on the question of effect of search conducted in violation of Section 50 of the said Act. The conclusions recorded in paragraph 55 of the said Judgment are as below :

"(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption u/s 54 of the Act can only be raised after prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption u/s 54 of the Act.

(9) That the Judgment in *Pooran Mal Vs. The Director of Inspection (Investigation)*, New Delhi and Others, cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information conducted in violation of the provisions of Section 50 of the Act can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search.

(10) That the Judgment in *Ali Mustaffa Abdul Rahman Moosa Vs. State of Kerala*,

correctly interprets and distinguishes the Judgment in Pooran Mal Vs. The Director of Inspection (Investigation), New Delhi and Others, and the broad observations made in State of Himachal Pradesh Vs. Shri Pirthi Chand and another, and Jasbair Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

33. In these sets of facts, I am of the opinion that in case of arrest by the empowered officer the applicant shall be enlarged on anticipatory bail, upon execution of personal bond of Rs. 25,000/- (Rupees Twenty Five Thousand Only), with one surety in the like amount on following conditions :

(i) The applicant shall appear when called upon by the empowered officer on five different occasions between 10 a.m. to 1 p.m. which may be consecutive or spread over as directed by the empowered officer for the purpose of further interrogation and investigation, if necessary.

(ii) That the applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer.

(iii) That the applicant shall not leave Maharashtra without obtaining prior permission of the Sessions Court having jurisdiction and in case the said applicant has to go from Nagpur to elsewhere, he shall leave an advance information about it, as to the place and duration where he would be staying, with the Sessions Court having jurisdiction and also the investigating officer.

34. The anticipatory bail is granted for a period of two weeks from today and the applicant shall apply for regular bail before the Court having jurisdiction at the earliest but not later than a week from today and in case such application is filed, the trial Court shall decide the same on merits, without being influenced by the observations made in this order. Hamdast allowed. Authenticated copy be given to both the sides.