
(1977) 04 BOM CK 0012

In the Bombay High Court

Case No : Criminal Application No. 351 of 1977

Madhav Keshav Mirashi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-04-1977

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3, 6, 6A, 6B, 6C

Citation : (1978) 80 BOMLR 321 : (1978) MhLj 219

Hon'ble Judges : Deshmukh, J;Aggarwal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Deshmukh, J.—This application raises a question of some interest under the provisions of the Essential Commodities Act, 1955 (hereinafter referred to as "the Act") read with the Maharashtra Scheduled Food Grains (Trade, Monopoly) Order 1971 (hereinafter called "the Order").

2. The facts are not in dispute. The petitioner is a proprietor of an eating house from Sangli named Avad Nivad Bhojnalaya. He has been doing this business of a boarding house for the last about ten years. From the affidavits filed by him, the petitioner seems to be doing a fairly prosperous business. He has about four hundred boarders taking food every day and the requirement of wheat for the purpose of chapattis is alleged to be about eighteen to twenty bags per month.

3. Under the said Order it was incumbent for every person in the State whether he is a private individual, businessman or a trader to file a return in relation to wheat as soon as that individual came in possession of more than ten quintals of wheat. The return was to be filed within twenty-four hours of the possession of more than ten quintals. Additional returns were to be filed on the first of the next month in relation to the possession of the stock of wheat in the previous month, if it exceeded by ten quintals. Such an order was in force in relation to wheat from March 1973 to November 1974. In fact the order appears to have been

renewed every six months and is discontinued or not renewed after November 30, 1974.

4. During the time this Order was in force, the petitioner did file returns when it became necessary under the Order in the year 1973. On June 10, 1974, the petitioner purchased seventy-two bags of wheat and stored them in the godown of Central Warehouse Corporation at Sangli. He also insured the goods with the Life Insurance Corporation of India. However, neither on the next day of the acquisition of this wheat nor on the subsequent date he filed any return as required by Clause 3 of the Order.

5. Sometime in August 1974 the manager of the petitioner's business one Mr. Naik approached the Authorities of the Warehousing Corporation to release a part of the wheat. He was told that the wheat could not be released until a specific sanction has been obtained from the District Supply Officer. Having come to know for the first time that the wheat has been already subjected to some Orders of the District Supply Officer, the petitioner applied on August 26, 1974, for releasing his stock. He got no reply till September 21, 1972. Hence he filed another application on that day to the District Supply Officer for the release of stocks. On the same day he was called by that officer and his statement was recorded. Thereafter a show cause notice was issued u/s 6A of the Act by the Collector dated September 27, 1974. This was obviously for the breach of Clause 3 of the Order. However, that was a notice addressed to the manager and not to the petitioner, who was the proprietor of the boarding house.

6. The manager filed a reply in which he pleaded the illness of his son besides the forgetfulness on his part to file the return. No hearing was held by the Collector u/s 6B of the Act, but an order confiscating the entire stock was passed on October 10, 1974. An appeal was filed against that order, being Criminal Appeal No. 157 of 1974, in the Court of the Sessions Judge at Sangli. That appeal was heard by the Additional Sessions Judge, who found that the principles of natural justice were not observed and a hearing was not given to the petitioner as contemplated by Section 6B of the Act. Hence the order of confiscation was set aside and the proceeding was remanded to the Collector for further disposal according to law.

7. For the first time after obtaining the copy of the Additional Sessions Judge's judgment, the petitioner filed a special return under Clause 4 of the Order and requested the Collector to issue instructions in that behalf. He again applied in the month of April 1975 for releasing the stocks on the ground that the grain was becoming old and therefore deteriorating. Thereafter the Collector issued a second show cause notice dated May 19, 1975 now properly addressed to the petitioner.

8. The petitioner showed cause in writing and the statements of the petitioner, his manager and his daughter-in-law were recorded. The Collector was not satisfied with the explanation and directed confiscation of all the stocks of

seventy-two bags. Criminal Appeal No. 132 of 1975 against that order came to be dismissed by the learned Sessions Judge on March 22, 1976. Being aggrieved this application under Article 226 of the Constitution has been filed.

9. The above facts are not in dispute. Though the petitioner purchased more than ten bags of wheat and was in possession thereof he failed to file a return as required by Clause 3 of the Order. The reasons for not filing the return, viz. the illness of the petitioner and the illness of the manager's son etc. are not being pressed in service before us. What is stated is that they may not be much and do not afford a very convincing explanation. It is, therefore, obvious that no return has been filed as required by law.

10. What is, however, indicated is that the confiscation u/s 6 of the Act can be brought about only if it is held that the petitioner had a guilty mind in not furnishing the returns. In other words, the circumstances in which the petitioner could be convicted u/s 7 of the Act, if a prosecution were to be filed against him, must also be shown to exist before an order of confiscation could be made. This means that mens rea is an important element and it must be shown to exist before the property of the petitioner could be confiscated.

11. The Collector undoubtedly is aware that mens rea has to exist. He has considered that part of the argument. The grievance of the petitioner is that the approach of the Collector in the circumstances of the present case is clearly erroneous. The provisions of Section 6C of the Act provide an appeal against the order of the Collector to the judicial authority, which is the Sessions Judge in this case. Since it is the appellate authority with all the powers to pass an order as it thinks fit confirming, modifying or annulling the order appealed against it was necessary for the appellate authority to apply its mind to the explanation given by the petitioner and the circumstances of the case with a view to determine whether mens rea is really proved in this case. That has not been done by the appellate authority in this case. The judgment of the appellate authority shows that it finds itself unable to interfere with the order passed by the Collector as the order of the Collector is a discretionary one. The appellate authority's approach is to treat the matter almost like a revision application, where the powers of interference are very limited. However, an authority being created as a full fledged appellate authority, under the provisions of Section 6C of the Act, it had all the powers of the original authority that passed the order. In other words the facts and circumstances must be examined by the appellate authority and it must come to its own conclusion about the existence or non-existence of mens rea. That not having been done, the order suffers from serious infirmity and should be rectified.

12. Before we go to the merits of the matter, it must be pointed out that the learned public prosecutor urged that our jurisdiction under Article 226 of the Constitution of India is limited and we should not interfere with the findings of fact. Even assuming that to be so, we find that the petitioner is being deprived of valuable property and if that deprivation is brought about by not properly

following the procedure of law, it would be obviously open to this Court to lay down the law in the matter and quash the order, if it is found that there has been no proper application of mind to the facts and circumstances of the case. Further part of our order will show that the Collector has failed to consider the explanation of the petitioner from the proper point of view and the appellate authority has practically abdicated its functions as an appellate Court. In the circumstances, it is necessary for us to indicate how this matter must be dealt with by respective authorities and what reasonable interferences are permissible in the facts and circumstances of this case. Since that has not been done by the authorities below, it would be necessary for us to lay down the correct law and to draw proper conclusions from the facts appearing on the record.

13. The history of the Essential Commodities Act, 1955 shows that originally the only penal section was Section 7. Section 7 itself came to be modified from time to time and the present form of that section is due to the last amendment by Act 30 of 1974. It came into force on June 22, 1974. The breach of the Order has been committed in this case first on June 11, 1974 and thereafter on the first of each month till November 30, 1974. The Order itself being not renewed it was not necessary to file any return after November 30, 1974.

14. In the year 1966 by the amending Act 25 of 1966 Sections 6A to 6D have been introduced. They represent a separate scheme for the purpose of adjudication and confiscation by the Collector. When a breach is caused of any provisions of the Act or Order issued u/s 3 of the Act in relation to any essential commodity, a seizure can be effected by the appropriate officers. The commodity is then required to be produced forthwith without delay before the Collector who has been given the right to confiscate the entire commodity or a part thereof, if a contravention of the Order is established. The contravention of the Order is also the basis of a prosecution under Sections 7 and 8 of the Act. The opening clause of Sub-section (1) of Section 7 says that if any person "contravenes" any order made u/s 3 he is liable to be punished as indicated by the provisions of Section 7 which follow. In the same way when any essential commodity is produced before a Collector and a "contravention" of any of the Orders is proved, the Collector has been vested with power to confiscate all or any part of the commodity after following the procedure laid down in Section 6B. Against the order of the Collector an appeal has been provided u/s 6C to the appellate authority to be appointed by the State Government. In this State it is the Sessions Judge who has been appointed as the judicial authority.

15. It is, therefore, clear whether a person is to be prosecuted for the imposition of any of the penalties u/s 7 or any proceedings are to be taken for the confiscation of the goods u/s 6A before the Collector, requirement to be proved is that there has been a contravention of any Order issued under the Act. In other words, the same set of circumstances must be established before an order of conviction is passed or confiscation of property is directed by the Collector u/s 6A. This being so, it would appear to us that mens rea would be a necessary

element to be proved before confiscation could be ordered. There is no doubt that an offence u/s 7 involves mens rea. That has been held by the Supreme Court in *Nathulal Vs. State of Madhya Pradesh*, Their Lordships pointed out that ordinarily mens rea is an essential ingredient of a criminal offence. Unless that element is expressly eliminated by the statute or it appears to have been eliminated by necessary implication it would be a sound rule of construction to treat mens rea as an essential ingredient of a criminal offence. According to their Lordships, this rule has been accepted in England as well as in India and is a sound rule which should be followed. They also point out whether the element of guilty mind is excluded from the ingredients of an offence the mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is not by itself decisive. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that mens rea may, by necessary implication, be excluded from a statute. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof.

16. If this is the law, which is already laid down, so far as Section 7 is concerned, and if the provisions of Section 6A are in pari materia with the provisions of Section 7, we see no reason why the element of mens rea should not form part of the breach of the rules alleged u/s 6A. The act which constitutes the basis of prosecution as well as the basis of an Order an adjudication and confiscation being the same, it cannot have a different content u/s 6A and Section 7 of the same Act. This view has already been taken by a learned single Judge of the Allahabad High Court in *Kishori Lal Bihani Vs. The Addl. Collector and District Magistrate, Kanpur and Others*, and *Babu Ram Jagannath Vs. The District Magistrate, Meerut and Others*, . We are in respectful agreement with the reasoning of the learned Judge. It is, therefore, necessary to examine the "explanation given by the accused in this case against the facts and circumstances present on the record with a view to find out the real intention and mind of the accused.

17. The Collector has been addressed in that behalf and he did consider the arguments of the petitioner. Unfortunately the learned Sessions Judge who heard the appeal did not show awareness of the fact that he was an appellate authority who had to consider all the circumstances of the case and examine not only the findings given by the Collector but also to determine whether the discretionary order regarding confiscation has been properly passed by the Collector. If the provisions of Section 6A vest the Collector with a certain discretion to confiscate or not to confiscate the essential commodity produced before him, the appellate authority undoubtedly has the power and the duty to examine whether the discretion has been properly exercised by the Collector. An appellate authority has a right to substitute its own decision regarding discretionary powers in place of the exercise thereof by the original authority.

18. When we look at the facts of the present case from that point of view, we

find that the main approach has been missed altogether. Undoubtedly the petitioner is a businessman who knew that he had to file a return. He has done so in the past in the year 1973. In the year 1974 he has not done so. The explanation based upon his own illness and the illness of his manager's son does not deserve much merit. It is not even pressed before us. We have to proceed on the footing that an error has been committed by not filing the return. What could be the intention behind this? It is this intention or the mens rea that has to be now investigated.

19. What has been pleaded by the petitioner in that behalf is that he has a popular eating house which has about four hundred persons as boarders on its roll for daily meals. The consumption of wheat at his shop is about eighteen to twenty bags per month. The establishment has a quota of Ata from Government to the extent of eight bags a month. However, he has pleaded that in the year 1973 when wheat was available in spite of some shortage and the provisions of the Order being in force, he never used the quota from the Ata allotted to him. The petitioner has always bought wheat in the open market. What he then quotes is that in the year 1974 when the Collectors of the area continued to include wheat as an essential commodity upto November 30, 1974 he found that it was worth while storing some grain as a stand-by stock for four months at least. That was with a view to get continuous supply of wheat for his own eating house without affecting the quality. The lean months are normally between June to November. The moment there is good prospect of the new crop of wheat, all old stored wheat comes out and the supply position becomes fairly easy. Within a couple of months thereafter a new crop is harvested and marketed. This being the general picture of the year, the petitioner wanted to store at least four months' stock so that he would have continuous supply as also there may not be change in the quality of food stuff he was serving to his customers.

20. The competition in the business like this could depend upon two factors. One who is able to supply at a cheaper rate may attract the customers. It may also be that the rates may be a little higher, but the quality is better. In that case the choosy customers might prefer the second shop to the first. There is nothing on the record to disprove the facts alleged by the petitioner that his monthly requirement is about eighteen to twenty bags of wheat. Even if the petitioner were to use the Ata quota allotted to him, it would only bring him eight bags and not more. The shortage of nearly twelve bags has to be covered by purchases in the open market. The petitioner made this stock not only by open purchase when there was no prohibition on purchase of wheat in the open market but stored the wheat in the godown of a Corporation which is Government owned Corporation. He also insured the goods. In other words, there is no concealment of the commodity purchased in the open market and whatever the stock the petitioner held could always be traced on the basis of documentary evidence.

21. What is the object of passing the Essential Commodities Act as also the object of issuing Orders under the same Act from time to time. The list of

essential commodities is not a fixed one or a stable list. The items change from time to time. The Government keeps a watch over the market as also the production by the agriculturists and decides which commodity should be included in the list of the essential commodities. Wheat was so included as an essential commodity for a period from March 1973 to June 30, 1974. The compulsion to file returns by every one who is in possession of more than ten quintals of the essential commodity is obviously with a view to know the total stocks available in the State. In the case of emergency the State could always lay its hands from its own record over the stocks that are declared by people and requisition sufficient portions for equitable distribution. To act in such a manner as to contravene this provision with a view to contribute to the shortage of commodity and to dispose of essential commodity at higher prices with a view to profiteering is sought to be checked by the provisions of the Orders that are issued from time to time under the Act.

22. What the petitioner pleaded before the Collector and what was unfortunately not understood in the proper spirit is that he was not a trader in wheat as a commodity. He has built up some stock for the use of his own business of eating house. The wheat was not meant for sale as wheat. It was to be converted into Atta and used in the business of the eating house for the preparation of chapattis. In view of the shortage in the market, he kept a ready stock to tide over lean months so that there should be proper continuous supply and the business should prosper as before. This explanation of the petitioner has not been considered in the light it ought to have been, in the circumstances of the case. If the allegation of the petitioner regarding the number of customers on the daily roll could not be doubted, it could not be said that a stock of seventy-two bags which would hardly cover four months requirement was a huge stock. What is a big stock or a huge stock is a comparative matter. If it were shown that the petitioner's requirement were hardly two to three bags a month and still he buys seventy-two bags in the market when available, it could be said as to why he purchases commodity even beyond his entire year's requirement. However, if an eating house owner demonstrates that the purchases were just to supplement what would be available in the market and to tide over the entire lean month's supply, it would be difficult to reject that explanation out of hand.

23. If this explanation appears to be reasonable in the circumstances, the petitioner has shown that his intention was not to do what really is sought to be prohibited by the provisions of the Act and the Order issued thereunder. In other words, he did not intend to commit a crime by making disproportionate profits by selling the essential commodity as an essential commodity. His only anxiety was to smoothly continue his business of eating house. In other words, the intention was not criminal but the behaviour merely demonstrated an anxiety to have an uninterrupted supply of raw material for his usual business of his eating house. It is from, that point of view that an argument was sought to be addressed to the Collector that a person who is merely a dealer or a trader occupies a different position than an owner of an eating house like the petitioner.

24. The intention of a dealer in grains is avowedly to sell the grain as such and if he conceals the stocks which are obviously meant for sale, his intentions are not quite clear. That analogy will not be applicable to the businessman of the type of the petitioner. This explanation has not been considered in the light in which it ought to have been considered by the learned Collector. We have already pointed out that the learned appellate authority has not applied its mind to the facts and circumstances of the case in the manner in which the appellate authority ought to do. In the circumstances it has become necessary for us to point out how the case of the present type is to be examined before a conclusion is drawn that the *metis rea* has already been established and the petitioner has not been able to supply any explanation or material which itself leads to that position.

25. We are thus satisfied that in the circumstances of this case, the important element of *mens rea* is missing and the petitioner has not made any stock with any of the intentions to contravene the provisions of the Act, which is made an offence punishable under the provisions of the Act or the Order issued thereunder.

26. In the view we take, it is not necessary to consider whether the discretion has been properly exercised. However, we have no doubt that the intention of the Legislature is not that the authorities under the Act and the Order should act mechanically. We are referring to this part of the case because at one stage the learned Sessions Judge has observed that the offence is purely technical. What that means in the circumstances of this case is difficult to understand. If it means that a mere statutory duty has not been properly performed but there has been no substantial damage from the point of view from which the Orders have been issued, the quantum of punishment obviously becomes relevant. Even there the discretion has not been properly used. If the offence was technical and the attached goods represent the four months stock of the material of the total business of the petitioner, we wonder whether forfeiting the entire stock would be a proper order in the facts and circumstances of this case. However, it is not necessary to dilate further in view of our conclusion earlier.

27. We also desire to point out how the appellate authority ought to conduct a matter of this type. After June 1974 Section 7 of the Act has been substantially amended. In all the cases of breach of Orders, there may not necessarily be a prosecution launched by the State. If a prosecution is launched it can result either in conviction or acquittal. If an order of acquittal is passed, it would be necessary to order that the attached goods be returned to the accused and where they do not exist in the form in which they were attached, how the order of the Court should be carried out has been incorporated in Sub-section (2) of Section 6C of the Act. However, before the present amendment by Act 30 of 1974 the criminal Court had a discretion to release or return the goods in spite of the fact that the accused is convicted. That discretion is now taken away. The moment there is conviction the criminal Court is obliged to pass an order of confiscation. However, where there is no prosecution and only proceedings u/s 6A are taken before the Collector, the discretion is still retained with the Collector

to pass an appropriate order of confiscation with regard to the whole or part of the goods seized. That being so, it is the duty of the appellate Court to examine whether the discretion has been properly exercised by the Collector.

28. Under Sub-section (7) of Section 6C, the appellate authority has been vested with the power to confirm, modify or annul the order passed by the Collector. Under Sub-section (2) thereof, the order of the appellate authority supersedes that of the Collector and is substituted in its place. That being so it is the duty of the appellate authority to consider the entire case on merits and thereafter also examine whether the discretionary part of the order has been properly passed by the Collector. The scheme of the provisions of Section 6A to 6D is that normally the proceedings undertaken by the authority seizing the essential commodity should end with the Sessions Judge who should bring to bear upon the proceedings a trained judicial mind after exercising all the powers vested in it under Sub-section (2) of Section 6C. Since that does not appear to have been done in this case, we are pointing out in our jurisdiction under Article 226 of the Constitution as to what is the correct law on the point and how that law ought to be implemented.

29. For the conclusions already drawn above, the petition succeeds. The order of confiscation passed by the Collector and confirmed by the Sessions Judge is quashed and set aside. The stocks of seventy-two bags of wheat be returned to the petitioner. In case, however, the stocks do not exist in spices and have been sold by the Collector, the sale proceeds thereof will be handed over to the petitioner.

30. Rule made absolute.