

Baij Nath And Anr. vs State on 8 November, 1955

Equivalent citations: AIR1956ALL234, 1956CRILJ449, AIR 1956 ALLAHABAD 234, 1956 ALL. L. J. 475

ORDER

Mulla, J.

1. This is a criminal reference made by the learned Sessions Judge, Rae Bareli, recommending that the conviction of the applicants Baijnath and Mohammad under Sections 12, 13 and 14 of the U. P. Opium Smoking Act (U. P. Act No. III of 1934) be set aside.

2. It appears that on the 3-7-1954, at about 5 P. M. Sri Gupta, the second Officer of police station Nasirabad, District Rae Bareli, was passing in front of the house of one Wahab, a gold, smith, in the town of Jais, He saw the two applicants smoking opium in a room of Wahab's house by the road side. He thereupon stopped three passers-by and in their presence recovered smoking pipes from the possession of both the applicants. He also recovered opium -weighing about half an anna from the possession of Mohammad. After making a memorandum of this recovery, he filed a case against the two applicants.

3. The learned Sessions Judge came to the conclusion that in view of Section 19-A, U. P. Opium, Smoking Act, as amended by U. P. Act 25 of 1953, Sri Gupta was not empowered to conduct this search and, therefore, this search was illegal. He also held that as there was no report of the Collector or any other officer of the Excise Department in this case, the Magistrate could not take cognizance of the offence in view of Section 25, U. P. Opium Smoking Act.

Along with this reference an explanation has also been submitted by the Magistrate who convicted the applicants. The Magistrate justifies his order of conviction and refers to certain notifications issued by the State Government by which all police officers irrespective of their ranks were made Excise Officers under Section 10, Sub-section (2) (e) of the U. P. Excise Act.

It is, therefore, contended by him that the second officer being an Excise Officer is also empowered to conduct a search and to prosecute the offenders. He also relied upon Section 2, Sub-section (7) of the U. P. Opium Smoking Act in which an officer of the Excise Department is defined. In this definition it is mentioned that an officer of the Excise Department includes an officer or person empowered under Section 10 (2), (e) of the U. P. Excise Act.

4. The first question to be determined is the case is whether a second officer who has been made an Excise Officer under Section 10 (2) (e) of the Excise Act can conduct a search under the U. P. Opium Smoking Act. The power of search is given under Section 53 of the U. P. Excise Act. Section 53 of the

Excise Act runs as follows:

"(1) Whether a Collector or an officer of the Excise Department not below such rank as the Local Government may prescribe or a police officer not below the rank of an officer in charge of a police Station has reason to believe that an offence punishable under Section 60, Section 61, Section 62, Section 63 or Section 65 has been, is being or is likely to be committed in any place, and that a search warrant, cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence, he may at any time, by day or night, enter and search such place; Provided that any officer other than a Collector taking action under this subsection shall before entering such place record the grounds of his belief as aforesaid.

(2) The Collector or other officer as aforesaid may seize anything found in such place which he has reason to believe to be liable to confiscation under this Act, and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason, to believe to be guilty of such offence as aforesaid." -

similar section is enacted in the U. P. Opium smoking Act and the amended Section 19-A which empowers the officers of the Excise Department or the police officers to conduct searches runs as follows:

"Section 19-A:--Whenever the Collector or any officer of the Excise Department authorised in that behalf by the State Government, or a police officer not below the rank of an officer In charge of ,a police station has reasonable) grounds for believing that an offence punishable under this Act has been or is being committed in any place and anything necessary for purposes of investigation into the offence may be found in any place within the limits of his territorial jurisdiction and that such a thing cannot, in his opinion, be otherwise obtained with-out undue delay, he may 'after recording in writing the grounds of his belief search or cause search to be made of any such place."

Reading the two sections together it is clear that the power of conducting searches is conferred on the Collectors, Officers of the Excise Department who are authorised by the State Government and police officers not below the rank of an officer in charge of a police station.

5. The State Government by its notification, dated 13-7-1910, together with amending notifications dated 11-10-1913, 6-6-1917 and 8-9-1926, conferred the power of search on all police officers irrespective of their rank and made them Excise Officers. By its very first notification dated 13-7-1910 the Government authorised among others all police officers including the Provincial Chaukidari force, town village and road Chaukidars to perform the acts and duties mentioned in Section 50 of the Excise Act.

This notification was issued by virtue of the powers conferred upon the Government by Section 10 of the Excise Act. It would thus appear that under the Excise Act even a Chaukidar could arrest a person under the provisions of Section 50 of the U. P. Excise Act and such an arrest would be a valid arrest. A police officer who is below the rank of an officer in charge of a police station does not make these searches and arrests as a police officer, but as an Excise Officer who has been given these powers by these notifications. Ostensibly the language of Section 53, U. P. Excise Act and Section 19-A of the U. P. Opium Smoking Act seems to indicate that a police officer below the rank of an officer in charge of a police station could not conduct these searches, but on a correct interpretation no such inference can be drawn.

All that Section 53, of the U. P. Excise Act and Section 19-A of the U. P. Opium Smoking Act connote is that a police officer below the rank of an officer in charge of a police station cannot conduct such searches, but as observed by me above, when such a search is made by a police officer lower in rank than an officer in charge of a police station, he is not making these searches in his capacity as a police officer but in his capacity as an Excise Officer. The words of Section 10(2) (e), of the U. P. Excise Act are as follows:

"The Local Government may by notification applicable to the whole of the United Provinces or to any district or local area comprised therein

(e) order that all or any of the powers and duties assigned to an officer of the excise department under Clause (d) of this sub-section shall, subject to the provisions of this Act, be exercised and performed by any officer other than an officer of the excise department or by any person,"

Obviously, under the provisions enumerated above, any person can be made an Excise Officer by the Provincial Government. It is therefore, not possible to hold that although any person can be made an Excise Officer, a police officer below the rank of an officer in charge of a police station cannot be made an Excise Officer.

Beading all these sections together, it is clear that certain authorities were specifically mentioned in Section 53 of the U. P. Excise Act and Section 19-A, U. P. Opium Smoking Act, while power was given to the Provincial Government to add to the number of these authorities, if it was considered desirable. The following sentence used in both these sections, namely, a police officer not below the rank of an officer in charge of a police station"

did not restrict the powers of the Local Government to empower such a police officer.

It only indicated that unless such powers are conferred by notification on such an officer, he is not entitled to conduct a search. I am, therefore, of the opinion that by virtue of these notifications, a second officer attached to a police station is also empowered to conduct a search under Section 53, U. P. Excise Act.

6. The question arises whether a second officer can also conduct a search under Section 19-A, U. P. Opium Smoking Act. If Section 19-A, U. P. Opium Smoking Act, alone was to be interpreted the answer would have been in the affirmative. The Provincial Government, however, framed a new rule on 10-5-1954. It is Rule 120J of the Rules relating to Opium given in Vol. III, Part II of the Excise Manual. It runs as follows:

"All officers of the Excise Department not below the rank of an Excise Inspector may exercise all the powers mentioned in Section 19-A of the U. P. Opium Smoking Act, 1934."

7. It would thus appear that only those Excise Officers who are not below the rank of an Excise Inspector can act under Section 19-A. The notifications mentioned above do not contain anything to show that these persons who have been made Excise Officers are also given a rank not below that of an Excise Inspector. A chowkidar cannot be presumed to be an Excise Officer not below the rank of an Excise Inspector. It is not for a court to determine who amongst the group of persons who have been made Excise Officers by these notifications are below the rank of an Excise Inspector and who are equal or superior to his rank.

It is for the State alone to clarify this point. On the law as it exists at the moment, it is not passible to hold that a second officer of a police station is equal to the rank of an Excise Inspector, unless their ranks are determined the Excise Officers created by these notifications cannot act under Section 19-A. Whatever powers were conferred upon them by the earlier notifications they stand annulled by the new Rule 120J.

It is certainly ridiculous to hold that while a second officer of a police station can conduct a search under Section 53, U. P. Excise Act, he cannot do so under Section 19-A, U. P. Opium Smoking Act read with rule 120J. But the anomalous situation is created by the Provincial Government itself. Rule 120J overrides the earlier notifications and, therefore, no authority to conduct a search under Section 19-A, U. P. Opium Smoking Act is now validly conferred on those persons who were made Excise Officers by these notifications.

There is another circumstance which shows that the search was not properly conducted. Both under Section 63, U. P. Excise Act, and Section 19-A of the U. P. Opium Smoking Act it has been clearly mentioned that such a search can only be conducted after the grounds for conducting the search are recorded in writing. There is no indication that any such record was made in this case. Both the circumstances mentioned above are, however, procedural irregularities and they will not vitiate the search, it will only make a court extremely cautious and critical of the evidence that is placed before it.

If the court after scrutinizing the evidence in such a manner still finds that the fact of recovery is proved beyond doubt it will act upon it and will not ignore the evidence of recovery. I, therefore, find that the order of the trial court cannot be set aside on the ground that the search was illegal and it vitiated the entire proceedings.

8. The reference made by the learned Sessions Judge must, however, be accepted on the second ground. In my opinion under the provisions of Section 25, U. P. Opium Smoking Act, the trial court was barred from taking cognizance of this case on the report filed by Sri Gupta. Section 25, U. P. Opium Smoking Act, runs as follows:

"No Magistrate shall take cognizance of an offence punishable under this Act except on the Complaint or report of the Collector or an officer of the Excise Department not below the rank of an Excise Inspector."

It is, therefore, clear that only two types of authorities are empowered to file a complaint. Under the U. P. Opium Smoking Act a complaint can either be filed by a Collector or by an Officer of the Excise Department not below the rank of an Excise Inspector,

9. The counsel for the State has not been able to place before me any notification of the Government by which those persons or officers who have been made Excise Officers under Section 10 (2) (e) of the U. P. Excise Act are further declared to be such officers of the Excise Department who are not below the rank of the Excise Inspector. I have already mentioned above that even, Chaukidars have been made Excise Officers.

It is, therefore, clear that several persona have been made Excise Officers under Section 10(2) (e), U. P. Excise Act, who obviously are below the rank of an Excise Inspector. The Governments has issued- no notification to clarify winch of these persons on whom these additional powers are conferred are below the rank of an Excise Inspector or equal to his rank. I cannot make any choice by inference.

It seems to me that special powers have been conferred on various persons and officers for the purposes of search and arrest, but there is no indication that any power has been conferred on any one to lodge a complaint. On the other hand, there are indications in the words of the notifications themselves that these, powers are conferred for a restricted purpose. In other words all the powers that are enjoyed by an Excise Officer of the rank of an Excise Inspector or above are not conferred upon those persons who have been made Excise Officers under Section 10 (2) (e), U. P. Excise Act.

Any police officer on whom the powers of an Excise Officer are conferred by the Provincial Government, therefore, does not become an officer for all purposes of the U. P. Excise Act. I. am in agreement with the view expressed by Asthana J. in -- 'Ganga Din v. State', AIR 1955 NUC (All) 3600 (A) Asthana J. observed:

"A police officer, or any other person on whom only some of the powers of an excise officer are conferred by the Provincial Government, does not become an excise officer for all purposes of the Excise Act but he is an excise officer for the limited purpose for which the power has been conferred on him and therefore he is not competent to file a complaint in respect of an offence under Section 60, Excise Act, unless that power has been expressly conferred on him under some notification of the Provincial Government."

I have not had the advantage of seeing the reasons given by the learned Judge for coming to this conclusion, but in my opinion there are good reasons why the excise officers made under Section 10(2)(e), U. P. Excise Act cannot be held to have power to file complaints. Firstly, the powers conferred under Section 10 (2) (e) of the U. P. Excise Act are additional powers. They are not those powers which the office carries with it. When a police officer is given these powers, these are extra-ordinary powers.

It was open to the Provincial Government to specifically state in the notifications that they could also file complaints. The very fact that it was not stated shows that the Provincial Government did not intend to confer this power upon them. The words of a notification, in my opinion, should be construed strictly and not liberally. No power can be exercised by a person, unless it is, vested in him and where the authority who could vest such powers has not chosen to do so, these powers cannot be exercised.

10. In -- 'Emperor v. Chatter Singh', AIR 1924 All 267 (B) a learned Judge observed:

"It was, therefore, unnecessary, and would have complicated matters, for the Local Government to issue a further notification authorising persons on whom it had already conferred powers for the purposes of the Act to do something which the Act says any "Excise Officer" may do,"

That is to say it was unnecessary to issue a separate notification authorizing him to submit a report or complaint to the Magistrate. With respect to the learned Judge who gave this decision I am unable to agree with him. The words of Section 10 (2) (e), U. P. Excise Act, under which these notifications were issued clearly show that "all or any of the powers and duties assigned to an officer of the Excise, Department"

may be conferred.

In other words, the empowering section itself made provision for restricted powers being conferred on those persons who were made Excise Officers, under the notifications. In my opinion it is not, therefore, open to contend that the Excise Officers created by these notifications could exercise all the powers of an excise officer even though they were not given to them by these notifications.

11. In another reported case of our High Court in -- 'Azim Ullah v. State', AIR 1950 All 610 (C) another learned Judge observed;

"The powers that can be delegated by the Provincial Government are expressly mentioned in Section 10, and the power of making a complaint or report of an offence punishable under the Excise Act is not such a power. So, such a power could not possibly be conferred by the Provincial Government upon any one. And if it could not be conferred, it cannot be argued that a, station officer in charge of a police station, though he is an Excise Officer for certain purposes, is not an excise officer for the

purposes of Section 70 because the power mentioned in that section has not been conferred upon him."

12. The argument is that since a station officer can file a complaint against an offender under the Excise Act although his name is not specifically mentioned under Section 70, U. P. Excise Act, it should therefore, follow that even those persons who have not been specifically vested with this power are authorised to file a complaint.

With due respect to the learned Judge who gave this decision, I am unable to accept this view. On a correct interpretation of Section 70 of the U. P. Excise Act even a station officer in charge of a police station is not empowered to file a complaint in an Excise case.

13. I agree with the view expressed in --'State v. Badruddin', AIR 1950 All 436 (D). A learned Judge in this case observed :

"Where a case is reported by the Station Officer and not by the Excise Officer, a Magistrate cannot legally take cognizance of the offence under Section 60."

It seems to me that the reason behind this distinction is very obvious. Powers for search and arrest are conferred on officers other than those of the Excise Department in order to meet emergencies.

An Excise inspector might not be available and a police officer might come to know about the commission of an offence under the Excise Act. As delay might defeat the ends of justice, emergency powers are given to police officers and even to Chaukidars.

In other words an additional force is created to supplement the strength of the Excise Officers to meet emergencies. No question of emergency arises at the time of filing a complaint. If any searches or arrests have been made under the Excise Act, reports can be submitted to the Collector or to the proper Excise Authorities. It is for them to decide whether they would file a) complaint or not.

In the decisions that have been placed before me and to which I have referred, this aspect of the case has not been considered. It is admitted that under the notifications issued by the Provincial Government the power to file a complaint is not specifically mentioned. Merely from the fact that they are made Excise Officers for a limited purpose it would be incorrect to infer that such officers are empowered to exercise all the powers of an Excise Officer.

As observed by me above, the intention of the Provincial Government in conferring these powers upon police officers is to meet emergent situations. It is well known that in several offences it is necessary to obtain a sanction before lodging a complaint. This shows that in some cases restrictions are placed upon the powers of the police to prosecute. Section 25 of the U. P. Opium Smoking Act is also a restriction of the same kind. It restricts the power of the police officers to prosecute the offenders and leaves it to the Collector and to the officers of the Excise Department not below the rank of an Excise Inspector to decide this question.

14. I, therefore, find that the Magistrate was barred from taking cognizance of an offence under Sections 12, 13 and 14, U. P. Opium Smoking Act, because the complaint was not filed either by the Collector or by an officer of the Excise Department not below the rank of an Excise Inspector. I have already mentioned above that there is no notification to indicate that a second officer of a police station is an officer of the Excise Department not below the rank of an Excise Inspector.

15. I, therefore, accept this reference and set aside the order of conviction passed against the applicants. The fine, if paid by them, should be refunded.