

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.7711 of 2012

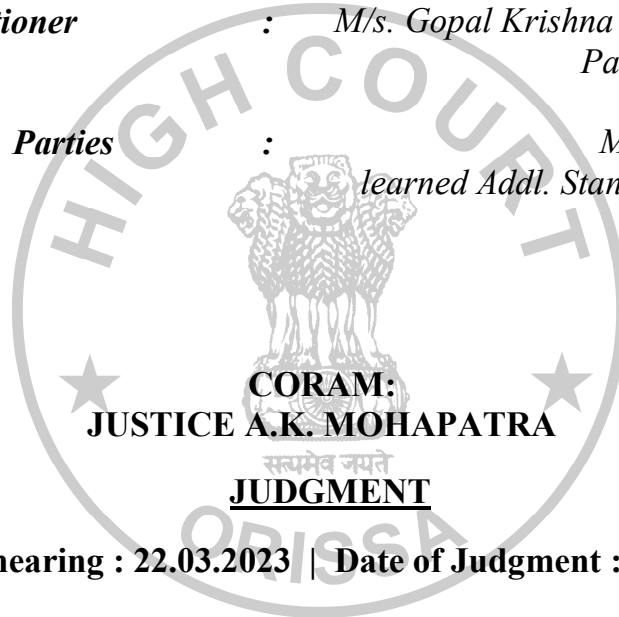
Sarat Kumar Swain *Petitioner*

-versus-

State of Odisha and others *Opposite Parties*

For Petitioner : *M/s. Gopal Krishna Nayak and S. Patra, Advocate*

For Opp. Parties : *Mr. A. Behera, learned Addl. Standing Counsel*



**CORAM:
JUSTICE A.K. MOHAPATRA**

JUDGMENT

Date of hearing : 22.03.2023 | Date of Judgment : 27.04.2023

A.K. Mohapatra, J.

1. The present writ application has been filed by the petitioner calling in question the conduct and the procedure adopted by the Opposite Parties while conducting the seizure of the PDS commodities by the S.I. Gangapur Police Station and the petitioner has further challenged the legality and propriety of the impugned order as well as the jurisdiction of the Collector, Ganjam in initiating the proceeding against the petitioner

under Section 6-A of the Essential Commodities Act on the basis of illegal seizure. The petitioner has further prayed for quashing of notice under Annexure-4 to the writ application.

2. The back ground facts leading to filing of the present writ application is that the petitioner is an honest businessman having very good reputation in the locality and he is in the business of distribution of PDS commodities for last twenty years. The writ application further reveals that the petitioner has an unblemished career as a PDS retailer as he has not been implicated in any case relating to commission of any irregularity in the distribution of PDS commodities in the locality.

3. On 18.09.2011 at about 6.00 P.M., while the petitioner was coming with Kerosene Oil in a truck, the OIC of Gangapur P.S. stopped the said vehicle and seized the truck as well as Kerosene Oil on the ground that the petitioner could not produce proper documents. It has also been mentioned that the petitioner produced the documents in respect of 2000 liters of Kerosene, however, he could not produce documents in respect of another 1000 liters of Kerosene that was being transported. In the writ application, it has been further pleaded that one Bipra Charan Swain has purchased 1000 liters of Kerosene and due to heavy rain and bad weather

and road condition, he was unable to shift such Kerosene Oil and accordingly decided to return the same.

4. Referring to clause-3 of the Control Order, 2008, it has also been stated in the writ application that the petitioner has not violated any guidelines and executive instructions issued by the Government. Furthermore, the petitioner, although, produced proper documents and stated before the OIC Gangapur P.S. that he has procured such Kerosene Oil from M/s. Gurumurthy Oil Company and produced valid papers before the OIC, the OIC of Gangapur P.S. did not take any note of the same. It is also contended that on verification by police, M/s. Gurumurthy Oil Company produced all the relevant documents for perusal. However, without considering the said documents, OIC, Gangapur P.S. was bent upon to seize and accordingly he had seized the Kerosene Oil that was being transported in the truck.

5. Learned counsel for the petitioner further contended before this Court that the petitioner has not violated any of the provisions of the PDS Control Order, 2008. He further submitted that although the petitioner produced valid paper/documents along with money receipt, but the appellate authority without following the guidelines and without giving an opportunity of show cause to the petitioner, seized 3000 liters of

Kerosene Oil belonging to the petitioner. It is also contended that the Collector, Ganjam issued a notice dated 19.10.2011 under Annexure-4 without application of mind. The said notice under Annexure-4 purported to be one under the provisions of the E.C. Act, is stated to be illegal, arbitrary and in furtherance of the mala fide intention of the Opposite Parties. He further contended that on the basis of such illegal report of the OIC, Gangapur P.S., the Collector, Ganjam without verifying the facts and without application of mind initiated an E.C. Case. Learned counsel for the petitioner further contended that although by the direction of the learned Additional Sessions Judge, Bhanjanagar in CRLREV No.34 of 2011, seized vehicle has been released by the police, however, the Collector, went ahead for issuance of notice and continued with the E.C. case against the petitioner.

6. Learned counsel for the petitioner assailed the notice issued by the Collector, Ganjam under Annexure-4 and further continuance of the E.C. case on the principal ground that the OIC Gangapur P.S. has no power and authority under the rules to seize the Kerosene Oil and as such, on the basis of such illegal seizure no confiscation proceeding under Section 6-A of the E.C. Act should have been initiated against the petitioner. Further referring to the notification dated 13.03.2008 issued by the Government of Odisha known as OPDS Control Order, 2008 and

specifically referring to clause-23 thereof, it is argued that the licensing authority or any other officer authorized by the Government have the power of entry and to conduct search and seizure in respect of the essential commodities. Pursuant to the aforesaid provisions, the Food Supplies and Consumer Welfare Department, Government of Odisha came out with a notification dated 29.03.2008 specifying therein the officers, who can exercise such power. Referring to the notification dated 29.03.2008, learned counsel for the petitioner submitted that no police officer has been conferred with such power under clause-23 of the OPDS Control order, 2008 to carry out search and seizure as prescribed therein. Therefore, the notice issued by Collector under Annexure-4 based on the seizure made by OIC Gangapur P.S. is bad in law and without jurisdiction and authority. Accordingly, learned counsel for the petitioner has approached this Court by filing the present writ application with a prayer to quash the notice dated 19.10.2011 under Annexure-4 issued by the Collector, Ganjam.

7. Per contra, the State Opposite Parties have filed the counter affidavit. The counter affidavit filed on behalf of the Opposite Party No.2 i.e. Assistant Civil Supplies Officer, Bhanjanagar has supported the notice issued by the Collector, Ganjam in E.C. Case No.42 of 2011. It has also been pleaded in the counter affidavit that for illegal

transportation and transaction in PDS Kerosene Oil by the petitioner, Gangapur P.S. has seized the Kerosene Oil and accordingly, lodged F.I.R. with an intimation to the licensing authority. Basing on such report, the licensing authority has initiated a proceeding under Section 6-A of the E.C. Act bearing E.C. No.42 of 2011.

8. Learned Additional Standing Counsel appearing on behalf of the State referring to the counter affidavit, further contended that for contravention of PDS Control Order, 2008, the quota of Kerosene Oil Sub-Wholesaler has been suspended and tagged with another distributor for smooth distribution of the PDS Kerosene Oil. Learned Additional Standing Counsel further contended that the petitioner himself admitted the fact that he could not produce the documents in support of transportation of 1000 liters of Kerosene Oil and accordingly, the licensing authority has not committed any illegality in issuing a notice to the petitioner under the provisions of the E.C. Act. He also submitted that the conduct of the collector is neither illegal nor arbitrary and that the Licensing Authority-cum-Collector, Ganjam-Opposite Party No.2 is well within the authority and jurisdiction conferred upon him by the statute.

9. Learned Additional Standing Counsel appearing on behalf of the State in course of his argument, referring to clause-3-A of the Kerosene

(Restriction on use and fixation of ceiling price) Order, 1966, submitted that the Sub-Inspector of Police is empowered for seizure of Kerosene Oil. He also referred to the notice dated 29.03.2008 and submitted that the police officers are empower for seizure of PDS commodities. Learned Additional Standing Counsel appearing on behalf of the State referred to the provisions under Section 102(1) of Cr.P.C. and submitted that any police officer can seize any property which may be alleged or suspected to have been stolen or which were found under the circumstances which creates suspicion of commission of any offence of which the concerned Police Officer is authorized to inspect under Section 156 of the Cr.P.C. Further the offences under the E.C. Act are cognizable in nature as provided under Section 10(A) of the E.C. Act.

10. Learned Additional Standing Counsel appearing on behalf of the State, in course of his argument, referred to the judgment of the Hon'ble Court in ***Tapan Kumar Samanta vrs. Collector-cum-District Magistrate, Balasore and others*** : reported in ***OCR Volume 45 (2010)-414*** and contended before this Court that in the said judgment it has been observed that the police officer not below the rank of Sub-Inspector can make search and seizure and it was further held that for search and seizure by any officer in the rank of Assistant Sub-Inspector is illegal. In such view of the matter, learned Additional Standing Counsel submitted

that the notice issued by the Collector on the basis of the report of Sub-Inspector of Police, is perfectly justified and lawful.

11. Having heard learned counsels appearing for the respective parties, and upon a careful examination of the contentions raised by such counsels and keeping in view the pleadings involved in the present case, this Court finds that the most pertinent question involved in the present writ petition is as to whether the search and seizure conducted by OIC, Gangapur P.S. is illegal valid and proper or not? And further on search and seizure whether the notice issued by the Licensing Authority-cum-Collector under Annexure-4 is legally sustainable? While answering the above noted two questions, this Court is required to look into the provisions of law as well as to determine as to, who is the competent authority, who can carry out the search and seizure as provided in PDS Control Order, 2008 as well as Kerosene Control Order, 1962.

12. Odisha Kerosene Control order, 1962, which has been framed in exercise of power conferred under Section 3 of the E.C. Act, 1955 provides in clause 3 that no person other than Wholesale Dealer and Sub-Wholesale Dealer under parallel marketing system is authorized to carry on the business as a Wholesale Dealer or Sub-Wholesale Dealer within the State of Odisha except in accordance with terms and conditions of a

license granted in that behalf by the Licensing Authority. Clause-12 of the said Control Order provides that the Licensing Authority or any other officer appointed by the State Government in this behalf made with such assistance search, seizure and remove the stock of Kerosene and vehicles, vessels and use Kerosene in contravention of the provisions of the said order or of the condition of the license issued by the authorities.

13. Similarly, the provisions found in clause-3-A of the Kerosene (Restriction on use and fixation of ceiling price) Order, 1966 were modified by the Central Government in exercising of the power conferred Section 3 of the E.C. Act, 1955. Clause-3-A thereof provides for power of entry, search and seizure. Clause-3-A (1), further provides that any police officer not below the rank of Sub-Inspector or any other officer of the Government or above authorized in this behalf by the Central Government or State Government may carry out the search and seizure as provided in the said Control Order in the year 1966. The aforesaid order in the year 1966 was repealed and substituted by Kerosene (Restriction on use and fixation of ceiling price) Order, 1993 issued by the Central Government vide notification dated 02.09.1993. Under clause-9 of the order, 1993 power of entry, search and seizure has been conferred upon an officer of the department of Food Supplies of Government not below the rank of an Inspector authorized by such

Government and notified by the Central Government or any officer authorized notified by the Central Government or any officer not below the rank of as well as officer of a Government company authorized by the Government and notified by the Central Government may with a view to ensure compliance of the provisions of this order exercise the power of entry, search and seizure.

14. The power exercisable under the Control Order, 1962, which has been referred to in the previous paragraph has been repealed by the Odisha Public Distribution System (Control) Order, 2008 notified by the Food Supplies and Consumer Welfare Department, Government of Odisha vide notification dated 13.03.2008. A careful scrutiny of the Control Order, 2008 reveals that clause-23 of the said order provides for power of entry, search and seizure etc. For better appreciation clause-23 of the OPDS Control Order 2008 has been quoted herein below:-

XX XX XX XX

“23. Power of entry, search and seizure etc. - (a) The Licensing Authority or any other officer authorized by Government in this behalf, may, with such assistance, if any, as he thinks fit :

(i) require the owner, occupier or any person in charge of the place, premises, vehicles or vessels in which he has

reason to believe that any contravention of the provisions of this order or of the conditions of any license issued there under has been, is being or is about to be committed, to produce any books, accounts or other documents showing transactions relating to such contravention;

(ii) enter, inspect or break open any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any licence issued there under has been, is being or is about to be committed;

(iii) take or cause to be taken extracts from or copies of any documents showing transactions relating to such contravention which are produced before him/her;

(iv) test or cause to be tested the weight of all or any of the essential commodities found in any such premises;

Provided that in entering upon and inspecting any premises the persons so authorised shall have due regard to the social and religious customs of the persons occupying the premises.

(v) search, seize and remove the stocks of the essential commodities and the packages, coverings, animals, vehicles, vessels or other conveyances used, in carrying the said essential commodities in contravention of the provisions of this order or of the conditions of any licence issued there under and thereafter take or authorize the

taking of all measures necessary for securing the production of the essential commodities and the packages, coverings, animals, vehicles, vessels or any other conveyances so seized in a Court and for their safe custody pending such production.

(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 clause.”

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15. Upon a careful examination of clause-23(a), this Court observes that the Licensing Authority or any other officer authorized by the Government in this behalf may, with such assistance exercise such power as has been provided in clause-23 including the power of entry, search and seizure. Therefore, it is pertinent to ascertain as to who are the authorities competent to carry out the search and seizure?

16. A question arose as to whether a police officer is competent to seize PDS Wheat along with the truck and as to whether on the basis of such seizure, confiscation under Section 6-A can be initiated? A coordinate Bench of this Court in the case of *Tapan Kumar Samant vrs. Collector-cum-District Magistrate, Balasore and others* : reported in 2010 (I) OLR 221 was required to adjudicate such issue. The coordinate

Bench of this Court after detailed analysis of facts came to a conclusion that since the ASI of Police, who was not authorized to make seizure, seized the so-called PDS wheat, seizure itself being illegal proceeding under 6-A of the E.C. Act is unsustainable in law. It is further relevant to mention here that the aforesaid case also involved interpretation on clause-23 of OPDS Control Order, 2008. In paragraph-3 of the judgment the coordinate Bench of this Court also referred to the notification of the Food Supplies and Consumer Welfare Department bearing Notification No.7450-FS.IC.2/2008 dated 29.03.2008 and observed that such notification specify and confer power of search and seizure as provided under clause-23 of the PDS Control Order, 2008 in Police Personnel and in paragraph-8 of the judgment of the coordinate Bench of this Court, it has been categorically held that since an ASI of Police, who was not authorized to make seizure, seized so-called PDS Wheat, the seizure itself being illegal, the proceeding under Section 6-A of the E.C. Act cannot sustain.

17. On analysis of the provisions of law applicable to the facts of the present case, this Court is of the considered view that a valid seizure is *sine qua non* for issuance of notice and initiating a proceeding under Section 6-A of the E.C. Act, 1955 for confiscation of the seized property. A valid seizure of the PDS commodities is the basis and foundation for

initiating and continuing with such proceeding under Section 6-A of the E.C. Act to confiscate the seized properties. In other words, if the seizure is not valid and the same is not in conformity with the provisions of law, such seizure is non-est in the eye of law and no proceeding can be initiated basing upon said illegal seizure by an authority, who is not competent to do so. The view taken by this Court gets support from a judgment of the Hon'ble Supreme Court in the case of ***Kailash Prasad Yadav and another vrs. State of Jharkhand*** : reported in ***2007 (II) OLR (SC) 471***. At this juncture, it is also relevant to refer to another Supreme Court judgment in the case of ***Nanda Kishore Singh vrs. State of Bihar*** : reported in ***Crimes Vol-(VIII) 1990(2)-744***. In ***Nanda Kishore Singh case*** (supra), it was held by the Hon'ble Supreme Court that whether the seizure was made by a person not competent to seize the essential commodities, such seizure being illegal, the proceeding under Section 6(A) of the E.C. Act can stand. Therefore, the view taken by this Court gets support from the above noted two Supreme Court judgments in the case of ***Kailash Prasad Yadav and another vrs. State of Jharkhand*** (supra) as well as ***Nanda Kishore Singh's case*** (supra).

18. Learned counsel for the petitioner also referred to the judgment in the matter of ***Anand Samal vrs. State of Orissa and others*** : reported in ***2011 (II) OLR-240*** a coordinate Bench of this Court was deciding an

issue as to whether a Police Officer is competent to seize PDS rice along with a truck on suspicion of the said rice was being sold in black market and whether on the basis of such seizure, a confiscation proceeding under Section 6(A) can be initiated? Learned coordinate Bench of this Court while answering the said issue referred to the notification of the State Government empowering officers to enter and to carry out search and seizure under clause-23 of the OPDS Control Order, 2008 vide notification dated 29.03.2008. On a careful analysis of the PDS Control Order, 2008, the coordinate Bench in the above noted judgment came to a conclusion that the S.I. of Police, who was not authorized to make seizure, seized the so-called PDS rice and as such, the seizure itself being illegal, the proceeding under Section 6(A) of the E.C. Act is unsustainable in law and accordingly, quashed the proceeding under Section 6(A) of the E.C. Act.

19. Keeping in view the aforesaid analysis of law as well as legal position as has been interpreted by various judgment of this Court as well as the Hon'ble Apex Court, this Court would now proceed to examine as to whether the OIC of Gangapur Police Station, who has admittedly carried out the search and seizure has been conferred with such power under the Statute and as such, competent to do so. With regard to the conferment of power an officer under clause-23(a) of the OPDS Control

Order, 2008, learned Additional Standing Counsel for the State has filed copy of the notification dated 29.03.2008 to impress upon this Court that the officers are also authorized to carry out the said search and seizure. On perusal of the notification dated 29.03.2008 under Annexure-B/2 to the counter affidavit, it appears that the Police Officers not below the rank of Inspector, who were initially not included in the said notification dated 29.03.2008 have been included under Sl. No.28, subsequently, vide Notification No.7599 dated 29.04.2010, OGE No.379 dated 13.05.2010. For better understanding the said Notification has been quoted herein below:-

“No7599—LS-PD-2/2010-FS & CW—In exercise of the powers conferred by sub-clause(a) of Clause 23 of the Orissa Public Distribution System (Control) Order, 2008, the State Government do hereby direct that the following amendment shall be made to the notification of the Government of Orissa in the Food Supplies & Consumer Welfare Department No.7450, dated the 29th March, 2008, namely :—

AMENDMENT

In The said notification, after Serial No.27, the following Serial No. and the entries against it under appropriate column shall be added, namely :—

“28—Police Officers not below the

Rank of Inspector. Within the local limit of
their jurisdiction”

By order of the Governor
ASHOK K. MEENA
Commissioner-cum-Secretary to Government”

20. On perusal of the notification dated 29.03.2008, it appears that the said notification had been issued in exercise of the power conferred by clause-23(a) of the OPDS Control Order, 2008 by the State Government and on further scrutiny it appears that initially no Police Officer was included under the said notification accordingly, the judgment of the coordinate Bench of this court in *Tapan Kumar Samanta vrs. Collector-cum-District Magistrate, Balasore and others* (supra) has been correctly decided. However, since the notification dated 29.03.2008 reveals that *Police Officer* not below the rank of Inspector has been included w.e.f. 13.05.2010, therefore, keeping in view the said notification the conduct of the Police Officer in the present case is to be examined. Before examining the facts of the present case, this Court would also like to observe that the judgment relied upon by the learned counsel for the petitioner in *Ananda Samal's case* (supra) has also been correctly decided. On careful scrutiny of the facts narrated in the judgment, it

appears that the seizure took place 01/02.09.2008 by the OIC, Anandapur Police Station. However, position of law as discussed hereinabove has changed w.e.f. 13.05.2010 and accordingly, Police Officer not below the rank of Inspector has been included in the notification dated 29.03.2008.

21. Reverting back to the facts of the present case and to decide the issue as to whether the Police Officer, who conducted the search and seizure was competent to do so under the OPDS Control Order, 2008, this Court would like to refer to the F.I.R. registered in the present case. The F.I.R. dated 19.09.2011 under Annexure-2 reveals that one Dinabandhu Behera S.I. of Police, Gangapur Police Station lodged the F.I.R. inter alia alleging that on 18.09.2011 at about 6.00 P.M., he along with Havildar, Subash Chandra Barada, Antaryami Padhy and Bhanja Kishore Behera were performing evening patrolling duty. At that time, they came across the seized truck and the PDS commodities, when they stopped the vehicle and found Kerosene Oil was being transported and on being asked, the driver of the vehicle could not produce any valid paper in respect of 1000 liters of Kerosene out of a total quantity of 3000 liters, the said Dinabandhu Behera, S.I. of Police Gangapur P.S. has categorically stated in the F.I.R. which is quoted herein below:-

“..... hence, I seized the above noted 3000 liters of Kerosene along with Truck and 2 nos of retail invoice

dated 14.09.2011 and 18.09.2011 in presence of above noted witnesses on 18.09.2011 at 7.00 P.M. for further verification. Then returned to P.S. along with seized kerosene Truck invoice with driver and called for Sub-dealer Sarat Kumar Swain to P.S. with other documents for further verification and produce before IIC and again as per direction of my IIC I proceeded to Surada for further verification of registers at the place of procurement.”

22. Now, again coming back to the notification dated 29.03.2008, it is clear that by virtue of an amendment Police Officer not below the rank of Inspector has been included w.e.f. 13.05.2010. Thus, the truck as well as PDS commodities like Kerosene Oil involved in the present case having been admittedly seized by the Sub-Inspector of Police, who is definitely below the rank of Inspector, the seizure made in the present case is absolutely illegal and contrary to the OPDS Control Order, 2008. Therefore, this Court has no hesitation to come to a definite conclusion that the seizure made in this case is illegal and therefore, the proceeding under Section 6(A) of the E.C. Act, 1955 initiated pursuant to notice under Annexure-4 to the writ application is also void and non-est in the eyes of law. Above view of this Court also gets support from the judgment of the Hon'ble Supreme Court in *Kailash Prasad Yadav* (supra) wherein the Hon'ble Supreme Court has held that valid seizure is a sine qua non for passing an order of confiscation of property and also

finding of the Hon'ble Supreme Court in *Nanda Kishore Singh* (supra) wherein seizure was made by a person not competent to seize the essential commodities and as such, said seizure being illegal, the proceeding under Section 6(A) of the E.C. Act is not sustainable in law.

23. In such views of the matter, this Court has no hesitation to hold that the seizure conducted in the present case by S.I. of Police is illegal and accordingly, the proceeding initiated under Section 6(A) of the E.C. Act and by the licensing authority and the notice under Annexure-4 are illegal and void and accordingly, the notice under Annexure-4 as well as the entire proceeding bearing E.C. No.42 of 2011 under Section 6(A) of the E.C. Act, initiated by the Collector, Ganjam-Opposite Party No.2, are hereby quashed.

24. Accordingly, the writ petition stands allowed. However, there shall be no order as to cost.

(A.K. Mohapatra)
Judge