SUPREME COURT.

†S.C. 1948

Aug. 11.

KIN MA MA (APPLICANT)

v.

THE CHAIRMAN, PUBLIC PROPERTY PROTECTION BOARD, AND ANOTHER (RESPONDENTS).*

Direction in the nature of habeas corpus—*Nature of return—Power of Court to examine its truth—Public Property Protection Act, ss. 2 (i), (ii), (b).*

Held : Under the English common law the return in a writ of *habeas corpus* could not originally be questioned but later by *Habeas Corpus* Act of 1816 (56 Geo. 3, C. 100) the rigour was mitigated. It gave power to the Judges to examine the truth of the facts set forth in such return by affidavit or affirmation.

The same principle should be applied in Burma. But the Supreme Court in issuing direction in the nature of *habeas corpus* does not sit as a Court of Appeal against the order of detention. In order to enable the Court to see whether the officer concerned had sufficient grounds of suspicion, *i.e.* whether he acted honestly, he must place all the facts and materials on which he acted before the Court. This must be done by an affidavit as provided by the rules of Supreme Court.

Definition of Public Property in s. 2 (i) of the Act is very wide. It does not however include all private properties. It means and includes one's own private property if it is intended, either under contract or any law for the time being in force, for use by the army, navy and air force in Burma and property purchased under such a contract from NAAFI is public property.

Rex v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14, followed.

Thein Moung for the applicant.

Chan Htoon (Attorney-General of the Union of Burma) for the respondents.

The judgment of the Court was delivered by

BA U, C.J.—This is an application for issue directions in the nature of a writ of *habeas corpus*. The applicant, Kin Ma Ma, is the senior partner of the firm of Messrs. Kin Ma Ma and Sons, Nos. 181, 189, Sule Pagoda Road, Rangoon. Her husband, U Tha Win, is the Managing Director of the said firm. The

* Criminal Misc. Application No. 12 of 1948.

† *Present :* SIR BA U, Chief Justice, E MAUNG, J., and KYAW MYINT, J.

firm was appointed as the Canteen Contractor to the Fighting Forces in Burma under a written contract dated the 13th January 1948.

The contract (Exhibit A) provides, *inter alia*—

"1. The contractor shall obey all official orders and regulations for the time being in force, including any orders which may be issued from time to time.

2. The area in which the contractor shall carry out his trade shall be that under the direct administrative control of O.C. the unit.

3. The contractor shall provide a shop and a restaurant and, in addition, other shops, dhobies, tailors, shoemakers as required.

4. The contractor shall not charge prices in excess of those notified in the official price list a copy of which it shall be his responsibility to put in all shops and restaurants and which will be signed by the O.C. unit or his representative.

* * * *

9. The contractor shall have the sole right of supply of all goods required for officers, non-commissioned officers and men within the unit lines except such goods as may be purchased under the orders of the Government by the officer commanding the unit or other persons on payment indent in accordance with the Regulations for the Army in Burma, from the BASC and rations provided in kind by the Government.

No outside hawkers or tradesmen will be allowed in the unit area.

* * * * "

In order to enable the contractor to supply the goods required by the Fighting Forces, the contractor was granted permits from time to time to purchase goods from the *NAAFI* (Navy, Army and Air Force Institute) stores taken over by Government. The goods so purchased by the contractor were to be sold only to the personnel of the Fighting Forces and to no others. This went on, apparently amicably, from the date, of the contract up till the 3rd July 1948. On that date U Tha Win was arrested by U Ba Tha, Inspector of Police of the Public Property Protection Police

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Bureau of Investigation, under section 7 (2) of the Public Property Protection Act, 1947, and since then U Tha Win has been in custody, first in the Barr Street Town Lock-up, and now in Insein Jail.

Two substantial points are submitted in support of the application, namely :

(1) that as the goods purchased by the contractor were purchased with his own money, even though from the *NAAFI* Stores, they were and are not public property within the meaning of section 2 (i) of the Public Property Protection Act, 1947, and that, therefore, the contractor could do whatever he liked with his own property ; and

(2) that, even assuming that the goods so purchased by the contractor with his own money were and are to be treated as public property, the arresting officer, U Ba Tha, has not shown any instance where the contractor has charged for his goods more than the prices fixed by the Army authorities, or sold them in the black market.

"Public Property" as defined in section 2 (i), Public Property Protection Act, means any store or equipment or any other property whatsoever belonging to, or consigned to, or intended for the use of the army, naval or air forces serving in Burma or belonging to, or consigned to, or intended for the use of, the Government of Burma or any local authority, or any Board or Body constituted under any law. The definition thus given is so wide that it even includes one's own property if it is intended or ear-marked for the use of the army, navy and air forces of the Union of Burma. This, if accepted as correct, is likely to lead to absurd results in some cases. Take, for instance, the case of a man having several bundles of piece-goods in his own possession as his own property, and an army officer coming round and telling him that

these bundles of goods are required for use by the army and that they must not be sold to others. These bundles of piece-goods would, according to the definition given above, become public property. Nobody in that case would have any sense of security with his own property. That would even in a way be in conflict with article 23 of the Constitution. As pointed out in our judgment passed in *U Htwe* v. *U Tun Ohn and one* (Civil Miscellaneous Application No. 5 of 1948), the grammatical and ordinary sense of the words has to be adhered to unless that would lead to some absurdity, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity.

Therefore, having regard to the whole context of section 2 (i), what public property means is and includes one's own property if it is intended, either under contract or any law for the time being in force, for use by the army, navy and air force in Burma, etc.

Now, what is not in dispute in this case is that the contractor was the only person given the right to purchase goods from the *NAAFI* Stores, and he was given that right as he was under orders to supply these goods to the army, navy and air forces of the Union of Burma and to no others. Therefore, though the goods purchased from the *NAAFI* Stores were goods purchased with his own money, they were public property within the meaning of section 2 (i) of the Public Property Protection Act. Therefore, if he dealt with these goods in any way contrary to the instructions given to him by officers of the armed forces, he would be committing a prejudicial act within the meaning of section 2 (ii) (*b*) of the Public Property Protection Act.

That brings us to the second point raised by the learned counsel for the applicant.

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In connection therewith, U Ba Tha in paragraph 4 of his affidavit states, amongst others—

"I say that in pursuance of these specific terms of contract, the military authorities have issued orders to U Tha Win that he shall sell the goods consigned to him exclusively to the members of the Burma Army, Navy and Air Forces. Contrary to the said order, lawfully issued by the military authorities attaching the discharge of the trust imposed upon U Tha Win under the said contract, many instances have been discovered in which U Tha Win has sold the goods received from the Civil Supplies and the NAAFI Stores at higher prices both to the members of the forces referred to above, and to the black-marketeers outside . . . ."

This allegation is traversed by both the applicant and her assistant, U Sein Maung. In paragraph 10 of her affidavit the applicant states :

"10. I say that no public property has ever been consigned to or received by my husband and I say that all along he has been dealing with his personal private property under the contract and no stores for the canteen have ever been sold with profit in black market nor have ever been sold at higher prices in the canteen."

In the case of U Sein Maung, he states in paragraph 6 of his affidavit as follows :

"6. I say that if there really were orders issued by the Military Authorities to the contractors or to the Managing Director, U Tha Win, in respect of the goods purchased by the contractors, as alleged by the Inspector of Police, U Ba Tha, in paragraph 4 of his affidavit, which affidavit, I have already read, U Ba Tha would certainly have produced such orders or a true copy thereof but he has refrained from doing so."

The question is whether this Court can and, if so, whether and how it should examine these disputed facts.

As pointed out in our judgment passed in *U Htwe*'s case (Civil Miscellaneous Application No. 5 of 1948), the writs as set out in article 25 of the Constitution are borrowed from English law, and they should, therefore,

consistently with our Constitution, be used in the same way as they are used in English law.

The writ of *habeas corpus* in English law is of two-fold origin, namely, common law and statute law. The latest statute on the subject is the *Habeas Corpus* Act, 1816 (56 Geo. 3, C. 100). At common law, the return could not be disputed. Sir William Holdsworth in his History of English Law, Volume IX at 119, said—

"But, in the course of the 18th century, two defects were disclosed in the existing law. Firstly, the Court had no power to examine the truth of any return made by a gaoler. Secondly, the Act of 1679 did not apply to a detention which was not a detention on a criminal charge . . . . . Attention was called to these defects, chiefly by the Acts which had allowed impressment for military service. To some extent also they were illustrated by the existing bankruptcy law and practice; for we have seen that that law, by giving incompetent commissioners large powers to commit bankrupts, provided occasions for issue writs of *habeas corpus* for their release. It seems to have been the first of these causes which gave rise to a Bill which was considered by the House of Lords in 1758. The object of the Bill was to extend the Act of 1679 so as to give the benefit of the writ of *habeas corpus ad subjiciendum* as improved by that Act to persons who were imprisoned otherwise than on a criminal charge. But the Lords took the opportunity to give the opinion of the Judges, not only on the questions of law as to the issue of writs of *habeas corpus ad subjiciendum* not falling within the Act of 1679, but also upon the question whether a Judge, before whom such a writ was returned, had power to examine the truth of the facts stated in the return.

To some extent, the views of the Judges were in conflict; but there was a very substantial measure of agreement. It was agreed by all that the truth of the return was not examinable by the Court, because it was a question of fact for a jury to be ascertained in other proceedings. The Courts, it was said, were concerned, not with the truth of the return, but with its sufficiency in point of law to justify a detention . . . . To some extent, however, the Judges had mitigated its harshness by adopting the practice of making a rule that a person holding another in his custody should show cause for his detention, and of discharging

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such person if no cause were shown. In that way, the merits of the case could be gone into."

The Legislature stepped in and helped the Judges to mitigate the rigour of the common law practice by enacting section 3 of the *Habeas Corpus* Act of 1816, which is, *inter alia*, as follows :

"In all cases provided for by this Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the Justice or Baron before whom such writ may be returnable to proceed to examine the truth of the facts set forth in such return by affidavit or by affirmation (in cases where affirmation is allowed by law) and to determine therein as to justice shall appertain."

At the end of the section it provides that such an examination shall be done in a summary way by affidavit or affirmation.

As our writ, as pointed out above, is derived from English law, it contains the characteristics of both the common law writ and the statute law writ.

As in English law, where in an application for a writ of *habeas corpus* for a man who has been imprisoned under sentence of a criminal Court of competent jurisdiction the return cannot be impugned, so in our law also we must hold that the return in such a case cannot be impugned. It is, however, otherwise in other cases. The question then arises as to what matters the examination should be directed to. To answer this question we cannot do better than quote the observation of Lord Green M.R. in the case of *Rex* v. *Secretary of State for Home Affairs* (1) this Court does not sit as a Court of appeal. To enable this Court to see whether the officer concerned had sufficient grounds for suspicion, or, in other words, whether he acted honestly, he must place all the facts

(1) (1942) 2 K.B. 14.

and materials on which he acted before this Court. This must be done by means of affidavit as provided by the rules of our Court. This is the same as in English law. In the present case, as pointed out above, the attitude taken up by the applicant is, as the goods were purchased from *NAAFI* Stores with their own money, they could do what they liked with those goods. That supports the case of the other side.

In these circumstances, we see no ground to interfere. The application is dismissed.