M. P. SHARMA AND OTHERS

v.

SATISH CHANDRA, DISTRICT MAGISTRATE, DELHI, AND OTHERS.

1954

March 15.

[MEHR CHAND MAHAJAN C. J., MUKHERJEA, S. R. DAS, VIVIAN BOSE, GHULAM HASAN, BHAGWATI, JAGANNADHADAS and VENKATARAMA AYYAR JJ.]

Constitution of India, arts. 19(1)(f) and 20(3)—Search warrant issued under s. 96(1) of the Code of Criminal Procedure (Act V of 1898)—Whether ultra vires *art. 19(1)(f)—Search and seizure of*

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documents under ss. 94 and 96 of the Code of Criminal Procedure—Whether compelled production thereof—Within the meaning of art. 20(3).

Held, that the provision for the search warrant under the first alternative of s. 96(1) of the Code of Criminal Procedure does not offend art. 19(1)(f) of the Constitution.

A search and seizure is only a temporary interference with the right to hold the property searched and the articles seized. Statutory recognition in this behalf is a necessary and reasonable restriction and cannot *per se* be considered to be unconstitutional.

A compelled production of incriminating documents by a person against whom a First Information Report has been made is testimonial compulsion within the meaning of art. 20(3) of the Constitution. But a search and seizure of a document under the provisions of ss. 94 and 96 of the Code of Criminal Procedure is not a compelled production thereof within the meaning of art. 20 (3) and hence does not offend the said Article.

A power of search and seizure is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction.

Scope and connotation of art. 20(3) explained.

John Lilburn's Case (3 State Trials 1315), *Boyd* v. *United States* (116 U.S. 616), *Weeks* v. *United States,* (232 U.S. 383), *Felix Gould* v. *United States* (255 U.S. 298), *Entick* v. *Carrington* (19 State Trials 1030), *Hale* v. *Henkel* (201 U.S. 43), and *Satya Kinkar Roy* v. *Nikhil Chandra Jyotishopadhaya* (A.I.R. 1951 Cal. 104) referred to.

ORIGINAL JURISDICTION PETITIONS Nos. 372 and 375 of 1953.

Original petition under article 32 of the Constitution of India for the enforcement of fundamental right.

Veda Vyas and *Daulat Ram Kalia* (*S. K. Kapur* and *Ganpat Rai,* with them) for the petitioners.

C. K. Daphtary, Solicitor General for India (*Porus A. Mehta* and *A. M. Chatterjee,* with him) for the respondents.

1954. March 15. The Judgment of the Court was delivered by JAGANNADHADAS J.

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JAGANNADHADAS J.—These two applications are for relief under article 32 of the Constitution arising out of similar and connected set of facts and are dealt with together. They arise under the following circumstances. The Registrar of the Joint Stock Companies, Delhi State, lodged information with the Inspector-General, Delhi Special Police Establishment, to the following effect. Messrs. Dalmia Jain Airways Ltd. was registered in his office on the 9th July, 1946, with an authorised capital of Rs. 10 crores and went into liquidation on the 13th June, 1952. An investigation into the affairs of the company was ordered by the Government and the report of the inspector appointed under section 138 of the Indian Companies Act indicated that an organised attempt was made from the inception of the company to misappropriate and embezzle the funds of the company and declare it to be substantial loss, and to conceal from the shareholders the true state of affairs by submitting false accounts and balance-sheets. Various dishonest and fraudulent transactions were also disclosed which show that false accounts with fictitious entries and false records were being maintained and that dishonest transfers of moneys had been made. It was accordingly alleged that offences under sections 406, 408, 409, 418, 420, 465, 467, 468, 471 and 477(a) of the Indian Penal Code had been committed. It was also stated that Seth R. K. Dalmia who was the Director and Chairman of Dalmia Jain Airways Ltd. has been controlling certain other concerns, *viz.*, (1) Dalmia Cement & Paper Marketing Co., Ltd., (2) Dalmia Jain Aviation Ltd. now known as Asia Udyog Ltd., and (3) Allen Berry & Co., Ltd. through his nominees and that all these concerns were utilised in order to commit the frauds. It was further stated therein by the Registrar of Joint Stock Companies that to determine the extent of the fraud, it was necessary to get hold of books not only of Dalmia Jain Airways Ltd. but also of the allied concerns controlled by the Dalmia group, some of which are outside the Delhi State. Lists of the offices and places in which and of the persons in whose custody the records may be available were furnished. Speedy

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investigation was asked for. This information was recorded by the Special Police on the 19th November, 1953, as the First Information Report. On the basis thereof an application was made to the District Magistrate, Delhi, under section 96 of the Criminal Procedure Code, for the issue of warrants for the search of documents and in the places, as per schedules furnished. Permission to investigate in respect of some of the non-cognisable offences mentioned in the First Information Report was also asked for. On the same day, the District Magistrate ordered investigation of the offences and issued warrants for simultaneous searches at as many as 34 places. The searches were made on the 25th November, 1953, and subsequent days and a voluminous mass of records was seized from various places. The petitioners pray that the search warrants may be quashed as being absolutely illegal, and ask for return of the documents seized. In Petition No. 372 of 1953 there are four petitioners of whom the second is the Delhi Glass Works Ltd., and the first the Deputy-General Manager thereof, the third its Secretary and the fourth a shareholder therein. In Petition No. 375 of 1953 there are five petitioners of whom the first is Messrs. Allen Berry & Co., Ltd., second Asia Udyog Ltd., the third Shri R. K. Dalmia, the fourth the Secretary and General Attorney of the third and the fifth a shareholder of petitioners Nos. 1 and 2, and an officer of petitioner No. 2. It will be seen that the petitioners in both the petitions belong to the four concerns, namely, (1) Delhi Glass Works Ltd., (2) Messrs. Allen Berry & Co., Ltd., (3) Asia Udyog Ltd., and (4) Dalmia Jain Airways Ltd. The last three are stated to be Dalmia concerns but it does not appear from the records placed before us what exact connection Delhi Glass Works Ltd. has with them. However, it is admittedly one of the places for which a search warrant was asked for and against which the First Information Report appears to have been lodged. In the petitions various questions were raised. But such of them which raise only irregularities and illegalities of the searches and do not involve any consitutional violation are matters which may

be more appropriately canvassed before the High Court on applications under article 226 of the Constitution and we have declined to go into them. The petitioners have, therefore, confined themselves before us to two grounds on which they challenge the constitutional validity of the searches. The contentions raised are that the fundamental rights of the petitioners under article 20(3) and article 19(1)(f) have been violated by the searches in question.

So far as the contention based on article 19(1)(f) is concerned we are unable to see that the petitioners have any arguable case. Article 19(1)(f) declares the right of all citizens to acquire, hold and dispose of property subject to the operation of any existing or future law in so far as it imposes reasonable restrictions, on the exercise of any of the rights conferred thereby, in the interests of general public. It is urged that the searches and seizures as effected in this case were unreasonable and constitute a serious restriction on the right of the various petitioners, inasmuch as their buildings were invaded, their documents taken away and their business and reputation affected by these largescale and allegedly arbitrary searches and that a law (section 96(1), Cr.P.C.) which authorises such searches violates the constitutional guarantee and is involved in this case in respect of the warrants on the right to hold and enjoy property. No doubt a seizure and carrying away is a restriction of the possession and enjoyment of the property seized. This, however, is only temporary and for the limited purpose of investigation. A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is necessary and reasonable restriction cannot *per se* be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of article 19(1) (f) is invalid. But, a search by itself is not a restriction in question which purport to be under the first

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alternative of section 96(1) of the Criminal Procedure Code.

The only substantial question, therefore, that has been raised is the one relating to article 20(3) which runs as follows :

"No person accused of any offence shall be compelled to be a witness against himself."

The argument urged before us is that a search to obtain documents, for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by article 20(3) as unconstitutional and illegal. It is not disputed that, *prima facie,* the article in question has nothing to indicate that it comprehends within its scope, the prohibition of searches and seizures of documents from the custody of an accused. But it is urged that this is necessarily implied therein by certain canons of liberal construction which are applicable to the interpretation of constitutional guarantees. In support of this line of argument great reliance has been placed upon American decisions in which similar questions were canvassed. The argument on behalf of the petitioners is presented in the following way. The fundamental guarantee in article 20(3) comprehends within its scope not merely oral testimony given by an accused in a criminal case pending against him, but also evidence of whatever character compelled out of a person who is or is likely to become incriminated thereby as an accused. It, therefore, extends not only to compelled production of documents by an accused from his possession, but also to such compelled production of oral or documentary evidence from any other person who may become incriminated thereby as an accused in future proceedings. If this view of the content of article 20(3) is accepted, the next step in the argument presented is that a forcible search and seizure of documents is, for purposes of constitutional protection of this guarantee, on the same footing as a compelled production of the said documents by the person from whom they are seized. This chain of reasoning, if accepted in its entirety, would render searches and seizures of documents and any

statutory provisions in that behalf illegal and void, as being in violation of the fundamental right under article 20(3). The question thus raised is of far-reaching importance and requires careful consideration.

Article 20(3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an article of its Constitution. It has also, to a substantial extent, been recognised in the Anglo-Indian administration of criminal justice in this country by incorporation into various statutory provisions. In order, therefore, to arrive at a correct appraisal of the scope and content of the doctrine and to judge to what extent that was intended to be recognised by our Constitution-makers in article 20(3), it is necessary to have a cursory view of the origin and scope of this doctrine and the implications thereof as understood in English law and in American law and as recognised in the Indian law.

In English law, this principle of protection against self-incrimination had a historical origin. It resulted from a feeling of revulsion against the inquisitorial methods adopted and the barbarous sentences imposed, by the Court of Star Chamber, in the exercise of its criminal jurisdiction. This came to a head in the case of *John Lilburn*(1) which brought about the abolition of the Star Chamber and the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. This principle, in course of time, developed into its logical extensions, by way of privilege of witnesses against self-incrimination, when called for giving oral testimony or for production of documents. A change was introduced by the Criminal Evidence Act of 1898 by making an accused a competent witness on his own behalf, if he applied for it. But so far as the oral testimony of witnesses and the production of documents are concerned, the protection against

(1) 3 State Trials 1315.

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self-incrimination continued as before. (See Phipson on Evidence, 9th Edition, pages 215 and 474).

These principles, as they were before the statutory change in 1898, were carried into the American legal system and became part of its common law. (See Wigmore on Evidence, Vol. VIII, pages 301 to 303). This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof. The language of the Fifth Amendment was considered by the American Courts as being wide enough to cover all the aspects of the principle of protection against self-incrimination as administered under the English common law including oral testimony of witnesses and production of documents. (See Willis on Constitutional Law, pages 518 and 519). In course of time further extensions of that privilege were recognised by the courts relating to searches and seizures. It came to be held that unreasonable searches and seizures of documents fell equally within the mischief of the Fourth and the Fifth Amendments [*Boyd* v. *United States*(1)], and that documents or other evidence so obtained were inadmissible in evidence [*Weeks* v. *United States*(2)].

In the Indian law the extent to which this protection is recognised appears from the various relevant statutory provisions from time to time. Section 111 of Act XV of 1852 recognised that an accused in a criminal proceedings was not a competent or compellable witness to give evidence for or against himself. This provision was repealed by the Evidence Act I of 1872. But meanwhile the Criminal Procedure Code of 1861 in sections 204 and 203 thereof respectively provided that no oath shall be administered to the accused and that it shall be in the discretion of the Magistrate to examine him. The Criminal Procedure Code of 1872 by section 250 thereof made a general questioning of the accused, after the witnesses for the prosecution had been examined, compulsory and section 345 thereof provided that no oath or affirmation shall be

(1) 116 U.S. 616.
(2) 232 U.S. 383.

administered to the accused person. These features have been continued in the later Codes of Criminal Procedure and have been incorporated into section 342 of the present Criminal Procedure Code of 1898. The only later statutory change, so far, in this behalf, appears to be that brought about by section 7 of the Prevention of Corruption Act, 1947. By virtue of that section an accused is a competent witness on his own application in respect of offences under that Act. So far as witnesses are concerned, section III of Act XV of 1852 also declared the protection of witnesses against compulsion to answer incriminating questions. Shortly thereafter in 1855, this protection was modified by section 32 of Act II of 1855 which made him compellable to answer even incriminating questions but provided immunity from arrest or prosecution on the basis of such evidence or any other kind of use thereof in criminal proceedings except prosecution for giving false evidence. This position has been continued under section 132 of the Evidence Act I of 1872 which is still in force. So far as documents are concerned, it does not appear that the Indian statutory law specifically recognised protection against production of incriminating documents until Evidence Act I of 1872 was enacted which has a provision in this behalf in section 130 thereof. It is not quite clear whether this section which excludes parties to a *suit* applies to an accused. Thus so far as the Indian law is concerned it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence.

Since the time when the principle of protection against self-incrimination became established in English law and in other systems of law which have followed it, there has been considerable debate as to the utility thereof and serious doubts were held in some quarters that this principle has a tendency to defeat justice. In support of the principle it is claimed that the protection

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of accused against self-incrimination promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confessions on unverified suspicion. (See Wigmore on Evidence, Vol. VIII, page 309). It is also claimed that that privilege in its application to witnesses as regards oral testimony and production of documents affords to them in general a free atmosphere in which they can be persuaded to come forward to furnish evidence in courts and be of substantial help in elucidating truth in a case, with reference to material within their knowledge and in their possession. (See Wigmore on Evidence, Vol. VIII, page 307). On the other hand, the opinion has been strongly held in some quarters that this rule has an undesirable effect on social interests and that in the detection of crime, the State is confronted with overwhelming difficulties as a result of this privilege. It is said this has become a hiding place of crime and has outlived its usefulness and that the rights of accused persons are amply protected without this privilege and that no innocent person is in need of it. (See Wigmore on Evidence, Vol. VIII, pages 314 and 315). Certain passages at pages 441 and 442 of Vol. 1 of Stephen's History of the Criminal Law of England are also instructive in this context and show a similar divergence of opinion.

In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention. Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is a right pertaining to a person "accused of an offence"; (2) It is a protection against "compulsion to be a witness"; and (3) It is a protection against such compulsion resulting in his giving evidence "against himself". The cases with which we are concerned have been

presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons "accused of an offence" within the meaning of article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material. It may be noticed that some of the accused enumerated in the First Information Report are incorporated companies. But no question has been raised before us that the protection does not apply to corporations or to documents belonging to them—a question about which there has been considerable debate in the American Courts. On the above footing, therefore, the only substantial argument before us on this part of the case was that compelled production of incriminating documents from the possession of an accused is compelling an accused to be a witness against himself. This argument accordingly raises mainly the issue relating to the scope and connotation of the second of the three components above stated.

Broadly stated the guarantee in article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in article 20(3) is "to be a witness." A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as

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production of documents is concerned, no doubt section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, *i.e.,* as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.

Considered in this light, the guarantee under article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for *production* of evidentiary documents which are reasonably likely to support a prosecution against them. The question then that arises next is whether search warrants for the seizure of such documents from the custody of these persons are unconstitutional and hence illegal on the ground that in effect they are tantamount to compelled production of evidence. It is urged that both search and seizure of a document uand a compelled production thereof on notice or summons serve the same purpose of being

available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force and has the apparent support of the Supreme Court of the United States of America in *Boyd* v. *United States*(1).

The question there which came up for consideration was in fact the converse, namely, whether a compulsory production of documents on the facts of that case amounted to search and seizure. There are dicta in that decision to the effect that a compulsory *production* of a man's private papers is a search and seizure since it affects the sole object thereof and that by this process the court extorts from the party his private books and papers to make him liable for penalty. It is necessary, therefore, to examine this decision rather closely in order to determine how far it can be a safe guide for our purpose. The question therein arose under the following circumstances. In an Act to amend the Customs Revenue Laws, there was a provision which enabled the Government Attorney to make a written motion to the court for the issue of a notice to the opposite-party for production of papers in his possession. The motion could be made if in the Attorney's opinion those books contain materials which will prove an alleged fact in support of a charge of defrauding the revenues, involving penalty and forfeiture of merchandise to which the fraud relates. It is also provided by the said section that if the court in its discretion allows the motion in which is set out the fact sought to be proved and calls upon the defendant to produce the documents, and the defendant fails or refuses to produce them without any proper and satisfactory explanation, the allegation of fact sought to be proved by such production may be deemed to have been confessed. The question that thereupon arose was whether an order for production made by the court under that section did not violate the constitutional rights declared by the Fourth and Fifth Amendments of the

(1) 116 U.S. 616.

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American Constitution. These amendments are as follows :

Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V.

"No person.....shall be compelled in any criminal case, to be a witness against himself ;....."

On the facts of the above case, there was no difficulty in holding that the production of documents in response to the motion granted by the court was a compelled production of incriminating evidence and that it violated the Fifth Amendment. The minority judgment brought this out clearly in the following passage :

"The order of the court under the statute is in effect a *subpoena duces tecum;* and though the penalty for the witness' failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have the charges against him of a criminal nature taken for confessed and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself is, I think, quite clear."

The majority Judges, however, went one step further and said as follows :

"The compulsory production of a man's private papers is search and seizure."

and again thus

"We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is soubstantialy different from compelling him to be a witness against himself."

Thus in the view that the order for production was tantamount to search and seizure and that in the case it was for a purpose prohibited by the Fifth Amendment, they held that the Fourth Amendment prohibiting unreasonable searches was also violated. The minority Judges, however, did not accept this view and pointed out that there was an essential difference between the seizure of a document on search and the production of a document. But even otherwise, it would appear on a careful consideration of the decision that the majority were at pains to make out that, in the circumstances of the case the order for production would amount to "an unreasonable search and seizure" and is hence unconstitutional as violating the Fourth and Fifth Amendments. The case, therefore, does not lend support for any general doctrine that a search and seizure in all circumstances is tantamount to a compelled production in violation of the Fifth Amendment. That decision itself expressly recognizes the legality of various kinds of searches and indeed the Fourth Amendment itself shows it. Thus what that decision really established was that the obtaining of incriminating evidence by *illegal* search and seizure is tantamount to the violation of the Fifth Amendment. It was in this light that subsequent cases have also understood this decision. [See *Felix Gouled* v. *United States*(1)].

Boyd's case(2) has relied on the famous judgment of Lord Camden in *Entick* v. *Carrington*(3), and learned counsel for the petitioners has also relied on it Strenuously before us. Wigmore in his Law of Evidence, Vol. VIII, page 368, has shown how some of the assumptions relating to it in *Boyd's case*(2), were inaccurate and misleading. While no doubt Lord Camden refers to the principle of protection against self-accusation with great force, in his consideration of the validity of general search-warrants, that case does not treat a seizure on a search warrant as *ipso facto* tantamount to self-incrimination. All that was said

(1) 255 U.S. 298; 65 Law. Edn. 647 at 651 and 653.
(2) 116 U.S. 616.
(3) 19 State Trials 1030.

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was that the legal philosophy underlying both is the same, as appears from the following passage :

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed *upon the same principle*. There too the innocent would be confounded with the guilty."

It may be noted that Lord Camden's judgment shows, by an elaborate dissertation, that the search warrant therein under consideration was unauthorised and illegal. Thus even the above dictum has reference only to an illegal search.

It is, therefore, impossible to derive from *Boyd's* case (1), support for the proposition that searches and seizures, in general, are violative of the privilege of protection against self-incrimination. Nor is it possible to import that doctrine with its differentiation between legal and illegal searches into our Constitution because we have nothing in our Constitution corresponding to the Fourth Amendment enabling the courts to import the test of unreasonableness or any analogous criterion for discrimination between legal and illegal searches.

In the arguments before us strong reliance has also been placed on the provision of sections 94 and 96 of the Criminal Procedure Code in support of the broad proposition that a seizure of documents on search is in the contemplation of law a compelled production of documents. The sections run as follows :

"94(1). Whenever any court, or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend

(1) 116 U. S. 616

and produce it, or to produce it, at the time and place stated in the summons or order.

".....

"96(1). Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1), has been or might be addressed will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the court to be in the possession of any person,

or where the court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

It may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

....."

It is pointed out that the procedure contemplated is that normally there should be a summons or notice for production under section 94 and it is only if there is no compliance therewith or if the Magistrate is satisfied about the likelihood of non-compliance that a search warrant is to be issued. It is, therefore, urged that these provisions themselves show that in law search and seizure is a substitute for compelled production on summons. There has been some debate before us whether section 94 applies to an accused person and whether there is any element of compulsion in it. For the purpose of this case it is unnecessary to decide these points. We may assume without deciding that the section is applicable to the accused as held by a Full Bench of the Calcutta High Court in a recent case in *Satya Kinkar Roy* v. *Nikhil Chandra Jyotishopadhaya*(1). We may also assume that there is an element of complusion implicit in the process contemplated by section 94 because, in any case, non-compliance results in the unpleasant consequence of invasion of one's premises and rummaging of one's

(1) A.I.R. 1951 Cal. 101.

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private papers by the minions of law under a search warrant. Notwithstanding these assumptions we are unable to read sections 94 and 96(1) of the Criminal Procedure Code as importing any statutory recognition of a theory that search and seizure of documents is compelled production thereof. It is to be noticed that section 96(1) has three alternatives and that the requirement of previous notice or summons and the non-compliance with it or the likelihood of such non-compliance is prescribed only for the first alternative and not for the second or the third. A "general search" and a "search for a document or a thing not known to be in possession of any particular person" are not conditioned by any such requirement. Indeed in cases covered by the second alternative such a requirement cannot even be contemplated as possible. It would, therefore, follow, on the theory propounded, that some at least of the searches within the scope of the second and third alternatives in section 96(1) would fall outside the constitutional protection of article 20(3)—an anomalous distinction for which no justification can be found on principle.

A consideration of the history of Indian statutory legislation relating to searches does not support the theory propounded. The provisions for searches are to be found in the successive Codes of Criminal Procedure. In the earliest Code, Act XXV of 1861, there appears no provision for issuing summons or notices for production of documents, but there was only a provision for the issue of a search warrant by a Magistrate under section 114 thereof, which is in the following terms :

"When a Magistrate shall consider that the production of any thing is essential to the conduct of an enquiry into an offence known or suspected to have been committed, he may grant his warrant to search for such thing ; and it shall be lawful for the officer charged with the execution of such warrant to search for such thing in any house or place within the jurisdiction of such Magistrate. In such case the Magistrate may specify in his warrant the house or place, or part thereof, to which only the search shall extend."

There was also section 142 of the said Code which vested in an officer in charge of police station with the power to make a search *suo moto* in certain circumstances. In the next Criminal Procedure Code, Act I of 1872, the relevant provisions were in sections 365, 368 and 379. Section 379 was more or less a repetition of section 142 of the previous Code (Act XXV of 1861) vesting power in a police officer to make a *suo moto* search. Section 365 appears to be the earliest statutory provision for the issue of a summons, either by a police officer or by a court for the production of a document required for investigation. This was followed by section 368 relating to the issue of search-warrants which was in the following terms :

"When a Magistrate considers that the production of anything is essential to the conduct of an inquiry into an offence known or suspected to have been committed or to the discovery of the offender,

or when he considers that such inquiry or discovery will be furthered by the search or inspection of any house or place,

he may grant his search-warrant; and the officer charged with the execution of such warrant may search or inspect any house or place within the jurisdiction of the Magistrate of the District.

The Magistrate issuing such warrant may, if he sees fit, specify in his warrant the house or place, or part thereof, to which only the search or inspection shall extend; and the officer charged with the execution of such warrant shall then search or inspect only the house, place or part so specified."

It will be noticed that even when the procedure of summons for production of documents was introduced, as above in section 365, the provision for the issue of a search-warrant in section 368 had absolutely nothing to do with the question of non-compliance by the concerned person with the summons for production. It is only in the next Criminal Procedure Code, Act X of 1882, that the provisions, sections 94 and 96, appear which correspond to the present sections 94 and 96 of Act V of 1898, linking up to some extent the issue of

search-warrants with non-compliance or likelihood of non-compliance with a summons to produce. It may be mentioned in passing that the provision for the issue of general search warrants appears for the first time in the Procedure Code of 1882 and even there the issue of such general warrants is not based on non-compliance with a previous summons for production. It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of article 20(3) as above explained. But search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense. Even in the American decisions there is a strong current of judicial opinion in support of this distinction. In *Hale* v. *Henkel*(1), Justice McKenna in his dissenting judgment makes the following observations :

"Search implies a quest by an officer of the law ; a seizure contemplates a forcible dispossession of the owner.....The quest of an officer acts upon the things themselves,—may be secret, intrusive, accompanied by force. The service of a *subpoena* is but the delivery of a paper to a party,—is open and aboveboard. There is no element of trespass or force in it."

A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a

(1) 201 U.S. 43; 50 Law. Edn. 652.

fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under article 20(3) would be defeated by the statutory provisions for searches. It is to be remembered that searches of the kind we are concerned with are under the authority of a Magistrate (excepting in the limited class of cases falling under section 165 of the Criminal Procedure Code). Therefore, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed. We are not unaware that in the present set up of the Magistracy in this country, it is not infrequently that the exercise of this judicial function is liable to serious error, as is alleged in the present case. But the existence of scope for such occasional error is no ground to assume circumvention of the constitutional guarantee.

We are, therefore, clearly of the opinion that the searches with which we are concerned in the present cases cannot be challenged as illegal on the ground of violation of any fundamental rights and that these applications are liable to be dismissed.

As stated at the outset, we have dealt only with the constitutional issues involved in this case leaving the other allegations as to the high-handedness and illegality of the searches open to be raised and canvassed before the High Court on appropriate applications. But we cannot help observing that on those allegations and on the material that has come within our notice, there appears to be scope for serious grievance on the side of the petitioners, which requires scrutiny.

We accordingly dismiss these applications but without costs.