



A study on the rationale behind the provisions of search and seizure in Indian criminal justice system

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Abstract

This article features the rationale behind the provisions of search and seizure in Criminal Procedure Code, 1973 and how these provisions have malfunctioned in certain areas when executed without warrant due to discretionary powers observed in the search and seizure provisions provided under the Criminal Procedure Code, 1973. It talks about how these provisions are misused in ground reality and how even general searches can be conducted without warrant under the veil of investigation through powers conferred in Section 165 and 166 under Chapter 12 of the Code of Criminal Procedure. The article enlightens us upon the potential grey areas in the Provisions of Search and Seizure and attempts to suggest better reforms.

Keywords: summon, search, seizure, warrant, CrPc

Introduction

The legal words used under Criminal Procedure Code, 1973 and covered under this article has been defined as hereunder

Summon

A summon is a command from a Court to an individual, to appear at a given time and place before him. In both criminal and civil cases, a summon can be issued.

Warrant

A warrant is a legal document that is issued by a judge or magistrate authorizing a police officer to make an arrest, search, seize property or take action relating to the administration of the justice system.

Search

The word 'search' refers to the operation of government machinery that involves checking through or carefully inspecting a location, area, person, object, etc. to detect something hidden or to reveal the pieces of evidence of a crime. The police can lookout for an individual or a car or premises, but only after taking necessary and legitimate lawful approval.

In American law the term "search" as applied to searches and seizures is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offence with which he is charged.

Seizure

Seizure contemplates a forcible dispossession of the owner and it is not a voluntary surrender. "Seizure" is a vigorous action that unexpectedly takes over, captures, removes, or overwhelms an entity or an individual.

Over centuries of both literary and social development we reached to a point of creating a new India as a "democratic socialist secular republic". The drafting Committee attempted to combine the best elements of the "British

theory of parliamentary sovereignty and the American theory of judicial supremacy".

Historical Background of Search & Seizure Provisions in India

In India, the power of search and seizure for prevention and investigation of offences was for the first time conferred under the Code of Criminal Procedure and since search and seizure is a process exceedingly arbitrary in character, stringent statutory conditions were imposed on the exercise of the power (held in Supreme Court's decision in State v. Rehman, AIR 1960 SC 210)

In the Criminal Procedure Code, 1973 the provisions related to search are mentioned in Chapter V-S.47, S.51 Chapter VII that covers the search when conducted with warrant and S.165, S.166 under Chapter XII are provisions when search is conducted without a warrant.

In order for these provisions to work in ground reality or for its execution, The Police Act, which was preserve of Section 243 of the Government of India Act, 1935, and the Police Regulation made in exercise of the powers conferred on the Government under that Act, continued to be in force under the Constitution after Independence. The Constitution of India vested power for establishing the Indian Police under the Police Act of 1861 primarily with responsibilities of "Crime Prevention, Investigation, and maintenance of law and order" The functions conferred to police are governed by the Constitution of India, the Indian Evidence Act of 1972, Criminal Procedure Code of 1973, the Indian Penal Code of 1860 and various state regulations. On the contrary the framers of these provisions have also displayed extreme distrust in the police and therefore laid provisions otherwise to prevent abuse by restricting their powers. (Power Corrupts, Absolute Power Corrupts Absolutely). For example, Under Indian Evidence Act, Section 25 prohibits any confession made before any police official to be proved in court under Criminal Procedure Code 1973. The analogy behind such restriction is to prevent any threat, force or compulsion by police officer as has been provided under

Article 20(3) of the constitution that ensures Immunity against Self Incrimination. The principle is espoused on the maxim “nemo tenetur prodere accusare seipsum” which essentially means “No Man is bound to Accuse Himself”

Rationale behind the Provisions

The lawmakers while framing these provisions kept in view the repercussions of search which ought to be a breach to privacy, though under legal sanctions but results in a social embarrassment for a person subject to being searched. A search is therefore executed in the interest of a larger good and for greater benefit of the society. At the same time lawmakers intended to defeat the possibilities of “potential methods of abuse” of such power in the hands of various authorities by restricting the said powers and prescribing the manner in which search has to be made.

The analogy behind search with a prior warrant is to let a judicial authority decide whether any reason, evidence, facts or witnesses contemplate to commission of an offence in a place to which search warrant has to be issued and whether upon application of mind it is presumed that such information is reasonable, apprehension is based on reasonable grounds or otherwise are genuine at all.

Whereas the analogy behind a search executed without a warrant is to eradicate unnecessary delay which would otherwise result in disappearance, destruction or tempering of the subject sought for the purpose of investigation.

Grey Areas under the Provision

Apart from the conditions mentioned under Section 100 of CrPC. Section 165 also imposes extra conditions wherein it requires that search and seizure be carried out in front of two independent witnesses.

Howbeit the said provision leaves to the liberty/discretion of an authorized police officer under extraordinary circumstances, upon reasons reduced in writing to execute a search for purpose related to investigation so as to avoid any unnecessary delay whilst reciprocally leaving possibilities of a police official to breach a house and privacy of its members in unimaginable forms.

Suggestions

These provisions are somewhat judicial where application of mind is a necessity and which are supposed to be allowed only on judge's discretion or upon judicial analogy but to meet the ends of justice, are now left to the discretion of administrative bodies who in the ground reality conducts even general searches without warrant under the veil of investigation, Otherwise for which they were subject to get a warrant.

The discretion for exercise of power to conduct search without warrant by a police officer authorized under an investigation has been confined through

1. manner of search prescribed under the rules and prior fulfillment of conditions precedent such as recording reasons in writing concerning the urgency of such search,
2. entry in the station diary before any movement,
3. Two local witnesses before conducting search and the police officer to be searched before entering such premises etc.

The analogy behind prescribing the manner in which search has to be conducted, several conditions to be fulfilled are to

confine powers of search & seizure in order to cease any or all possibilities of this arbitrary approach which can result in abuse of law while acting under the law.

Nonetheless, the law has yet malfunctioned between these provisions even after attempts of recognizing both the aspects which are:

1. to allow search and seizure without warrant in order to meet the ends of justice and,
2. Confining such powers to prevent any abuse.

It is observed that the law occasionally uses the ingredient “reasonable grounds” for providing authority to the police officer. Instead, the emphasis have been on the opinion that there is no time to seek a search warrant in order to avoid unnecessary delay. Further, this power by virtue of Sec 166 of the CrPC has been extended to places beyond the jurisdiction by himself or another police officer of such area.

It is observed that the said provision is not restricted to search of what is stolen or believed to be stolen and it permits the police officer to make search for anything necessary for the purposes of investigation into any offence.

The very idea of Criminal law is based upon the principle of Mens rea which is the mental element of a person to commit a crime.

Therefore, mere possession of a thing, when it is possible that such thing could have been planted or ended up at a place without his own knowledge tends to convict a person with no criminal intent.

Therefore, it is necessary to have solid and reasonable grounds to ascertain criminal intent of a person or for his place and if any police officer fails to have such reasonable grounds that constitutes mens rea shall not execute a search merely upon the opinion that there was not enough time to seek a warrant or if necessary, such officer shall execute a search whether with or without warrant as per the case be in a manner which does not create social embarrassment for the person being searched or for his family.

Bombay High Court held Illegal search is violation of fundamental right to privacy, State directed to pay compensation.

A divisional bench comprising of T.V Nalawade and S.M Gavhane, JJ. Partly allowed the present petition while explaining the significance of few provisions of the CrPC.

In the present case, acts of the respondents, police officers, of taking search of the house of the petitioner was illegal and was held interference in the privacy of the petitioner and his Family. A compensation of Rs. 10 lakh was claimed as relief for infringement of fundamental right, “Right of Privacy”. Petitioner also contends that during the said search, one Constable had tried to plant a pistol in his house but due to his own alertness he failed to plant it. Petitioner further adds that while leaving the house, threats were given by the police that they would implicate the petitioner in a false crime.

The provisions discussed above are thoroughly explained hereunder as follows

Chapter V, containing Section 47 & 51 of the Code of Criminal Procedure, 1973 deals with the provisions relating to Search of place entered by person sought to be arrested and Search of Arrested Person

Chapter VII, containing Sections 91-100 of the Code of Criminal Procedure, 1973 deals with the provisions relating

to the summons to produce documents or other things, search-warrant provisions, and other laws related to search and seizure. The provisions of this chapter concerns with summons and warrants, their issue, the manner in which they are served, and executed.

Section 165 and 166 under Chapter XII is an exception to above provisions where a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place and such thing cannot in his opinion be otherwise obtained without undue delay, such officer may after recording in writing the grounds of his belief and specifying in such writing so far as possible, the thing for which search is to be made, search, or cause search to be made for such thing in any place.

Procedure relating to search and seizure:

Section 47 states that the if any person acting under a warrant of arrest has reason to believe that the person being Sough is hiding in any place, be provided free ingress from the owner or incharge of such place and all reasonable facilities for search therein. And if such ingress cannot be sought that it is lawful for a person acting under a warrant to break open any door to avoid any opportunity of escape to person to be arrested. In case a place in occupancy of a female and particularly for a Pardanashi women she shall be asked to withdraw such place on notice and she is at liberty to withdraw.

Section 51 states that when a person is arrested by a police officer under a warrant or without warrant and when the person cannot furnish bail or cannot legally be admitted to bail. The police officer may search such person and where any article is seized it shall be recorded on a receipt and given to that person. In case of a female, such search shall be made by another female with strict regard to decency.

Section 91 states that the Court may issue a summon or the officer in charge may give a written order stating that the person has to produce the document or anything which is believed to have importance in order to carry out investigation, inquiry or proceedings. The person who is in possession of that particular document or thing has to comply with the request and produce it at the time and place prescribed by the Summon or order.

Section 92 states that If the law enforcement agencies including the District Magistrate and the High Court are of the opinion that a document, parcel or anything which is in the custody of postal or telegraph authority is essential for the investigation, trial or the proceedings, then the Postal or telegraph authority has to adhere to the directions given by the court and deliver the document as per the instructions. The Court may allow the postal or telegraph authority to conduct searches for any document, parcel or item because of which the order of the Court is pending.

Section 93 prescribes when a search warrant can be issued. First of all, if the Court believes that the person to whom the Summon or order has been addressed, will not bring the document or the thing which is essential to the proceedings, a warrant can be issued against that person. It can also be issued if the Court does not know the person who may be having the document. The Court may specify the particular place or part till which the inspection will extend and the person in charge of the inspection will follow the order of the Court as given and not extend the limit of inspection. Only the District Magistrate or Chief Judicial Magistrate

can grant the search of a document which is in the custody of postal or telegraph authority.

Section 94 deals with the search carried out at places that are suspected to contain properties that might be stolen or might also hold the forged documents. After the inquiry or the information, if a District Magistrate, Sub-divisional Magistrate or a Magistrate of first-class is of an opinion that a place would have been used for deposit or sale of stolen property or if it would have been used for the production of objectionable articles as mentioned and prescribed in this section, he may authorize the Police Officer (above the rank of a constable) by warrant to enter such place with assistance if required.

The Police have to search the place in the manner specified in the given warrant, taking the possession of property that could be objectionable or stolen. He has to convey about the same to the Magistrate or has to guard the same until the offender is taken to the Magistrate. He may dispose of the objectionable article in some safe place and if he finds any person who may be involved in the deposit, sale, or production of the objectionable article or stolen property, he may take the person in custody and later carry him before the Magistrate.

Coming to the articles/things which are considered as objectionable as per Section 94 –

- counterfeit coins, currency note or stamps,
- forged documents
- false seals
- Pieces of metals prohibited under the Metal Tokens Act, 1889 (1 of 1889), or brought in India as prohibited pursuant to Section 11 of Customs Act, 1962 (52 of 1962).
- Objects considered as obscene under Section 292 of IPC (45 of 1860)
- Instruments that may be used for the production of the above objectionable articles.

Section 95 gives the power to the Court to declare some publications forfeited. The Court can issue search warrants for those publications and if the State Government finds that any article, newspaper, document or book may contain some matter which is punishable under the following sections that are 124A, 153A, 153B, 292, 293 or 295A of IPC, it can declare every copy of such material to be forfeited to the Government. The Magistrate can authorize any Police Officer to seize those documents. As per the warrant, the Police may enter and search the suspected document on any premises. The point to note here is, the Police Officer appointed for the search, cannot be below the rank of Sub-Inspector. The term “Newspaper” and “Book” have the same meaning as said in the Press and Registration of Books Act, 1867, and the word “Document” includes any drawing, painting, photograph, or other visible presentations.

Example: In the case of Anand Chintamani Dighe v. State of Maharashtra, the State Government seized a notice for the forfeiture of the book in all forms entitled Mee Nathuram Godse Bolto ahe (I am Nathuram Godse speaking) including Gujarati translation for reasons that the publication of the said book will disturb public tranquillity, encourage disharmony or feelings of enmity, hatred or ill-will among different groups or communities.

Section 97 is regarding the search of a person whose confinement amounts to an offence. If any District, Sub-Divisional, or a first-class Magistrate has a reason to believe

the same, he may issue a search warrant. The person to whom the search warrant is addressed has to search the confined person and if he finds the confined person, he has to take him immediately before the Magistrate for further proceedings. Section 98 covers the aspects involved for the restoration of an abducted woman including a female child under the age of 18. Section 99 covers the directions for search warrants. The provisions of Sections 38, 70, 72, 74, 77, 78 and 79 are applied to all the search warrants issued.

Forms relating to search warrants and summons

Form number 10 is for the warrant to search after the officer receives a piece of information about the particular offence, once it is filed. Form number 11 is for the search of any particular place which is the suspected place of deposit. Under Form number 30, Special Summons is issued for the person who is accused of committing petty offences. Under form number 33, Summons to witness is executed. These are the forms relating to search warrants and summons.

Persons in charge of a closed place to allow search

If any place has to be searched or inspected is closed, the person residing or in charge of that place has to grant entry to the Officer as mentioned in Section 100 and has to provide him with all the facilities that are appropriate or essential for searching. If the entry or ingress cannot be obtained, then the Police Officer can proceed in a manner as specified in Section 47(2).

If any person is suspected of hiding something that the officer is searching for, then the person can be searched in order to find that concealed article. If a woman is hiding or concealing, then the woman can be searched by another woman; but the search conducted has to be with strict regard to decency. As per this section, it is important to call two or more respectable and independent inhabitants of that particular society or locality.

Example: In the case of *Roop Chand vs the State of Haryana*, the Court reiterated that it is a well-settled law concept that the Investigating Agency should assist independent witnesses when contraband articles are seized while they are available, and their inability to do so in such a situation casts a cloud of doubt on the prosecution case. But if none of them is ready to be a witness to the search conducted or are not available, the Police may issue an order to them in writing to do the same. If any person refuses to be a witness without giving a reasonable cause, such person shall be deemed to have committed an offence under Section 187 of IPC.

The search has to be conducted in the presence of the called inhabitants. A list of all the seized materials with the places has to be signed by witnesses. No witnesses are required to attend the proceedings unless specifically mentioned in the summon. The occupant can be present in every instance of the search. The Police Officer has to give a copy of seized items to the Occupant; Section 101 deals with the disposal of things that are found in search beyond jurisdiction. If a search warrant is issued by a court beyond its jurisdiction, the things together with the list of the seized items have to be taken immediately to the court. Under Section 103, a magistrate can direct a search to be made in his presence.

Powers of the Police Officer

While it is the Police's responsibility to maintain law and order in the society; we've all heard of incidents where Police crossed their boundaries and violated our rights. So

here is a short description of Police powers in India relevant to searches and seizures.

The subsequent legislation confers the power to the Police and the law enforcement agencies. The power of Police Officers to seize certain property is given under Section 102 in The Code of Criminal Procedure, 1973. Any Police Officer can seize any property that may be known or suspected to have been stolen or found in circumstances that raise suspicion of any crime being committed. This Police Officer has to report the seizure to the senior officer if he is subordinate to that senior officer who is in charge of the police station. Every police officer shall immediately report the seizure to the Magistrate with jurisdiction. Where the confiscated property is such that it cannot be conveniently transported to the Court, he may give custody to any person on his execution of a bond undertaking to deliver the property before the Court as and when appropriate and to give effect to the Court's further orders as to the disposition of the property.

Section 165:

1. Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such things cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief specifying in such writing, so far as possible, the thing for which search is to be made, search or cause to be made, for such thing in any place within the limits of such station.

Police may perform a search without a warrant in your house or office if they suspect you have hidden items that are deemed illegal like narcotics, etc. As for a shared house, if you are not present, the police will search for shared areas without a warrant but not for your private things. Police may also search a towed or confiscated car without permission.

Landmark Judgments

In the case of *V. S. Kuttan Pillai v. Ramakrishnan*, the procedural validity of search warrants was upheld, in which it was held that a search for the premises occupied by the accused did not in any way force him to provide evidence against himself and was thus not in violation of Article 20(3) of the Indian Constitution.

In the case of *Ramesh vs Laxmi Bai*, It was held that a son in his father's custody should not be held or considered as unlawful detention, and, accordingly, no search warrant could be issued for the same.

In the case of *Matajog Dobey vs. H.C. Bhari*, the court stated that in cases where statutory provisions have not been complied with, the credibility of evidence in support of the search may be diminished and the evidence provided may be disbelieved unless the defendant gives sufficient reasons for any non-compliance with the provisions.

In the case of the *State of Maharashtra vs. Tapas D. Neogy*, it was upheld that 'bank account' is to be ascertained as property under section 102 of the code and the police officer is empowered to seize the operation of such bank account in the event that these properties are specifically related to the commission of the offence for which the investigation is

conducted.

In the case of the State of MP vs. Paltan Mallah, it was held that the evidence obtained under illegal search is not completely ruled out unless it has caused the accused serious prejudice. The Courts have always been given the discretion to decide whether or not to accept such evidence.

In the case of Modan Singh vs. State of Rajasthan, it was held that if the evidence of the prosecuting officer retrieving the missing items is compelling, it is not appropriate to deny the proof of recovery on the basis that seizure witnesses do not accept the version of the prosecution.

Conclusion

The powers of Search and Seizure conferred under the code of Criminal Procedure, 1973 plays a crucial role in both Civil and Criminal justice system. It is the very weapon handed over to the administrative bodies for the collection of evidences upon which the whole litigation is based. The powers conferred under these provisions are to aid, assist and empower the authorized person to have authority during the course of discharge of his duties. In earlier times, a principle prevailed that the house of a person is his castle and not even Queen of England can break into a person's castle. But with due need and wisdom the presumption emerged that for benefit of the society at large. An ingress even into a private property shall be allowed in order to catch hold of criminals and crime to meet the ends of justice in the society.

Police officers are provided with the authority to conduct inquiries, arrest people, conduct searches, conduct seizures of persons and their property and even use appropriate force in the line of duty. So this power must be exerted within the limits of the law, and when officers exceed those limits they jeopardize the admissibility of any information gathered for prosecution on one hand and shake the faith of believers in law in the society on the other.

Eventually we humans are filled with emotions that inspires us both towards good and bad. Greed is worst of all which has masked itself in forms like corruption, loathing and revenge. Presence of any such from in a person authorized for investigation puts in jeopardy the delivery of justice and discharge of his duties diligently. Therefore, various rules prescribing the manner of search, fulfillment of certain conditions during or before exercising powers of search and seizure has been imposed. Yet like any legislation these rules and provisions gives room for interpretation and if observed closely jeopardizes the very purpose of justice system to some extent.

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