

State of Madhya Pradesh & Anr

Vs

Thakur Bharat Singh

Civil Appeal No. 1066 of 1965

(V. Bhargava, J. M. Shelat, J. C. Shah JJ)

23.01.1967

JUDGMENT

SHAH, J. –

On April 24, 1963, the State of Madhya Pradesh made an order in exercise of powers conferred by section 3 of the Madhya Pradesh Public Security Act, 1959 - hereinafter called 'the act' - directing the respondent Thakur Bharat Singh -

(i) "that he shall not be in any place in the Raipur district;

(ii) "that he shall reside in the municipal limits of Jhabua town, district Jhabua, Madhya Pradesh, and shall proceed there immediately on the receipt of this order; and

(iii) that he shall notify his movements and report himself personally every day at 8 a.m. and 8 p.m. to the Police Station Officer, Jhabua."

The respondent moved a petition in the High Court of Madhya Pradesh under Arts. 226 & 227 of the Constitution challenging the order on the grounds, inter alia, that sections 3 & 6 and other provisions of the Act which authorised imposition of restrictions on movements and actions of person were ultra vires in that they infringed the fundamental freedoms guaranteed under Article 19(1)(d) & (e) of the Constitution of India and that the order was "discriminatory, illegal and violated principles of natural justice." Shivdayal, J., declared clause (i) of the order valid, and declared clauses (ii) and (iii) invalid. In the view of the learned Judge the provisions of section 3(1)(a) of the Act were valid and therefore the directions contained in clause (i) of the order could lawfully be made by the State, but cls. (b) & (c) of section 3(1) of the Act were invalid because they contravened the fundamental freedom of movement guaranteed under Article 19 of the Constitution, and therefore the directions contained in cls. (ii) & (iii) of the order were invalid. Against the order passed by Shivdayal, J., two appeals were filed under the Letters Patent of the High Court. A Division Bench of the High Court held that clauses (a) & (c) of section 3(1) of the Act were valid, but in their view clause (b) of section 3(1) was not valid because it violated the fundamental guarantee under Article 19(1)(d) of the Constitution. The High Court however confirmed the order of Shivdayal, J., since in their view the direction contained in clause (iii) of the order was "inextricably woven" with the directions in clause (ii) and was on that account invalid. Against the order of the High Court, the State of Madhya Pradesh has appealed to this Court.

The relevant provisions of the Act may be briefly set out. Section 3 of the Act provides :

(1) "If the State Government or a District Magistrate is satisfied with respect to any person that he is acting or is likely to act in a manner prejudicial to the security of the State or to the maintenance of public order, and that, in order to prevent him from so acting it is necessary in the interests of the general public to make an order under this section, the State Government or the District Magistrate, as the case may be, may make an order -

(a) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or persons as may be specified therein, he shall not be in any such area or place in Madhya Pradesh as may be specified in the order;

(b) requiring him to reside or remain in such place or within such area in Madhya Pradesh as may be specified in the order and if he is not already there to proceed to that place or area within such time as may be specified in the order;

(c) requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner, at such times and to such authority or person, as may be specified in the order;

(d) imposing upon him such restrictions as may be specified in the order, in respect of his association or communication with such persons as may be mentioned in the order;

(e) prohibiting or restricting the possession or use by him or use by him of any such article or articles as may be specified in the order.

#(2) . . . . .(3) . . . . .##

(4) If any person is found in any area or place in contravention of a restriction order or fails to leave any area or place in accordance with the requirements of such an order, then, without prejudice to the provisions of sub-section (5), he may be removed from such area or place by any police officer

(5) If any person contravenes the provisions of any restriction order, he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

Section 4 authorises the State to revoke or modify "the restriction order", and section 5 authorises the State to suspend operation of the "restriction order" unconditionally or upon such conditions as it deems fit and as are accepted by the person against whom the order is made. Section 6 requires the State to disclose the grounds of the "restriction order" Section 8 provides that in every case where a "restriction order" has been made, the State Government shall within thirty days from the date of the order place before the Advisory Council a copy thereof together with the grounds on

which it has been made and such other particulars as have a bearing on the matter and the representation, if any, made by the person affected by such order. Section 9 provides for the procedure of the Advisory Council, and section 10 requires the State to confirm, modify or cancel the "restriction order" in accordance with the opinion of the Advisory Council.

By clause (ii) of the order the respondent was required to reside within the municipal limits of Jhabua town after proceeding to that place on receipt of the order. Under clause (b) of section 3(1) the State is authorised to order a person to reside in the place where he is ordinarily residing and also to require him to go to any other area or place within the State and stay in that area or place. If the person so ordered fails to carry out the direction, he may be removed to the area or place designated any may also be punished with imprisonment for a term which may extend to one year, or with fine, or with both. The Act it may be noticed does not give any opportunity to the person concerned of being heard before the place where he is to reside or remain in is selected. The place selected may be one in which the person concerned may have no residential accommodation, and no means of subsistence. It may not be possible for the person concerned to honestly secure the means of subsistence in the place selected. Sub-section 3(1)(b) of the Act does not indicate the extent of the place or the area, its distance from the residence of the person externed and whether it may be habitated or inhabited : the clause also no where provides that the person directed to be removed shall be provided with residence, maintenance or means of livelihood in the place selected. In the circumstances we agree with the High Court that clause (b) authorised the imposition of unreasonable restrictions insofar as it required any person to reside or remain in such place or within such area in Madhya Pradesh as may be specified in the order.

Counsel for the State did not challenge the view that the restrictions which may be imposed under clause (b) of section 3(1) requiring a person to leave his hearth, home and place of business and live and remain in another place wholly unfamiliar to him may operate seriously to his prejudice, and may on that account be unreasonable. But he contended that normally in exercise of the power under clause (b) a person would be ordered to remain in the town or village where he resides and there is nothing unreasonable in the order of the State restricting the movements of a person to the town or place where he is ordinarily residing. It is true that under clause (b) an order requiring a person to reside or remain in a place where he is ordinarily residing may be passed. But in exercise of the power it is also open to the State to direct a person to leave the place of his ordinary residence and to go to another place selected by the authorities and to reside and remain in that place. Since the clause is not severable, it must be struck down in its entirety as unreasonable. If it is intended to restrict the movements of a person and to maintain supervision over him, orders may appropriately be made under cls. (c) and (d) of section 3(1) of the Act.

Counsel for the State urged that in any event so long as the State of emergency declared on October 20, 1962, by the President under Article 352 was not withdrawn or revoked, the respondent could not move the High Court by a petition under Article 226 of the Constitution on the plea that by the impugned order his fundamental right guaranteed under Article 19(1)(d) of the Constitution was infringed. But the Act was brought into force before the declaration of the emergency by the President. If the power conferred by section 3(1)(b) authorised the imposition of unreasonable restrictions, the clause must be deemed to be void, for Article 13(2) of the Constitution prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and laws

made in contravention of Article 13(2) are to the extent of the contravention void. Section 3(1)(b) was therefore void when enacted and was not revived when the proclamation of emergency was made by the President. Article 358 which suspends the provisions of Article 19 during an emergency declared by the President under Article 352 is in terms prospective : after the proclamation of emergency nothing in Article 19 restricts the power of the State to make laws or to take any executive action which the State but for the provisions contained in Part III was competent to make or take. Article 358 however does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency. Counsel for the State while conceding that if section 3(1)(b) was, because it infringed the fundamental freedom of citizens, void before the proclamation of emergency, and that it was not revived by the proclamation, submitted that Article 358 protects action both legislative and executive taken after proclamation of emergency and therefore any executive action taken by an officer of the State or by the State will not be liable to be challenged on the ground that it infringes the fundamental freedoms under Article 19. In our judgment, this argument involves a grave fallacy. All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others : it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles : (1) the sovereignty of the people with limited Government authority i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is distribution of powers between the three organs of the State - legislative, executive and judicial - each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive actions. As pointed out by Dicey in his "Introduction to the study of the Law of the Constitution", 10th Edn., at p. 202 the expression "rule of law" has three meanings, or may be regarded from three different points of view. "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government." At p. 188 Dicey points out :

"In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the government in England : and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects."

We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority.

Counsel for the State relied upon the terms of Article 162 of the Constitution, and the decision of

this Court in *Rai Sahib Ram Jawaya Kapur v. The State of Punjab* ([1955] 2 S.C.R. 225) in support of the contention that it is open to the State to issue executive orders even if there is no legislation in support thereof provided the State could legislate on the subject in respect of which action is taken. Article 162 provides that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. But Article 162 and Article 73 are concerned primarily with the distribution of executive power between the Union on the one hand and the States on the other, and not with the validity of its exercise. Counsel for the State however strongly relied upon the observations of Mukherjea, C.J., in *Rai Sahib Ram Jawaya Kapur's case* ([1955] 2 S.C.R. 225) :

"They do not mean,.... that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already."

These observations must be read in the light of the facts of the case. The executive action which was upheld in that case was, it is true, not supported by legislation, but it did not operate to the prejudice of any citizen. In the State of Punjab prior to 1950 the text-books used in recognized schools were prepared by private publishers and they were submitted for approval of the Government. In 1950 the State Government published text books in certain subjects, and in other subjects the State Government approved text-books submitted by publishers and authors. In 1952 a notification was issued by the Government inviting only "authors and others" to submit text-books for approval by the Government. Under agreements with the authors and others the copyright in the text-books vested absolutely in the State and the authors and others received royalty on the sale of those text-books. The petitioners - a firm carrying on the business of preparing, printing, publishing and selling text books - then moved this Court under Article 32 of the Constitution praying for writs of mandamus directing the Punjab Government to withdraw the notifications of 1950 and 1952 on the ground that they contravened the fundamental rights of the petitioners guaranteed under the Constitution. It was held by this Court that the action of the Government did not amount to infringement of the guarantee under Article 19(1)(g) of the Constitution, since no fundamental rights of the petitioners were violated by the notifications and the acts of the executive Government done in furtherance of their policy of nationalisation of text-books for students. It is true that the dispute arose before the Constitution (Seventh Amendment) Act, 1956, amending, inter alia, Article 298, was enacted, and there was no legislation authorising the State Government to enter the field of business of printing, publishing and selling text-books. It was contended in support of the petition in *Rai Sahib Ram Jawaya's case* ([1955] 2 S.C.R. 225) that without legislative authority the Government of the State could not enter the business of printing, publishing and selling text-books. The Court held that by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen : the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights. Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the Subject on which the executive order is issued.

We are therefore of the view that the order made by the State in exercise of the authority conferred by section 3(1)(b) of the Madhya Pradesh Public Security Act 25 of 1959 was invalid and for the acts done to the prejudice of the respondent after the declaration of emergency under Article 352 no immunity from the process of the Court could be claimed under Article 358 of the Constitution, since the order was not supported by any valid legislation.

The appeal therefore fails and is dismissed.

Appeal dismissed.

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