Aeltemesh Rein, Advocate, Supreme Court of India

Vs

Union of India and Others

Writ Petition (Criminal) No. 163 of 1988 (Under Article 32 of the Constitution of India)

(E. S. Venkataramiah JJ)

04.08.1988

ORDER

VENKATARAMIAH, J. –

1. On the basis of the allegations made in the above writ petition at the time of the preliminary hearing the court felt that notice should be issued to the Union of India regarding two matters and accordingly the court made an order that the Union Government shall show cause.

> (i) why it should not be directed to implement faithfully the decision of this Court in Prem Shankar Shukla v. Delhi Administration as regards the handcuffing of the accused arrested under the provisions of the criminal law; and
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> (ii) why it should not be directed to consider the question of issuing a notification bringing Section 30 of the Advocates Act, 1961 (hereinafter referred to as 'the Act') into force since already more than 25 years had elapsed from the date of the passing of the Act.

2. The first question referred to above arose on account of the allegations relating to the alleged handcuffing of an advocate practicing in Delhi contrary to law while he was being taken to the Court of the Metropolitan Magistrate at Delhi after he had been arrested on the charge of a criminal offence. It is urged that the Union Government and the Delhi Administration had not issued necessary instructions to the police authorities with regard to the circumstances in which an accused arrested in a criminal case, could be handcuffed or fettered in accordance with the judgment of this Court in Prem Shankar Shukla v. Delhi Administration. The learned Attorney General of India very fairly conceded that it was for the Union of India to issue necessary instructions in this behalf to all the State Governments and the governments of Union Territories. We accordingly direct the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused should be resorted to in conformity with the judgment of this Court referred to above and to circulate them amongst all the State Governments and the governments of Union Territories. This part of the order shall be complied with within three months.

3. We shall now take up for consideration the second question referred to above. The Advocates Act, 1961 received the assent of the President of India on May 19, 1961. Sub-section (3) of Section 1 of the Act provides that it shall in relation to the territories other than those referred to in sub-section (4) come into force as the Central Government may by notification in the official gazette appoint and different dates may be appointed for different provisions of the Act. Chapters I, II and VII of the Act were brought into force on August 16, 1961, Chapter III and Section 50 (2) on

December 1, 1961, Section 50 (1) on December 15, 1961, Sections 51 and 52 on January 24, 1962, Section 46 on March 29, 1962, Section 32 and Chapter VI [except Sections 50 (1) and (2), 51, 52 and 46 which had already come into force] on January 4, 963, Chapter V on September 1, 1963 and Sections 29, 31, 33 and 34 of Chapter IV of the Act on June 1, 1969. Section of the Act, with which we were concerned, has not yet been brought into force, Section 30 of the Act reads thus :

> 30. Right of advocates to practice.-Subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which this Act extends,-
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> (i) in all courts including the Supreme Court;
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> (ii) before any tribunal or person legally authorised to take evidence; and
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> (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

4. When section 30 of the Act is brought into force every advocate whose name is entered in the State roll will be entitled as of right to practice throughout the territories to which the Act extends, before the courts, tribunals and other authorities or persons referred to therein. Even today there are laws in force in the country which impose restrictions on the right of an advocate to appear before certain courts, tribunals and authorities. Section 36 (4) of the Industrial Disputes Act, 1947 provides that in any proceeding before a Labour Court, Tribunal or National Tribunal a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be. Section 13 of the Family Courts Act, 1984 provides that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. There is a proviso to the said section whereunder if the Family Court considers it necessary in the interest of justice it may seek the assistance of a legal expert as amicus curiae. There are certain land tribunals constituted under some of the Acts which are in force in certain States before which advocates cannot appear at all. In many of the cases which come up before the courts or tribunals before which advocates cannot appear as of right complicated questions of law affecting the rights of individuals arise for consideration and they need the assistance of advocates. We have travelled a long distance from the days when it was considered that the appearance of a lawyer on one side would adversely affect the interests of the parties on other other side. The Legal Aid and Advice Boards, which are functioning in different States, can now be approached by people belonging to weaker sections, such as, Scheduled Castes Scheduled Tribes, women, labourers etc. for legal assistance and for providing the services of competent lawyers to appear on their behalf before the courts and tribunals in which they have cases. In these circumstances prima facie there appears to be now no justification for not bringing into force Section 30 of the Act.

5. It is no doubt true that the Central Government has been given the power by Parliament to appoint the date on which any of the provisions of the Act shall come into force by sub-section (3) of Section 1 of the Act and the said provision does not lay down any objective standards for the determination of the date on which any of the specific provisions of the Act should be brought into force. The question for consideration is whether this Court can issue a writ in the nature of mandamus to the Central Government to bring Section 30 of the Act into force. Dealing with a similar question a Constitution Bench of this Court in A. K. Roy v. Union of India has taken the view that a writ in the nature of mandamus directing the Central Government to bring a statute or a

provision in a statute into force in exercise of powers conferred by Parliament in that statute cannot be issued. Chandrachud, C. J., who spoke for the majority of the Constitution Bench has observed at pages 314 to 316 of the Reports thus : [SCC pp. 310-12 : SCC (Cri) pp. 188-89, paras 51 and 52]

But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the Forty-fourth Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament ad if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus.... But, the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms. That makes it difficult for us to substitute our own judgment for that of the government on the question whether Section 3 of the Amendment Act should be brought into force.... It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of Section 3 of the Forty-fourth Amendment into force.....

If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by appropriate writ to discharge the function assigned to it by the Parliament.

6. The effect of the above observations of the Constitution Bench is that it is not open to this Court to issue a writ in the nature of mandamus to the Central Government to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the Central Government. As long as the majority view expressed in the above decision holds the field it is not open to this court to issue a writ in the nature of mandamus directing the Central Government to bring Section 30 of the Act into force. But, we are of the view that this decision does not come in the way of this Court issuing a writ in the nature of mandamus to the Central Government to consider whether the time for bringing Section 30 of the Act into force has arrived or not. Every discretionary power vested in the executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. The Act was passed in 1961 and nearly 27 years have elapsed since it received the assent of the President of India. In several conferences and meetings of lawyers resolutions have been passed in the past requesting the Central Government to bring into force Section 30 of the Act. It is not clear whether the Central Government has applied its mind at all to the question whether Section 30 of the Act should be brought into force. In these circumstances, we are of the view that the Central Government should be directed to consider within a reasonable time the question whether it should bring Section 30 of the Act into force or not. If on such consideration the Central Government feels that the prevailing circumstances are such Section 30 of the Act should not be brought into force immediately it is a different matter. But it cannot be allowed to leave the matter to lie over without applying its mind to the said question. Even though the power under Section 30 [sic Section 1 (3)] of the Act is discretionary, the Central Government should be called upon in this case to consider the question whether it should exercise the discretion one way or the other having regard to the fact that more than a quarter of century has elapsed from the date on which the Act received the assent of the President of India. The learned Attorney General of India did not seriously dispute the

jurisdiction of this Court to issue the writ in the manner indicated above.

7. We, therefore, issue a writ in the nature of mandamus to the Central Government to consider within a period of six months whether Section 30 of the Act should be brought into force or not. The writ petition is accordingly disposed it.

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