

# ALLAHABAD HIGH COURT

Sri Ram Das Gaur

Vs.

City Magistrate

Criminal Misc. Appln. No. 1343 of 1959

(D.S. Mathur, J.)

16.09.1959

## ORDER

**D.S. Mathur, J.**

1. This is a petition under Article 228 of the Constitution of India read with Section 561-A, Criminal Procedure Code, by Ram Das Gaur to quash the Criminal Case No. 611 of 1959 pending against him in the Court of Sri M. N. Mathur, Magistrate, Varanasi, and also to declare the order dated 28-4-1959 promulgated under Section 144, Criminal Procedure Code to be ultra vires and of no legal consequence.
2. The petitioner has challenged the order promulgated under Section 144, Criminal Procedure Code on many grounds, but as the order could not be deemed to be in force on the expiry of two months from the date of the original order, it is not necessary to express any opinion on the constitutionality of Section 144, Criminal Procedure Code or of the order promulgated under this section.
3. The material facts of the case are that a section of the Hindus started an agitation with regard to a mosque which was constructed under order of the Moghul Emperor Aurangzeb in place of or on the site of old Lord Vishwanath Temple. A new idol of Lord Vishwanath was installed near the mosque in another temple which exists upto now. There is a platform lying between this mosque and the temple and Hindus wanted to perform Yagya on this land. As the relations between the Hindus and Muslims were likely to be disturbed and there was an imminent possibility of disturbance of public tranquility, the City Magistrate of Varanasi promulgated an order Section 144, Criminal Procedure Code on 23-2-1959 to be valid for a period of one month. The order was extended for a further period of one month and it ceased to be effective on expiry of the prescribed period of two months. It was on 28-4-1959 that the City Magistrate promulgated another order under Section 144, Criminal Procedure Code, the material portion of

which runs as below :

"Whereas it has been made to appear to me that the Hindu Mahasabha agitation for the restoration of the Gyanvapi mosque is still continuing and that after the expiry of the orders promulgated by me under Section 144, Criminal Procedure Code, some persons acting in pursuance of the aforesaid agitation took advantage of the expiry of the order under Section 144, Criminal Procedure Code and collected near the Gyanvapi mosque on 23-4-59 and 27-4-59 and raised provocative slogans and tried to disturb the public peace and whereas it is learnt that the Hindu Mahasabha will send batches of leaders to agitate about the restoration of the Gyanvapi mosque and whereas these activities, in my opinion, are likely to lead to a breach of the peace and to disturb the tranquillity and I consider it necessary to take immediate action for the prevention of the breach of the peace, I, P. D. Chaturvedi, City Magistrate, Varanasi hereby order under Section 144, Criminal Procedure Code as follows :

- (1) No person shall organise and no person shall take part in any assembly of five or more persons, without written permission of the City Magistrate.
- (2) .....
- (3) .....
- (4) .....
- (5) No person shall raise any slogans or spread any rumours or shall do any act which is likely to create tension between Hindus and Muslims and to disturb the public tranquility.

.....  
Sd. P.D. Chaturvedi,  
City Magistrate, Varanasi  
28-04-1959."

4. The main point for consideration is if the second order under Section 144, Criminal Procedure Code, shall be deemed to be in continuation of the earlier one whereby the period was extended beyond two months, or the order promulgated on 28-4-1959, is a fresh, completely new. order under Section 144, Criminal Procedure Code.

5. The maximum period for which an order under Section 144, Criminal Procedure Code can remain in force is laid down in sub-section 6 thereof. The sub-section runs as below :

"(6) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the State Government by notification in the Official Gazette, otherwise directs."

The wordings of the sub-section are clear and are not capable of any ambiguity. In other words, an order passed under Section 144, Criminal Procedure Code shall remain in force for a period

not exceeding two months, unless in cases of danger to human life, health, or safety, or a likelihood of a riot or an affray, the State Government by notification in the official gazette extends the period. The present was a case where a riot was apprehended and there was a likelihood of human life being in danger. Consequently, the State Government could, if it so desired, extend the period for which an order under Section 144, Criminal Procedure Code could remain in force.

6. What has been done in the present case is that instead of the State Government issuing the notification to extend the period for which the order under Section 144, Criminal Procedure Code could remain in force, the City Magistrate issued another order a few days after the expiry of the prescribed period of two months by issuing another order under Section 144, Criminal Procedure Code. The learned Standing Counsel has urged that the second order should be treated as a fresh order which by itself could remain valid for another period of two months. It was conceded by him that a Magistrate could not promulgate an order or renew it for a total period exceeding two months. There can be instances where a second order passed after a few days may not be treated to be in continuation of the first, and the second order would be an independent order promulgated under Section 144, Criminal Procedure Code. For example, consider a case where as a result of the order passed under Section 144, Criminal Procedure Code conditions became peaceful, and the relations between rival parties become normal as before the dispute, but all of a sudden after a few days relations between the parties become tense and it is again apprehended that a disturbance of public tranquility may take place. In such cases the Magistrate would be acting in good faith when he issues a fresh order under Section 144, Criminal Procedure Code. But if conditions do not become peaceful and apprehension is expected even after the expiry of the prescribed period of two months from the date of the issue of the original order under Section 144, Criminal Procedure Code, any fresh order to be promulgated under this section would be in continuation of the first and in the eye of law, the Magistrate shall be deemed to be promulgating an order for a period exceeding two months - an order which would be beyond his jurisdiction. It is a settled law that one cannot do an act indirectly which he could not do directly, or that one cannot flout the express provisions of an enactment.

A colorable act on the part of a public officer shall not be accepted on its face value and one shall have to look into the facts to find out whether such an act was done in good faith, or indirect method was adopted to get over the provisions of the law. The present is one of those cases where the Magistrate cannot be held to have acted in good faith : when he issued the second order under Section 144, Criminal Procedure Code, he was indirectly extending the period for which an order under Section 144 could not remain in force.

7. In the impugned order dated 28-4-1959 the Magistrate himself mentioned that Hindu Mahasabha agitation for restoration of the Gayanvapi mosque was still continuing and that after expiry of the orders promulgated under Section 144 Criminal Procedure Code, some persons acting in pursuance of the aforesaid agitation, took advantage of the expiry of the order under Section 144 Criminal Procedure Code and collected near the Gyanvapi mosque on 23-4-1959

and 27-4-1959 and raised provocative slogans and tried to disturb the public peace. The Magistrate has used words to make it clear that the agitators took advantage of the expiry of the order; but at the same time he was alive to the situation that the agitation had throughout been continuing and was not given up before the expiry of the period of the earlier orders. The earlier orders expired on 22-4-1959, and the Hindus had agitated and uttered slogans on the next day also. When the agitation was continuing and had not subsided for even one day, the total period for which the order under Section 144 Criminal Procedure Code could remain in force would be two months from the date of the first order, unless extended under a valid notification by the State Government. Admittedly no such notification was issued nor was it published in the Official Gazette.

8. To sum up, the order dated 28-4-1959 promulgated under Section 144 Criminal Procedure Code was beyond the jurisdiction of the City Magistrate of Varanasi and in the eye of law it had no force.

9. A complaint with regard to an offence punishable under Section 188 Indian Penal Code could be made by the City Magistrate only after a valid order under Section 144 Criminal Procedure Code had been promulgated. Consequently the complaint was also beyond the jurisdiction of the City Magistrate and shall have to be quashed.

10. The petition is hereby allowed and the order under Section 144, Criminal Procedure Code, dated April 28, 1959 and also the complaint made against the petitioner are hereby quashed. The proceedings already pending against the petitioner in the Court of Sri M. N. Mathur, Judicial Officer, Varanasi, shall also stand quashed. The petitioner is said to be confined in Jail and he should be released immediately unless wanted in connection with some other case. Costs on parties.

Petition allowed.