

(1962) 11 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 248 of 1960

A.H. Magermans

APPELLANT

Vs

S.K. Ghosh

RESPONDENT

Date of Decision : 20-11-1962

Acts Referred:

Constitution of India, 1950 — Article 245, 258, 73
Foreigners Act, 1946 — Section 3

Citation : AIR 1963 Cal 369 : (1963) CriLJ 9 : 67 CWN 206

Hon'ble Judges : B.N. Banerjee, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.N. Banerjee, J.—The petitioner, A.H. Magermans, is a Belgian national. He arrived in India, on November 23, 1947, with a Belgian Passport and a Visa for India issued by the Visa section of the British Embassy, at Brussels. The visa was issued either at the request of the Head of the Catholic Church St. Michael of Brussels (as stated in the affidavit-in-opposition, affirmed by Ajoy Kumar Dey, Inspector of Police Security Control) or at the request of the Head of the Society of Jesus, residing at St. Michael's College, Brussels (as the petitioner affirms), in order to enable the, petitioner to take up missionary work in India. After arrival in India, the petitioner did some work connected with the Jesuit Mission at Calcutta and Ranchi and thereafter severed his connection with the Mission, in or about February 3, 1952, and adapted himself to secular life. The fact of this severance was brought to the notice of the officer-in-charge of the Department of Registration of Foreigners, in Calcutta, by the Superior Regular, Calcutta Jesuit Mission, in his letter dated December 3, 1953 (Annexure "A" to the affidavit-in-opposition, affirmed by Ajoy Kumar Dey.)

2. On severance of his connection with the Jesuit Mission, the petitioner entered in the service of different commercial establishments in Calcutta. His application for extension of the period of stay in India was not granted by the Government of

India, firstly, because he had changed the nature of his work in India and, secondly, because his employers were not willing to furnish the usual financial guarantee on behalf of the petitioner. Then ensued a long and protracted struggle, put up by the petitioner, to frustrate all attempts to make him leave India. Ultimately, however, the petitioner left India on or about April 21, 1957. Thus ended the first chapter of the petitioner's stay in India.

3. In July 1957, Messrs. Leonard Biermans Turnhout, a company carrying on manufacturing business in India, approached the Government of India with a request to allow the petitioner to enter India and take up duties as Manager of the Calcutta Office of the company, to which post the petitioner had been appointed. The Government of India was at first reluctant to grant the request and issue visa to the petitioner but ultimately, for reasons, best known to itself, agreed to authorise the entry of the petitioner to India, on an undertaking "given by him in writing that he would not prolong his stay in India beyond the period of one year.

4. The petitioner arrived in India on or about May 16, 1958. But even after the expiry of one year, the petitioner did not leave India, as undertaken by him. On the other hand, he applied for an extension of his stay in India. While that application was pending, Messrs. Leonard Biermans Turnhout dispensed with the services of the petitioner as Manager of their Calcutta establishment, for reasons, with which I am not concerned. The petitioner, who appears to have been a sort of a rolling stone in his secular life, thereafter successively joined the offices of M. A. M. Kashani and Sons, Rolls Print Co., and other commercial firms in Calcutta and while serving in such offices obtained several short term extensions of his period of stay in India. At last, however, the petitioner was served with an order, dated January 13, 1960, calling upon him to leave India within 30 days of the date of the service of the order upon him. A copy of the said order is Annexure "C" to the petition. The order was made u/s 3(2)(c) of the Foreigners Act, 1946 and was signed by respondent No. 1, Deputy Secretary to the Home (Passport) Department, Government of West Bengal. The petitioner admits to have received the order on 4-2-1960. As was to be expected the petitioner began a second serial of struggle to bypass the order and on different pretexts obtained extensions of the date fixed for him to leave India. This went on up to September 1960.

5. On September 7, 1960, however, the petitioner was served with a second order under the Foreigners Act, 1946, calling upon him to leave India within 15 days of the service of the order upon him. The order is Annexure "E" to the petition and is signed by respondent No. 1, At this stage, the petitioner gave up his milder methods of applying before the authorities for extension of his period of stay in India and openly challenged the order, dated September 7, 1960, as illegal and without jurisdiction. He caused service of a notice of demand calling upon the respondent No. 1 to withdraw the order. The result was that the petitioner had to be arrested, on 18-11-1960, for violation of the order and had

to be prosecuted before the Chief Presidency Magistrate, Calcutta, under the Foreigners Act. In these circumstances the petitioner moved this Court, on 23-11-1960 and obtained the present Rule. There are prayers in the petition for issue of Writs in the nature of Certiorari, Mandamus, and other prohibitive Writs for the quashing or the withdrawal of the order, dated September 7, 1960 and also for the quashing of the criminal prosecution, against him.

6. Mr. Ginwala, learned Advocate for the petitioner, argued the following points for my consideration. He contended, in the first place, that Section 3 of the Foreigners Act, 1946 (Act XXXI of 1946) was an invalid piece of legislation, because it conferred uncontrolled powers on the Central Government over foreigners, without any relation, to the object of the Act. He contended, in the next place, that Notification No. 4/3/56-(1). F. I., dated April 19, 1958, entrusting some of the State Governments, including the State of West Bengal, with the functions of the Central Government, inter alia, in making orders of the nature specified in Clauses (c), (cc), (d) and (J) of Sub-section (2) of Section 3 of the Foreigners Act, 1946 and, under the Foreigners Order, 1948, was an invalid piece of notification, because the powers delegated were legislative powers, which could not possibly be delegated under Article 258 of the Constitution contemplating as the Article did delegation of executive powers only. He also contended that the aforesaid notification was bad on another ground; 5n that the Notification contemplated that the State shall, in exercise of its entrusted authority, comply with the general and special direction as the Central Government may from time to time issue. He argued that having had entrusted its authority, the Central Government could not make the State Government work under its direction and such a half-way entrustment was no delegation under the law. I propose to take up the arguments advanced by Mr. Ginwala in the order they were made:

Clauses (c), (cc), (d) and (f) of Section 3(2) of the Foreigners Act read as follows ;

Section 3(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner-

* * * * "(c) shall not remain in India or in any prescribed area therein;

(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;

(d) shall remove himself to, and remain in such area in India as may be prescribed;

(e) * * * (f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

and may make provision for any matter which is to be or may be prescribed and

for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act".

7. The vires of section 3(2)(c) of the Foreigners Act, 1946 came up for consideration before the Supreme Court, in the case of Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others, . In that case the petitioner, a West German subject, was placed under preventive detention by an order of the West Bengal Government, u/s 3 (1) (b) of the Preventive Detention Act 1950, on the ground that he was a foreigner within the meaning of the Foreigners Act 1946 and that it had become necessary to make arrangements for his expulsion from India, and, therefore, he was required to be detained until the issue of an appropriate order from the Central Government. The petitioner challenged the order of his preventive detention on various pleas, including a challenge to the vires of Section 3(1)(b) of the Preventive Detention Act 1950 and Section 3(2)(c) of the Foreigners Act 1946, on the ground that they offended Article 14 of the Constitution. The challenge was repelled by Bose, J. with the following observations:

"We now turn to the argument that Section 3(1)(b) is ultra vires because it offends Article 14 of the Constitution. Actually, the attack here is on Section 3(2) (c) of the Foreigners Act but as Section 3(1)(b) of the Preventive Detention Act is consequential on that it is also involved. Section 3(1)(b) permits detention of a "foreigner" within the meaning of the Foreigners Act, 1946. The definition of "foreigner" is given in Section 2(a) of that Act and is as follows:

" "Foreigner" means a person who-

(i) is not a natural-born British subject as defined in Sub-sections (1) and (2) of Section (1) of the British Nationality and Status of Aliens Act, 1914, or

(ii) has not been granted a certificate of naturalization as a British subject under any law for the time being in force in India". The rest of the definition is not material. The argument is that this differentiates between foreigner and foreigner. It takes two classes of British subjects who are now as much foreigners as any one else not an Indian citizen, out of the class of foreigners for the purposes of preventive detention and for the purposes of expulsion under the Foreigners Act. This, it was contended, offends Article 14, which provides that -

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

This argument is easily answered by the classification rule which has been repeatedly applied in this Court. The classification of foreigners into those who are British subjects of the kind set out in the definition, and others, so as to make the former not foreigners for the purposes of the Foreigners Act and the Preventive Detention Act, is a reasonable and rational classification and so does not, on the authority of our previous decisions, offend Article 14. There is no individual discrimination and it is easily understandable that reasons of State

may make it desirable to classify foreigners into different groups. We repel this argument.

It was then said that at any rate there is differentiation in the same group because the definition discriminates between classes of British subjects inter se. It was pointed out that the British Nationality and Status of Aliens Act, 1914 was repealed in 1948 and re-enacted in another form but as our Act has retained the 1914 definition that is the one we must consider. We do not intend to examine this contention because, even if it be true that there is the discrimination alleged, namely between one class of British subject and another, that will not give the petitioner a right of challenge on this ground. He is not a British subject and so is not a member of the only class that could claim to be aggrieved on this score. This Court has decided in earlier cases that the only persons who can impugn any given piece of legislation under Article 32 are those who are aggrieved thereby. As the petitioner is not a person aggrieved, so far as this point is concerned, he not being a British subject, he cannot attack the section on this ground.

We hold that the impugned portions of Section 3 (r) (b) of the Preventive Detention Act and Section 3(2)(c) of the Foreigners Act, 1946 are intra vires"

8. Mr. Ginwala, however, argued that the aforesaid decision of the Supreme Court did not affect his argument because the definition of the expression "foreigner" underwent a drastic change by the Foreigners Laws (Amendment) Act, 1957, and the amended definition merely read as "Foreigner means a person who is not a citizen of India". He also contended that he was not invoking Article 14 of the Constitution in support of his arguments as to the unconstitutionality of Section 3(2), Foreigners Act but that he was disputing the vires of Section 3, firstly, because the section had no nexus with the object of the Act and, secondly, because the section conferred uncanalised and unbridled power on the Central Government in relation to foreigners.

9. Mr. Ginwala is right in his contention that Hans Mulla's case (Supra) does not touch his argument in the form that he puts it. I have, therefore, to see whether Section 3 of the Foreigners Act is bad because of excessive delegation of authority to the Central Government.

10. On the question how far delegation of legislative function is permissible, the law is now well-settled. Essential legislative functions must not be delegated but subordinate legislative functions may. This is so because in the tempo of the prevailing conditions of modern society, events occur which are difficult to foresee and it is impossible for the legislature to anticipate all events or to provide for all eventualities. Legislature, therefore, necessarily leaves the duty of making rules and of taking necessary actions under the statute to the appropriate Government. But this delegation must not be uncontrolled and unguided and only such delegation of authority may be made to the Government for the exercise of which sufficient guidance has already been provided in the

Statute itself (vide *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, and *Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others*, .) I have, therefore, to see what guidance is contained in the *Foreigners Act, 1946* in the matter of making of orders on foreigners, a jurisdiction which has been entrusted by the Central Government to the State Governments. The long title to the Act reads as "An act to confer upon the Central Government certain powers in respect of foreigners." The use of the adjective "certain" before the expression "power" leaves the object of the Act a good deal uncertain. The preamble, however, resolves the uncertainty and limits the power "in respect of the entry of foreigners in India, their presence therein and their departure there from" The object of the Act therefore, is limited to powers over the entry, presence and departure of foreigners into, in, and from India. This is a very necessary power, which every government must possess over foreigners, whose presence may be or may, in course of time, become dangerous to the security of the administration or undesirable for other reasons. Since such reasons may be many and may arise on account of political and other considerations, too numerous to define, the legislature could not visualise all the eventualities and left the whole matter of foreigners' presence in India to the executive discretion. The problem of immigration and presence of foreigners, is difficult for the legislature to resolve once for all, because the problem is linked up with many variables, both national and international. A foreigner, once a friendly alien, may become an enemy alien after he enters India, if his country later on enters into war with the country where he may be; or even though belonging to a friendly nation, a foreigner may himself indulge in undesirable activities jeopardising the security of the country where he may be; or foreigners may come in such numbers or put in such competition as may upset the economic set up of the country. It must, therefore, be left to the executive discretion as to which foreigners should be allowed entry into the country, under what condition they should stay in the country and when and how they should depart therefrom. Section 3 of the *Foreigners Act*, authorising prohibition, regulation or restriction on the entry of foreigners into India or their departure therefrom or their presence or continued presence therein is not bad for excessive delegation of authority, because the power in respect of entry of foreigners into India, their presence therein and their departure therefrom must be left, as of necessity, to the discretion of the executive. Apart from the guidance given in the preamble to the Act and in the section itself, no larger guidance is possible to be given and no set pattern is feasible to be set up because of the nature of the problem concerning foreigners. I, therefore, overrule the first branch of Mr. Ginwala's contention that Section 3 of the Act is bad for excessive delegation of powers to the Government.

11. I now turn to the second branch of Mr. Ginwala's argument concerning the invalidity of the notification No. 4/3-56-(1)- F.1, dated April 19, 1958. The said notification is set out below : -

"In exercise of the powers conferred by Clause (1) of Article 258 of the

Constitution and of all other powers enabling him in this behalf and in supersession of all previous notifications on the subject in so far as they relate to the Acts, Rules and Order hereinafter mentioned, the President, with the consent of the State Government concerned, hereby entrusts to the Government of each of the States of Andhra Pradesh, Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal the functions of the Central Government

(i) u/s 5 of the Indian Passport Act, 1920 (34 of 1920):

(ii) under Rules 2 and 4 of the Indian Passport Rules 1950;

(iii) under Rule 3 of the Registration of Foreigners Rules, 1939;

(iv) in making orders of the nature specified in Clauses (c), (cc), (d) and (f) of Sub-section (2) of Section 3 of the Foreigners Act, 1946 (31 of 1946) and

(v) under the Foreigners Order, 1948, subject to the following conditions, namely:-

(a) that in the exercise of such functions the said State Government shall comply with such general or special directions as the Central Government may from time to time issue; and

(b) that notwithstanding this entrustment, the Central Government, may itself exercise any of the said functions should it deem fit to do so in any case.

Fateh Singh, Jt. Secy."

12. It appears from the notification that the entrustment of the authority under the Foreigners Act and Order was made to the Government of West Bengal in exercise of the powers conferred by Clause (1) ,of Article 258 of the Constitution. Mr. Ginwala contended that Article 258 contemplated entrustment of executive power and not legislative power. He further contended that the power to make an order u/s 3 of the Foreigners Act was legislative power and was incapable of entrustment. This argument is not very well-conceived.

" "Although legislative, executive and judicial powers are formally distinct, it is not the case that legislative functions are exclusively performed by the legislature. X X Executive functions are incapable of comprehensive definition. X X X They include in addition to the execution of the laws, the maintenance of public order, the management of crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations and provision and supervision of such services as education, public health, transport and state assistance and insurance. In the performance of these functions public authorities are bound to issue orders which are not far removed from legislation and to make decisions affecting the personal and proprietary rights of individuals which, while not strictly judicial, are quasi-judicial in character". (Halsbury Laws of England Vol. VII Article 409 Simons edition).

That being the scope of executive power, the criticism that an order u/s 3 of the Foreigners Act takes the colour of legislation, that is to say, of subordinate legislation, may not wholly deprive the order of its character as an executive order or an order made in exercise of the executive power. Under Article 73 the Executive power of the Union extends to matters with respect to which the Parliament has power to make laws, that is to say, matters included in List I, Schedule VII to the Constitution. Items 17 to 19 of List I, cover matters relating to aliens, extradition, admission into and emigration and expulsion from India and passport and visas. These being matters over which the executive power of the union also extends, may be entrusted under Article 258 of the Constitution by the Central Government to the State Government either conditionally or unconditionally. Moreover, I have hereinbefore come to the conclusion that powers u/s 3(2) of the Foreigners Act may be validly delegated to the executive. Thus the criticism that the power u/s 3 of the Foreigners Act could not validly be entrusted to the State Government by the Central Government must fail.

13. I now take up for consideration the last argument by Mr. Ginwala, namely, that the conditional entrustment made by the Central Government to the State Government, as under the impugned notification, is bad because the State Government was required to comply with the general or special direction by the Central Government in the exercise of the functions entrusted. This argument has two infirmities. In the first place the argument ignores the express provision in Article 258 of the Constitution providing for entrustment of authority conditionally or unconditionally. If the entrustment be burdened with conditions, there is no reason why condition (a) to the notification must be struck down. In the next place, assuming for the sake of argument that condition (a) to the notification is bad and beyond the power of entrustment as in Article 258 of the Constitution, even then there is nothing to show that the impugned order was made by the Government of West Bengal under the special direction of the Central Government. This point was raised in ground No. IX in the petition which reads as follows : -

"The impugned order having been made by the Government of West Bengal in pursuance of instruction given by the Central Government is invalid and contrary to law because, assuming the delegation to the State Government to be valid, the State Government ought to have independently applied its mind in issuing the order."

14. Ground No. IX is included in paragraph 27 of the petition, which is affirmed as true to the belief of the deponent. There is no indication how and by what process of reasoning the petitioner arrived at that belief and I am not prepared to attach any importance to such a statement. Further, even if I had held that condition (a) was bad (which I do not hold), the said condition being severable from the main part of the notification would not have made the entrustment bad without the condition. Since I hold, further, that the condition has no application in the case of the petitioner, the argument as to the impropriety of such a

burdensome condition to the entrustment becomes of irrelevant consideration. The last argument advanced by Mr. Ginwala, therefore, also fails.

15. Since the petitioner has violated an order validly made against him to leave India, he must face the consequences thereof under the Foreigners Act and Order and for that reason I am not prepared to interfere with the criminal prosecution started against him.

16. This Rule is accordingly discharged. I, however, make no order as to costs.

17. All interim orders stand vacated.