

(1990) 12 MAD CK 0001

In the Madras High Court

Case No : Writ Petition No's. 305, 306 and 668 of 1990

Ananda Bhavanani alias Swamy Geethanando, Ananda
Ashram, Pondicherry and Others

APPELLANT

Vs

The Union of India and Union Territory of Pondicherry

RESPONDENT

Date of Decision : 05-12-1990

Acts Referred:

Citizenship Act, 1955 — Section 6(1)
Essential Commodities Act, 1955 — Section 3
Foreigners Act, 1946 — Section 3(2)

Citation : (1991) LW(Cri) 393

Hon'ble Judges : Thanikkachalam, J; Nainar Sundaram, J

Bench : Division Bench

Advocate : G. Masilamani for K.P. Krishna Chetty, P. Ranganathan and G. Alex Benzigan, for the Appellant; S. Govind Swaminathan, for for S. Veeraraghavan and K.S. Ahmed, for the Respondent

Judgement

Nainar Sundaram, J.—There are three writ petitions. W.P. No. 305 of 1990 is by Ananda Bhavanani alias Swami Geethananda to quash

the order of deportation dated 26.12.1989 passed u/s 3(2) of the Foreigners Act 31 of 1946, hereinafter referred to as the Act. W.P. No. 306 of

1990 is by Meenakshi Devi Bhavanani questioning a similar order of deportation passed against her. W.P. No. 668 of 1990 is by Meenakshi Devi

Bhavanani for a writ of declaration declaring Sections 3(2)(c) and 3(2)(a) of the Act as ultra vires the Constitution and unconstitutional. Ananda

Bhavanani alias Swami Geethananda is the husband of Meenakshi Devi Bhavanani. Meenakshi Devi Bhavanani is an American Citizen. Ananda

Bhavanani alias Swami Geethananda is a Canadian citizen. They are indisputably foreigners within the meaning of the Act. Mr. G. Masilamani,

learned Counsel appearing for the Petitioners, in support of the pages in the writ petitions would advance six submissions, coveting interference at our hands in writ powers. We also heard Mr. S. Govindaswaminathan, learned senior counsel appearing for the Respondents answering the submissions made by the learned Counsel for the Petitioners. We will deal with each one of the submissions in seriatim assessing the merits of them.

2. The first submission of the learned Counsel for the Petitioners, which we propose to consider, is with reference to Sections 3(2)(a) and 3(2)(c) of the Act. For the purpose of understanding the scope of the submission, it will be convenient to extract the relevant portions of Section 3 of the Act taking in Sub-sections (2)(a) and (2)(c).

3. Power to make order: (1) The Central Government may by order, make provision either generally or with respect of all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure there from or their presence or continued presence therein,

(2) in particular and without prejudice to the generality of the foregoing power, orders made under this S. may provide that the foreigner.

(a) Shall not enter India, or shall enter India only at such times and by such route and as such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) Shall not depart from India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) Shall not remain in India or in any prescribed area therein.

What the learned Counsel for the Petitioners submits is that the language of Section 3(1) contemplates that the Central Government should first

make provision generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of

foreigner and only after such a provision has been made, there could be under and pursuant to such provision, particular orders as contemplated

under Sections 3(2)(a) and 3(2)(c) of the Act." In substance, learned Counsel for the Petitioners says that the making of any order under Sub.

Sections 2(a) and (2)(c) of Section 3 must and a source in a preceding provision that should be made u/s 3(1) of the Act. Even by a plain reading of the provision, we are not able to spell out a support to this theory of the learned Counsel for the Petitioners. Section 3(1) of the Act only contemplates the Central Government making the order. That order could make varied provisions as generally contemplated in the body of Section 3(1). Section 3(2) particularises and illustrates certain orders that could be made u/s 3. Section 3(1) confers the general power to make orders making provisions for prohibiting, regulating, or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein. Section 3(2) speaks about illustrative orders. We cannot put a premium on the language of the provision and read something into it which is not explicitly there, to say that any order that could be made u/s 3(2) must be preceded by a general provision made u/s 3(1). This line of thinking by the learned Counsel is fallacious and is the result of a misconception of the legal position. This type of provision is not unfamiliar or an unusual feature to legislative powers. In very many pieces of legislation, this type of provision has been found either with reference to rule making power or order making power. The main Section is always considered as the source of power and the Sub-section has been held to be merely an illustrative one. The function of Sub-section (2) of Section 3 of the Act is merely illustrative, the order making power is conferred by Sub-section (1) of Section 3 of the Act. The set of expressions "orders made under this section" leaves no room for ambiguity that the general source of order making power is to be found in Sub-section (1) of Section 3 of the Act and the function of Sub-section (2) of Section 3 of the Act is only illustrative. This becomes more clear when we look into the opening set of expressions "In particular and without prejudice to the generality of the foregoing power" found in Sub-section (2) of Section 3 of the Act. The illustrative orders in Sub-section (2) of Section 3 of the Act are not exhaustive. Whatever is included in Sub-section (2) of Section 3 of the Act is also included in Sub-section (1) of Section 3 of the Act. Even without resort to Sections (2) of Section 3 of the Act, any order coming within the scope of Sub-section (1) of Section 3 of the Act, could be made and effectuated under it. Sub-section (1) of Section 3 of the Act could operate by itself and is not at all controlled by Sub-section (2) of

Section 3 of the Act.

3. Learned Counsel for the Petitioners also wants us to draw a parity between the language of Section 3 of the Essential Commodities Act, 1955,

with Section 3 of the Act and learned Counsel for the Petitioners says that under the Essential Commodities Act, 1955, general orders have come

to be made u/s 3 thereof, and they are only being followed up by further actions. First of all, we must point out that these are two pieces of

legislation, each one operating in a different field, serving different objects and purposes. The Essential Commodities Act, 1955, is an Act to

provide, in the interests of the general public, for the control of the production, supply and distribution of and trade and commerce in certain

commodities. The object and purpose behind the Act become evident when we look into the preamble to the Act, as a whole, which reads as

follows:

An Act to confer upon the Central Government certain powers in respect of foreigners.

Whereas it is expedient to provide for the exercise by the Central Government of certain powers in the respect of the entry of foreigners to India,

their presence therein and their departure there from;

These two pieces of legislations are not in pari materia. Furthermore, the language of Section 3 of the Essential Commodities Act, 1955, is also not

strictly in pari materia with the language of Section 3 of the Act. Even otherwise, as per our discussion of the legal position regarding provisions like

this, we cannot indulge in a construction of Section 3 of the Act as the learned Counsel for the Petitioners would like to have. Hence, we eschew

the first submission.

4. The second submission of the learned Counsel for the the Petitioners is that Section 3 as a whole confers on the Executive unguided and

uncanalised powers. There was a dealing with the attack on the vires of Section 3(2)(c) of the Act in Hans Muller of Nuremburg Vs.

Superintendent, Presidency Jail, Calcutta and Others, and the Supreme Court held that SECTION (2)(c) of the Act is "intra vires". The following

observations found in the pronouncement bring out the wide scope of the power under the Act.

The Foreigners Act confers the power to expel foreigners from India. It vests the

Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.

A foreigner has no such right and can be expelled without any formality beyond the making of an order by the Central Government.

In *A.H. Magermans Vs. S.K. Ghosh*, the above pronouncement of the Supreme Court was adverted to and the learned single judge of the High

Court of Calcutta met the other argument relating to conferment of uncanalised and unbridled power, in the following manner:

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, 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, 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 over rule the first branch

of Mr. Ginwala's contention that Section 3 of the Act is bad for excessive delegation of powers to the Government.

5. The proposition is well settled by the highest Court in the land that so long as the legislature indicates, in the operative provisions of the statute

with certainly, the policy and purpose of the enactment, the mere fact that the legislation, is skeletal, or the fact that a discretion is left to those

entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of legislative power as to

amount to an abdication of its functions, or that the discretion vested is uncanalised and unguided as to amount to a carte blanche to discriminate

and if the power or discretion has been conferred in a manner which is legal and constitutional, the fact that parliament could possibly have made

more detailed provisions, could obviously not be a ground for invalidating the law. Vide *Jyoti Pershad Vs. The Administrator for The Union*

Territory of Delhi,

6. In *A.H. Magermans Vs. S.K. Ghose and Others*, , a Bench of the High Court of Calcutta dealt with the question of excessive delegation and

head Note "A" of the Report sums up the discussion, in the following manner:

If the legislature has clearly indicated the underlying principle and policy of legislation, and has laid down the criteria and proper standards, but has

left the application of those principles and standards in the hands of the executive, it cannot be said that there is excessive delegation of powers by

the legislature. The Legislature has indicated both in the preamble and in Section 3 and the sub-sections thereunder and in Section 3A of the

Foreigners Act the Principle and the "policy of the legislation. The standards and the criteria on which the power is to be exercised have been

clearly defined. What has been left with the Executive, is the application of the principles to individual cases. Hence, it cannot be held that there has

been excessive delegation of powers under the Foreigners Act, 1946, in favour of the Executive As to when the Executive authority should act in

exercise of the powers under the statute and in respect of which individuals, must be left to the discretion of the Executive authority. Section 3(2)

(c) of the Foreigners Act, 1946 cannot be struck down on the ground of excessive delegation of power.

In *Bhawalkhan Zelanikhan Vs. B.C. Shah*, , learned single Judge of the High Court of Bombay had occasion to consider the object and scope of

the and after adverting to the relevant provisions, the learned single Judge opined:

How, before referring to the foreigners order enacted in exercise of the power contained in Section 3 of the Act it is relevant to point out that from

Section 3 above the object of the Act appears to be to provide for prescribing, regulating and restricting amongst other things the presence and

continued presence of a foreigner in India. What appears to have been intended is to confer power on the Executive authority to prescribe and

specify conditions for continuance of a foreigner in India. Extremely wide kind of or unlimited restrictions and prohibitions and regulations can be

validly prescribed and specified. The Legislature intended to give widest possible

powers to the Government for obvious reasons. A foreigner is not entitled to any guarantees or fundamental rights as a citizen is entitled to under the Constitution. A foreigner can be dangerous to security of India. His presence may be undesirable for any reason of any kind and it appears to have been intended by the Legislature to leave the whole matter of the foreigner's presence in India to the Executive discretion of the government. The provisions as contained in Section 3 make this object of the Act abundantly clear. The last words in the Sub-section (2) of Section 3 of the Act show the wide character of the powers intended to be conferred on the Government. The power is given to make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters which may be deemed expedient or necessarily by the Government for giving effect to the Act.

In view of the legal position discussed as above, we are not able to countenance the second submission of the learned Counsel for the Petitioners.

7. The third submission made by the learned Counsel for the Petitioners is that the impugned orders of deportation violate the principles of natural

justice in that the Petitioners were not afforded an opportunity to make their say on the question. Reliance was placed by the learned Counsel for

the Petitioners on the pronouncement of a learned single Judge of the High Court of Andhra Pradesh in Mohammed Khan v. State of Andhra

Pradesh 1978 A W R 408 . That has been, in our view, rightly distinguished by Mr. S. Govind., Swaminathan," learned senior counsel appearing

for the Respondents. Here is a case where there is no dispute that the Petitioners are foreigners. In the case dealt with by the learned single judge

of the High Court of Andhra Pradesh that dispute was very much there. The person claimed that he is a citizen of India and asserted that he is not a

foreigner. That was found to be a jurisdictional issue and there was no adjudication over the same after affording an opportunity to the person to

make his say. It is only in the context of such facts, the learned single Judge of the High Court of Andhra Pradesh was obliged to hold that the

order of deportation had violated the principles of natural justice. We cannot disassociate the view of the learned single Judge expressed in that

case from the fact of that case. Learned Counsel for the Petitioners also places reliance on the pronouncement of Balasubramanyan, J. In Tudor

Gunasekhar Jayavardane v. Government of India 1983 (CrL.) MLJ 131 : 1983 L.W. (CrL.) 115 in support of this contention of his. That was a

decision rendered in the context of the Passport (Entry into India) Rules, 1950, before its amendment in 1984. We do not think that we should

take the pronouncement as expressing a general view that before an order is made u/s 3 of the Act, the person concerned should be heard. If that

should be the understanding, which the learned Counsel for the Petitioners wants us to form about the pronouncement we find no warrant to do so

and we can go to the extent of saying that we are not subscribing our support to such a view at all. Considering the policy behind and the object of

the Act, very many exigencies would arise, which we cannot enumerate and glossaries and which would impel quick and lightning action to be

taken under the Act, failing which, the very security of the nation may be jeopardised. The Act is a piece of legislation having a significance and a

play of its own and as pointed out by the Supreme Court, the Act vests the Central Government with absolute and unfettered discretion and a

foreigner can be expelled without any formality beyond the making of the order. That settles the third submission and the same stands negatived.

8. The fourth and the fifth submissions of the learned Counsel for the Petitioners are built on humanitarian grounds. The fourth submission is that the

Petitioners have come to India before two decades; they have embraced Hinduism; a son is born to them and Ananda Bhavanani alias Swami

Geethananda has achieved eminence in the field of Yoga and Meenakshi Devi Bhavanani in the field of Barathanatyam and the present action is

violative of the well known principles of human rights. Learned Counsel for the Petitioners was at country, which right has no foundation in law,

and in particular when an order under the Act has come to be made. Hence, we decline to accept the fourth submission put forth by the learned

Counsel for the Petitioners. Learned Counsel for the Petitioners would advance the fifth submission by saying that the Petitioners have acquired

properties and the question of the taking over of their properties has not reached finality before Courts. Even this factor is of no relevance at all on

the question which we are called upon to decide. Accordingly, the fifth submission also stands discountenanced.

9. That last and the sixth submission is that the Petitioners have claimed citizenship under the Citizenship Act, 1955, and the controversy over the

same is still open. There are already orders declining to accord the certificate of naturalisation, as asked for u/s 6(1) of the Citizenship Act, 1955.

On the date of impugned orders of deportation, which have come to be passed on 26.12.1989, the Petitioners had not obtained any certificate of

naturalisation. The possibility or potentiality of obtaining any such certificate is of no relevancy at all for deciding the validity of the orders of

deportation. No other point was urged. For all these reasons, we are not able to countenance the prayers in the writ petitions and accordingly we

dismiss the writ petitions, but we make no order as to costs. All said, the liberty is that of the Petitioners to approach the authorities concerned for

reconsideration of the orders of deportation and the discretion is that of the said authorities to consider it, and we are not giving any mandate as

such.