
(1966) 01 GUJ CK 0006
In the Gujarat High Court

Bashir Ahmed Hafiz Mehbub

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 02-01-1966

Acts Referred:

Bombay Police Act, 1951 — Section 56, 56, 61
Constitution of India, 1950 — Article 226, 227

Citation : (1966) 7 GLR 786

Hon'ble Judges : N.M. Miabhoy, J;N.K. Vakil, J

Bench : Division Bench

Judgement

N.M. Miabhoy, J.—These two petitions raise a common question of law and are based on similar facts. Therefore, we are pronouncing this common judgment which will dispose of both the petitions. The petitions are filed under Articles 226 and 227 of the Constitution of India. Petitioner in Special Criminal Application No. 28 of 1965 is Bashir Ahmed Hafiz Mehbub. Petitioner in Special Criminal Application No. 30 of 1965 is Hamid Ahmed Hafiz Mehbub. In both the petitions, the first respondent is the State Government and the second respondent is I.C. Sheth, Judicial Magistrate, First Class, Narol. Petitioners pray that an order, dated 22nd July 1965, to be presently mentioned, passed by the second respondent in a criminal proceeding against each of them should be quashed and that the second respondent be directed to dispose of the application, below which the order is passed in both the criminal proceedings, in accordance with law.

2. The facts giving rise to these two petitions are as follows. The Deputy Commissioner of Police, Special Branch, Ahmedabad, passed an order of externment on 26th April 1964 against each of the petitioners u/s 56 of the Bombay Police Act, 1951 (Bombay Act No. XXII of 1951), (hereafter called "the Act"), externing each petitioner from the district of Ahmedabad City and the contiguous districts of Ahmedabad Rural, Kaira and Mehsana and directing "each of them not to return to or enter those districts for a period of two years from the date of the order. Petitioners complied with the said orders and removed themselves outside the districts specified in the order. Each of the petitioners,

however, filed a writ petition in this Court under Article 226 of the Constitution of India, challenging the legality of the order of externment passed against each of the petitioners. The writ petition filed by Bashir Ahmed Hafiz Mehbub was numbered as Special Criminal Application No. 9 of 1964 and that filed by the other petitioner, Hamid Ahmed Hafiz Mehbub, was numbered as Special Criminal Application No. 10 of 1964. This Court, however, dismissed both the writ petitions by its judgment pronounced on 23rd July 1964. Petitioners' case is that they bona fide believed that the impugned orders were passed by the Deputy Commissioner aforesaid in mala fide exercise of his power. They allege that they did not agitate that question in the aforesaid two writ petitions because evidence was required to be led to support the plea. Therefore, according to petitioners, they decided to test the validity of the orders on the score of mala fides by committing a token breach of the impugned orders. Each of the petitioners, therefore, wrote a letter, dated 8th March 1965, to the Police Inspector, Aslali, intimating that officer that he would commit a breach of the order of externment passed against him. In accordance with this plan, each of the petitioners presented himself on 9th March 1965 at 7-00 A. M. at Narol Police Chowkey, situated within the limits of the Ahmedabad District (Rural). Thereupon, the authorities filed a criminal case against each of the petitioners, charging each of them with an offence u/s 142 of the Act. In the course of the trial, each petitioner filed an application stating that he proposed to establish that the impugned order passed against him was null and void on the ground that it was "unjust, illegal and mala fide". Each petitioner further prayed for an order summoning the Police Commissioner of Ahmedabad or any other person acquainted with the facts of the case to produce all papers relating to the externment proceedings, such as show cause notice, the reply thereto, the depositions of defence witnesses and other applications. This application was probably resisted by the prosecution on the basis of Section 61 of the Act. That section provides that an order passed, amongst other sections, u/s 56 of the Act, shall not be called in question in any Court except on three stated grounds. The learned Magistrate examined the applications of petitioners from this standpoint. He came to the conclusion that the ground of mala fides was not one of the grounds stated in Section 61, on the basis of which the orders of externment could be challenged in a Court of law. Therefore, the learned Magistrate came to the conclusion that petitioners were not entitled to put forward the pleas of mala fides and it was not necessary for him to summon the witnesses aforesaid. On this sole ground, the learned Magistrate rejected the applications. As already stated, it is against these two orders that the two petitioners have filed these two writ petitions.

3. Mr. Daru challenges the orders passed by the second respondent on two grounds. Firstly, he submits that, in order that Section 61 of the Act may apply the order must have been made under the sections mentioned in that section, including Section 56. He submits that, when an order is made in mala fide exercise of the power conferred under any of the named sections, then, the order

so made is not one, made under the relevant section, but it is one which is made de hors the same and that, therefore, the provisions of Section 61 are not attracted to a case where the order in question is being challenged on the ground that it was made in the mala fide exercise of the power conferred under the relevant section. Secondly, and alternatively, Mr. Daru submits that, if the ground of mala fides is excluded by Section 61 of the Act, then, the exclusion is bad as being violative of the fundamental rights embodied in Articles 19 and 21 of the Constitution of India.

4. In our judgment, the first submission of Mr. Daru is correct and, therefore, it is not necessary to decide upon the validity or otherwise of his second and alternative submission.

5. Section 61 of the Act is in the following terms:

Any order passed u/s 55, 56 or 57 or by the State Government u/s 60 shall not be called in question in any Court except on the ground that the authority making the order or any officer authorised by it had not followed the procedure laid down in Sub-section (1) of Section 59 or that there was DO material before the authority concerned upon which it could have based its order or on the ground that the said authority was not of opinion that witnesses were unwilling to come forward to give evidence in public against the person in respect of whom an order was made u/s 56.

The section bars the jurisdiction of a Court in regard to action taken under Sections 55, 56, 57 and 60 except on two stated grounds in regard to three sections and three stated grounds in regard to Section 56. Therefore, the intention of the Legislature is quite clear that orders passed under the aforesaid sections should be immune from judicial scrutiny, except on the stated grounds. But, in order that the jurisdiction of a Court may be barred, it is necessary that the order must be one which is passed under one or the other of the four stated sections. In the present petitions, we are concerned with the question as to whether Section 61 of the Act bars the jurisdiction of the Court when the order under any of the sections mentioned therein happens to be made in mala fide exercise of the power conferred by that section. In order to answer this question, the key expression appears to be "order passed under section" and the key word in that expression appears to be "under". The answer to the question depends upon the correct interpretation of the word "under", used in the aforesaid expression. The question for consideration is whether, when an officer purports to exercise a power under a section in mala fide exercise thereof, he can be said to exercise that power "under" the section.

6. In our judgment, on general principles, it is difficult to conceive of an answer to the question other than the one for which Mr. Daru contends. The doctrine of ultra vires is now well entrenched in the realm of judicial interpretations. If an officer exceeds the power conferred upon him, then, it cannot be said that, in regard to the excess, he is exercising any power at all. The excess must be

struck down on the ground that the excess is outside the jurisdiction of the officer concerned. The law knows a number of species of the genus-the doctrine of ultra vires or excess of authority. An act which is outside the four corners of the section which confers power upon an officer, an act done in colourable exercise of the power so conferred, an act done in fraud of that power or an act which is done in mala fide exercise of that power-all are various species which have been known to law and which species have been struck down on the ground that the officer cannot be said to be acting in exercise of his power when he does so under all or any of the aforesaid circumstances. Though the competence of a sovereign Legislature to empower an officer to act in a mala fide manner cannot be denied and though such a piece of legislation has to be tolerated in all countries where the same cannot be challenged on constitutional grounds, the ordinary presumptions would be that no Legislature in any civilized country would ever think of empowering an officer to act in a mala fide manner and that a Court of law shall not hold that such a power is conferred on an officer unless the Legislature has provided for the same, expressing its intention, explicitly or by necessary implication. The presumption would be that, when a power is conferred by a Legislature, sovereign or subordinate, upon any officer, the Legislature intends that the officer shall act within the limits of his power and not in excess thereof and that, in exercise of such a power, the officer will act in good faith and that, when a power is conferred by a statute upon an officer, it carries with it, in exercise of that power, the duty to exercise the power bona fide and within the limits of law. The Legislature cannot be presumed to have intended the exercise of a power which is in excess of the officer's authority or to confer a power upon the officer to exercise it in a mala fide manner. It is true that the Legislatures sometimes do provide for granting indemnity or immunity to officers if they happen to exceed their powers. But such a provision cannot be construed as a licence to such officers to act in a mala fide manner. If the Legislature does not say anything regarding the way in which a power is to be exercised, the presumption is that the power is to be exercised in a bona fide manner. This is on the principle that, when an officer does an act mala fide or acts in fraud thereof or in colourable exercise of his power, the officer is not acting under the power conferred by the Legislature.

7. In our judgment, interpreting Section 61 of the Act in the light of the aforesaid principles, we must reach the conclusion that the Legislature did not intend to exclude the jurisdiction of the Court to examine the plea that the power under the aforesaid section was exercised in a mala fide manner and thereby intended to grant an immunity to the officer concerned to have his action completely screened from judicial scrutiny. In our judgment, such a conclusion must irresistably follow in spite of the fact that Section 61 of the Act mentions specifically only three grounds on which orders passed under the relevant section can be challenged in a Court of law.

8. There is considerable body of authority in support of the aforesaid view. In *Smt. Somavanti and Others Vs. The State of Punjab and Others*, one of the

questions which Their Lordships had to consider was the effect of the finality given by the Legislature to a declaration u/s 6 of the Land Acquisition Act, 1894, to the effect that a particular purpose for which the land is acquired is a public purpose. In spite of the fact that the Legislature enacted, in express terms, in that section, that the declaration under that section was final and conclusive, Their Lordships held that the declaration was challengeable on the ground that the Government, in making the declaration, was committing a fraud on its power or that the declaration was made in colourable exercise of its power. At page 165, Their Lordships made the following observations:

Though we are of the opinion that the Courts are not entitled to go behind the declaration of the Government to the effect that a particular purpose for which the land is being acquired is a public purpose, we must emphasise that the declaration of the Government must be relatable to a public purpose as distinct from a purely private purpose. If the purpose for which the acquisition is being made is not relatable to public purpose, then a question may well arise whether in making the declaration there has been, on the part of the Government, a fraud on the power conferred upon it by the Act. In other words, the question would then arise whether that declaration was merely a colourable exercise of the power conferred by the Act, and, therefore, the declaration is open to challenge at the instance of the party aggrieved. To such a declaration, the protection of Section 6(3) will not extend. For, the question whether a particular action was the result of a fraud or not is always justiciable, provisions such as Section 6(3) notwithstanding.

In *Tan Bug Taim Vs. Collector of Bombay*, Mr. Justice Bhagwati (as he then was) had to construe Section 16, Sub-section (1) of the Defence of India Act, (1939), which, in terms, enacts that no order in exercise of any power conferred by or under that enactment shall be called in question in any Court, and, His Lordship came to the conclusion that, in spite of the aforesaid provision, the Court had jurisdiction to go into such questions as to whether the provisions of the Act were not complied with or whether the powers conferred by the Act were being misused or had been exceeded or were being used mala fide and for a collateral purpose. In reaching the aforesaid conclusion, the learned Judge reviewed a number of English and other decisions which had previously been reviewed by Young, C.J., in *Electric Supply Co. Ltd., Lahore v. Province of Punjab* AIR 1943 Lah 41. The learned Judge pointed out that in *Secretary of State v. Mask & Co.* I. L. R. (1940) Mad 599, Lord Thankerton observed that it was "well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. "He has also referred to the observations of Lord Reading, C. J., in *Rex v. Brixton Prison (Governor) Ex parte, Sarmu* (1916) 2 K.B. 742, that if the Court is of opinion that the powers were being misused, it was able to deal with the matter and that "In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers, the Court would have

jurisdiction to deal with the matter. " The learned Judge has also referred to the observations made by Law, J., in the same case, which was a detention case, which deserve to be quoted in full. The observations are as under:

I do not agree that if the Executive were to come into this Court and simply say "A person is in our custody and, therefore, the writ of habeas corpus does not apply because the custody is at the moment technically legal", the Court would have no power to consider the matter and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown in reply to an application for the writ would not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of the law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as that proposition involves.

The learned Judge has also referred to the observations of Farewell, J. in *Roberts v. Charing Cross, Euston and Hampstead Railway Co.* (1903) 87 LT 732, which also deserve to be quoted in full. The observations are as under:

Lord Macnaghten there refers to a remark of the Master of the Rolls in (1898) 2. Ch. 603 and goes on: "In a word, the only question is, has the power been exceeded? Abuse is only one form of excess. If the Legislature has given powers and those powers are being used for the purpose of carrying out the works authorised and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of power so given and is, therefore, ultra vires.

The learned Judge has also referred to *Galloway v. Mayor and Commonalty of London* (1886) L. R. 1 House of Lords 34, wherein it was stated that where persons had special powers conferred on them by Parliament for effecting a particular purpose, they could not be allowed to exercise those powers for any purpose of a collateral kind. Lastly, the learned Judge has also quoted the observations of AIR 1943 26 (Nagpur) . In that case, Bose, J. was dealing with the same Section 16, Sub-section (1) of the Defence of India Act, (1939). The observations of the learned Judge are as follows:

...Section 16 requires that the order be passed in the exercise of the power conferred by the Act and not merely in colourable exercise of such power.... It is not enough, therefore, that these orders should be passed under colour of the power conferred. They must be done in actual exercise of it and, as I read the law, no power is conferred to make such orders in bad faith, or in abuse of the Act, or for the purpose of effecting a fraud on the Act, and consequently these issues must be investigated if they are raised.

9. It is true that there is difference in language used in Section 16, Sub-section (1) of the Defence of India Act (1939) and that used in Section 61 of the Act. In Section 16(1) of the Defence of India Act (1939), the provision was that no order made in the purported exercise of any power conferred by or under the Act shall be called in question in any Court. In Section 61 of the Act, the section begins by

stating that "Any order passed u/s 55, 56 or 57 or by the State Government u/s 60 shall not be called in question in any Court". However, in our judgment, there is no substantial difference between the two provisions. Though the Legislature has used different language in both the sections, it has expressed the same thought in the two sections. Under the circumstances, Mr. Daru's contention that the proper interpretation of Section 61 is that it does not exclude the jurisdiction of the Court to enquire into the question where an order passed u/s 56 was mala fide deserves to be upheld.

10. We may mention that the two applications below which the impugned orders were passed indicate in all three defences, viz., (i) injustice (ii) illegality, and (iii) mala fides. However, Mr. Daru states to us that he does not propose to press the first two defences and confines his case only to the third defence of mala fides. It is because of this concession that we have confined our discussion to the question of mala fides and we should not be taken to have expressed any opinion regarding the merits of the other two defences, based on the ground of injustice and illegality.

11. However, before we conclude, we must refer to the decision in *Hasanalli Mohamedhussein Shariffi Vs. State of Bombay*, In that case the vires of Sub-section (7) of Section 27 of the City of Bombay Police Act (IV of 1902) was challenged. A Division Bench of the High Court of Bombay, consisting of Bavdekar and Chainani JJ., held that that provision was ultra vires. Now, sub-section (7) of Section 27 is in pari materia with Section 61 of the Act. Both the sections are similarly worded. There are certain observations made in that judgment which conflict with the view which we have taken above. Those observations are capable of being read as meaning that the defence of mala fides is excluded from the jurisdiction of the Court on account of the words used in Sub-section (7) of Section 27. If those observations constitute the decision of the Court, then, there cannot be any doubt that we are bound by the same, and, if we happen to differ from that decision, the only course open to us will be to refer the matter to a larger Bench, unless, on the authority of *Somawanti's* case (supra), we are prepared to say that the decision is no longer good law. However, we have, after a careful consideration of the judgments delivered by the two learned Judges, come to the conclusion that the observations are obiter and do not constitute the ratio of the case. In fact, there are certain observations in the judgment of Bavdekar J., which would go to show that the learned Judge did not intend that the proper construction of Sub-section (7) of Section 27 demanded to throw overboard the doctrine of ultra vires or excess of power. At page 434, the learned Judge has stated that an order passed by the Commissioner under sub-sections (1), (2) or (2A), which correspond to some of the sections mentioned in Section 61 of the Act, must be interpreted to mean an order purporting to be passed under these sub-sections, provided however it is within his powers. The question which was raised for decision in *Hasanalli's* case was not whether the defence of mala fides is barred by the provisions contained in Sub-section (7) of Section 27 of the City of Bombay Police Act (1902); but the question Was,

whether the defence that the order of externment was bad on account of the fact that that order did not mention the route by which the proposed externnee was to go, was barred under the provisions of Sub-section (7) of Section 27 of the City of Bombay Police Act (1902). It appears from the judgment that such an order was required to be made under one of the sub-sections of Section 27. The question for consideration was, whether the omission to mention the aforesaid direction was challengeable before a Court of law. The view which appears to have been assumed by the learned Judges, and on the basis of which they proceeded to consider the question of vires of that sub-section, was that the aforesaid defence was not available to the proposed externnee. This view was assumed, probably on the ground that the omission to give the aforesaid direction was not mentioned in Sub-section (7) as one of the grounds on the basis of which the jurisdiction of the Court could be invoked, whereas, in regard to some other directions or omissions thereof, the sub-section expressly stated that the Court had jurisdiction to deal with them. Therefore, any observations which the learned Judges have made in considering the question of vires on the subject of mala fides must be treated as obiter and not binding. We have carefully considered the above observations. But, having regard to the aforesaid authorities and the principles mentioned therein, we are unable to agree with the observations which the learned Judges have made in connection with Sub-section (7) of Section 27 of the City of Bombay Police Act. With due respect, in our judgment, the assumption made by the learned Judges on that score was not at all justified.

12. In the aforesaid view of the matter, it is not necessary for us to consider the validity of the second and the alternative submission, viz., whether Section 61 of the Act is ultra vires Articles 19 and 21 of the Constitution, made by Mr. Daru. In fact, we may say that Mr. Daru expressly stated to us that he would not press for a decision on that particular point if we hold that the proper construction of Section 61 was that the defence of mala fides was not excluded from judicial scrutiny. However, we may mention that Mr. Daru's alternative contention was that, even if we did not agree with his first submission, then Hasanalli 's case would be a strong authority in his favour for the proposition that Section 61 of the Act was ultra vires of Article 19 of the Constitution of India. As we have already pointed out, Sub-section (7) of Section 27 of the City of Bombay Police Act and Section 61 of the Act are in pari materia. In our judgment, the argument of Mr. Daru would have been irresistible. However, we agree with him that, so long as the constitutionality of a statutory provision can be held, a Court should be reluctant to decide that the provision is ultra vires the Constitution.

13. For the aforesaid reasons, the orders passed by the second respondent must be held to be erroneous in law. The error is apparent on the face of the record. Mr. Sompura attempts to get the rules discharged, on the ground that the point, now raised, is barred by the principle analogous to the principle of res judicata. This defence is urged by Mr. Sompura on the basis of the two writ petitions which were earlier filed by petitioners in this Court and which had come to be

dismissed. Mr. Sompura's contention is that the question of mala fides could and should have been raised by the two petitioners in the earlier writ petitions and the same not having been raised in those petitions, petitioners are debarred from raising that question now in this Court or in any other Court. In our judgment, the argument of Mr. Sompura deserves to be repelled on two grounds. In the first instance, even assuming that a principle analogous to the principle of res judicata is applicable to criminal cases, that principle is not applicable to the facts of the present petitions. In the present writ petitions, petitioners are not challenging the orders of externment in this Court. What they are challenging in this Court are the orders passed below their applications that the plea of mala fides is not available to the two petitioners. In the second instance, the order that we propose to pass will not debar the second respondent from dealing with the plea of principle analogous to res judicata, if the same happens to be raised before him. All that we decide is that the interpretation which is given by the learned Judge to Section 61 of the Act as debarring him from entertaining the plea of mala fides, is wrong. If petitioners' defence is liable to be dismissed, on any other ground, such as, the ground of principle analogous to res judicata, the second respondent will be fully competent to deal with the same in accordance with law, if it happens to be raised before him.

13.1 For the aforesaid reasons, in our judgment, petitions deserve to be "allowed. We quash the orders of the second respondent and direct that he will proceed to deal with the application of each of the petitioners in each case on its own merits in accordance with law and in the light of this judgment.

14. Rule made absolute to the extent mentioned above. There will be no order as to costs in both the petitions.