
(1990) 03 BOM CK 0006

In the Bombay High Court

Case No : Criminal Writ Petition No. 983 of 1989

Bhimrao Ashruji Mhaske

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 09-03-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21

Criminal Procedure Code, 1973 (CrPC) — Section 151, 151(3), 46

Citation : (1990) 3 BomCR 671 : (1990) 92 BOMLR 221

Hon'ble Judges : M.L. Pendse, J;D.J. Moharir, J

Bench : Division Bench

Advocate : Usha Purohit, for the Appellant; N.M. Kachare, Public Prosecutor for respondents 1 and 2, for the Respondent

Judgement

M.L. Pendse, J.

1 The petitioner is a double graduate and is a permanent resident of Shirpur, Dt. Dhule and which is a tribal area. The petitioner claims to be an active member of Chhatra Yuva Sangharsha Vahini and is working for the uplift and progress of tribal people who inhabit Shirpur and areas round about. The petitioner claims that these tribal people are deprived of educational and financial facilities and are leading a life of total deprivation of economic advantage. The petitioner claims that he along with a group of young people are working for the downtrodden for several years. Naturally, they came in conflict with vested and political interests in the area. The age old battle between the haves and have not continues in this backward region of the State and it is the grievance of the petitioner that the powerful state of the society having political and economic clout use the Government machinery for harassing the petitioner and preventing him from bringing injustice done to the tribals to the notice of the people. The petitioner claims that the police authorities adopt proceedings one after another against the petitioner by resorting to the provisions of section 151 of the Code of Criminal Procedure and the petitioner is detained in custody for no fault.

2. The petitioner complains that on March 19, 1989 the petitioner was taken into custody by Sub-Inspector of Police Shirpur police station, in exercise of powers u/s 151 and, thereafter, produced before the Judicial Magistrate, First Class, Shirpur on March 20, 1989. The Sub-inspector of Police submitted a report to the Judicial Magistrate requesting that the petitioner should be remanded to magisterial custody in exercise of powers u/s 151(3) of the Code of Criminal Procedure as the activities of the petitioner are in breach of the provisions of the Maharashtra Prevention of Communal Anti-social and other Dangerous Activities Act, 1980. The Judicial Magistrate passed order on the report made by the Sub-inspector and directed the petitioner to be kept in custody till March 23, 1989. It is the grievance of the petitioner that on March 23, 1989 he was not produced before the Magistrate, but behind his back the remand was extended till March 28, 1989. On March 28, 1989 the Sub-inspector again requested the Judicial Magistrate to extend the period of remand, but the Magistrate declined to grant the request and directed the petitioner to be set at liberty forthwith.

The petitioner claims that on March 20, 1989 and on March 28, 1989, when he was produced before the Judicial Magistrate, First Class, Shirpur, he was brought from the custody in handcuffs, although there was no occasion to handcuff the petitioner. The petitioner submits that he had never indulged in any violent activities or was guilty of running away from police custody, but the Sub-inspector i.e. respondent No. 2 with a view to humiliate, handcuffed the petitioner and brought him before the Judicial Magistrate. The petitioner complained to the Judicial Magistrate on March 28, 1989 against the action of the Sub-inspector in handcuffing him. The Magistrate by order dated March 28, 1989 observed that it is the choice and discretion of the police machinery to determine whether the petitioner should be brought in court in handcuffs or not. The Magistrate observed that police being on trusted with the maintenance of law and order, the Magistrate is not concerned as to how the petitioner was brought before the Court. 3. The petitioner then approached this Court by filing the present petition on July 23, 1989 and the two prayers made in the petition are " (a) that the State of Maharashtra and the Police Sub-inspector be directed to pay a sum of Rs. 5,000/- as compensation to the petitioner for illegal act of handcuffing the petitioner; and (b) a declaration that the provisions of section 151(3) of the code of Criminal Procedure as amended by section 18 of the Maharashtra Prevention of Communal, Anti social and other Dangerous Activities Act, 1980 be declared to be ultra vires of the Constitution. In answer to the petition, respondent No. 2, G.B. Pawar, Sub-inspector of Police, has filed return affirmed on September 27, 1989. Respondent No. 2 claims that the petitioner was not handcuffed when he was taken to the Court either on March 20, or on March 28, 1989. Respondent No. 2 then asserts that the escorting party who had taken the petitioner to the Court had not handcuffed the petitioner though as a precautionary measure the escorting party had carried handcuffs while taking the petitioner from jail to the Court. The State of Maharashtra has not filed any return.

4. The first question that requires determination is as to whether the petitioner was brought before the Judicial Magistrate on March 20 and March 28, 1989 in handcuffs and if so, whether it was at the behest of respondent No. 2 Sub-inspector, Mrs. Purohit learned Counsel appearing on behalf of the petitioner. Submitted that the petitioner complained to the Judicial Magistrate on March 28, 1989 about the fact of being brought to the Court in handcuffs and the Judicial Magistrate entertained the complaint but declined to take any action on the specious ground that the Judicial Magistrate is not concerned as to how the petitioner was brought to the Court. It is undoubtedly true that on March 28, 1989 the petitioner did complain about his being handcuffed on March 20 and March 28, 1989. The approach of the Judicial Magistrate to this complaint is entirely unsatisfactory. It is correct that maintenance of law and order problems is within the powers of the police authorities but it is futile to suggest that even if the petitioner is handcuffed, the Magistrate will not look into the grievance by claiming that it is the choice and discretion of the police machinery. The Supreme Court examined the law relating to treatment of prisoners in the case of *Sunil Batra Vs. Delhi Administration and Others etc.*, . The Supreme Court observed that insurance against escape does not compulsorily require handcuffing unless no other way is practicable. This decision was reiterated in *Prem Shankar Shukla Vs. Delhi Administration*, . It is now well-settled that a person in custody is entitled to human dignity and it is not necessary handcuff him while producing before the Magistrate of taking the person back to custody from the magisterial Court in handcuffs unless the situation so demands. It is not the sweet will of the Police Officer to determine whether a person in custody should be handcuffed or not, but the Police Officer must take decision on a reasonable apprehension. It is open for the Police Officer to handcuff the accused provided there is an apprehension that the accused is likely to be violent while taken to the Court or the person has history of absconding from police custody. Unfortunately in spite of decisions of this Court as well as of the Supreme Court, Police Officers indiscriminately put handcuffs on the person in custody while producing such persons before the Court. Rules as regards handcuffing of the person in custody are set out in the Bombay Police Manual, 1959, but the rules are observed more in breach by the Police Officers. This is an extremely unhappy situation and the practice is followed by Police Officers forcibly on the assumption that every person in custody is likely to abscond. When a person who is handcuffed without any reason whatsoever complains to the Magistrate on production, then it is not proper for the Magistrate to ignore the complaint by observing that it is within the domain of the Police Officer to determine whether the person should be handcuffed or not. The Magistrate should exercise authority and take steps against the Police Officer who violates the rules set out in the Bombay Police Manual and acts in flagrant violation of the directions issued by the Supreme Court from time to time.

5. Now, in the present case, the petitioner did complain before the Magistrate about the Police Officer handcuffing the petitioner while producing before the

Judicial Magistrate. Respondent No. 2 Sub-inspector has filed return and has denied that the petitioner was handcuffed while producing before the Magistrate either on March 20 or March 28, 1989. We are not prepared to accept the bare denial of the Police Officer though was accept the claim of the Police Officer that he was not personally present while the petitioner was taken to the Court. The return filed by the Sub-inspector sets out that an escorting party had taken the petitioner to the Court of the Judicial Magistrate. The affidavit does not disclose who were the members of the escorting party and when we enquired from the Public Prosecutor, the only answer was that some constables had carried the petitioner to the Court. The constable who are members of the escorting party were directly under the control of the Sub-inspector of Shirpur police station and who was station officer at the relevant time. The Sub-inspector ought to have set out the names of the members of the escorting party and there is no reason why the members of the escorting party did not the affidavit denying that the petitioner was handcuffed. The petitioner had complained before the Judicial Magistrate on March 28, 1989 itself and we have therefore, no hesitation in concluding that the grievance of the petitioner is true. The return filed by respondent No. 2 does not indicate that there was any occasion to handcuff the petitioner. The return merely claims that there was enough ground for keeping the petitioner in custody u/s 151 of the Code of Criminal Procedure, but even assuming that fact to be correct, still that does not permit the handcuffing of the petitioner. In our judgment, the action of handcuffing the petitioner was entirely incorrect and has caused serious prejudice. It is now well-settled by a catena of decisions of the Supreme Court and of this Court that where a fundamental right of the citizen is infringed without any excuse and, in a manner not warranted by the law of the land, then the authority violating such rights is liable to pay compensation. As the petitioner was handcuffed by the authority of law set up the State Government, the State of Maharashtra is liable to pay compensation to the petitioner. Taking into consideration all the facts and circumstances of the case, in our judgment, the proper compensation that the State of Maharashtra should pay to the petitioner is Rs. 1,000/-.

6. The Petitioner also challenges the vires of amendment to section 151 by Maharashtra Act No. VI of 1981. Before examining the challenge, it is necessary to set out the provisions of sub-sections (1) and (2) of section 151 of the Code of Criminal Procedure, 1973, enacted by the Parliament:---

"151. (1) A Police Officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty four hours from the time of his arrest unless his further detention is required or authorised under sub-section (3) or under any other provisions of this Code or of any other law for the time being in force."

A plain reading of these two sub-sections makes it clear that the power is conferred on the Police Officer to arrest a person without orders from a Magistrate and without a warrant if it appears to the Police Officer that the person had a design to commit any cognizable offence and commission of such offence cannot be prevented but for the arrest. It further provides that the person arrested shall not be detained in custody for a period exceeding 24 hours from the time of his arrest. The section was enacted by the Parliament with a view to prevent commission of cognizable offences and it is obvious that the Police Officer cannot detain the person in custody for a period in excess of 24 hours. Indeed, the action contemplated is one which is preventive in nature and is to be exercised in emergent circumstances.

7. The Government of Maharashtra issued an ordinance known as "the Maharashtra Prevention of Communal, Anti-social and other Dangerous Activities Ordinance, 1980" on satisfaction that circumstances existed which rendered it necessary to take immediate action to make a law to provide for the prevention of communal, anti-social and other dangerous activities in the State of Maharashtra and for matters connected therewith. The ordinance was promulgated on August 27, 1980 and subsequently the Maharashtra Legislature enacted Maharashtra Act No. VII of 1981 and the Act received the assent of the President on January 22, 1981. The Act is called the Maharashtra Prevention of Communal, Anti-social and other Dangerous Activities Act, 1980. By section 18 of this Act, section 151 of the Code of Criminal Procedure in its application to the State of Maharashtra was amended by adding sub-section (3), Sub-section (3) reads as under:-

"(3)(a) Where a person is arrested under this section and the officer making the arrest, or the officer in charge of the police station before whom the arrested person is produced, has reasonable grounds to believe that the detention of the arrested person for a period longer than twenty-four hours from the time of arrest (excluding the time required to take the arrested person from the place of arrest to the Court of a Judicial Magistrate) is necessary, by reason that---

(i) the person is likely to continue the design to commit, or is likely to commit, the cognizable offence referred to in sub-section (1) after his release; and

(ii) the circumstances of the case are such that his being at large is likely to be prejudicial to the maintenance of public order, the officer making the arrest, or the officer in charge of the police station, shall produce such arrested person before the nearest Judicial Magistrate, together with a report in writing stating the reasons for the continued detention of such person for a period longer than twenty-four hours.

(b) Notwithstanding anything contained in this Code or any other law for the time being in force, where the Magistrate before whom such arrested person is produced is satisfied that there are reasonable grounds for the temporary detention of such person in custody beyond the period of twenty-four hours, he

may, from time to time, by order remand such person to such custody as he may think fit:

Provided that, no person shall be detained under this section for a period exceeding fifteen days at a time, and for a total period exceeding thirty days from the date of arrest of such person.

(c) When any person is remanded to custody under clause (b), the Magistrate shall, as soon as may be, communicate to such person the grounds on which the order has been made and such person may make a representation against the order to the Court of Session. The Sessions Judge may, on receipt of such representation, after holding such inquiry as he deems fit, either reject the representation, or if he considers that further detention of the arrested person is not necessary, or that it is otherwise proper and just so to do, may vacate the order and the arrested person shall then be released forthwith."

Sub-section (3) provides that where a person is arrested by a Police Officer u/s 151(1) and the officer has reasonable grounds to believe that the detention of such person beyond twenty-four hours is necessary by reason of (a) the person is likely to continue the design to commit cognizable offence and (b) the circumstances of the case are such that the release of the person is likely to be prejudicial to the maintenance of public order. Even if the Police Officer comes to such conclusion, it is not permissible for the Police Officer to keep the person in custody beyond twenty-four hours without producing such person before the Judicial Magistrate together with a report in writing stating the reason for his continued detention. The Magistrate is then required to ascertain whether there are any reasonable grounds for keeping the person in custody and if the Magistrate is satisfied, then the person can be detained in custody for a period not exceeding fifteen days at a time and for a period not exceeding thirty days from the date of arrest. A right is conferred on the person who have been kept in custody in accordance with the direction of the Magistrate, to make a representation to the court of Session and the Sessions Court is empowered to pass appropriate order about the release of the person. It is obvious that the Police Officer is not conferred with the power to detain a person in custody after twenty four hours without prior judicial intervention. It is not left to the subjective satisfaction of the Police Officer to detain a person in custody after twenty-four hours and unless the Judicial Magistrate on objective examination is satisfied that the apprehension by the Police Officer is reasonable, the liberty of the person cannot be deprived with resort to the provisions of the amended sub-section (3) of section 151 of the Code.

The vires of the provisions of section 151(3) of the Code was challenged in *Shahaji Lokhande v. Mirqali*, reported in 88 Bom.L.R. 114. It was claimed before the Division Bench that the amended section is violative of Articles 14, 21 and 22 of the Constitution of India and the amendment is carried out for the purpose of preventive detention. It was claimed that the provisions of preventive detention incorporated in sub-section (3) of section 151 of the Code are wholly outside the

scope of Articles 21 and 22 of the Constitution. It was also claimed that the section confers an unbridled and arbitrary power upon the Magistrate to grant remand; as guidelines are not laid down by the amended sub-section. The Division Bench turned down the Challenge and held that the amended provisions of section 151 is intra vires. The Division Bench found that the State Legislature was competent to enact the amendment and after it received the assent of the President, the challenge as to power of legislative competence cannot survive. The challenge on the ground of conferment of unbridled and arbitrary power was turned down with the finding that there is judicial intervention on after a period of twenty-four hours and the Judicial Magistrate is required to objectively satisfy that there are reasons for keeping the person in preventive custody beyond twenty-four hours. We are bound by the decision of the Division Bench and, therefore, it is not permissible for the petitioner to again question the vires of the amended provisions of section 151(3).

8. Mrs. Purohit submitted that the provisions of sub-section (3) of section 151 of the Code are entirely misunderstood and misconstrued both by the Police Officers and the Judicial Magistrates. While exercising powers under sub-section (3), the Judicial Magistrate imports the concept of maintenance of public order as artificially defined under the Maharashtra Prevention of Communal, Anti-social and other Dangerous Activities Act, 1980. To appreciate the submission of the learned Counsel. It is necessary to refer to section 2(a) of the Act which defines the expression "acting in any manner prejudicial to the maintenance of public order". The expression means:-

"(i) propagating, promoting, or attempting to create, or otherwise functioning in such a manner as to create, feelings of enmity or hatred or disharmony on grounds of religion, race, caste, community or language of any persons or class of persons:

(ii) making preparations for using or attempting to use, or using, or instigating, including or otherwise abetting the use of any lethal weapons (including firearms and explosives, inflammable or corrosive substances), where such preparations, using, attempting, instigating, inciting or abetting disturbs, or is likely to disturb public order;

(iii) attempting to commit, or committing, or instigating, inciting or otherwise abetting the commission of mischief within the meaning of section 425 of the Indian Penal Code in respect of public property or to detain a person in custody on receiving knowledge that such person has a design to commit any cognizable offence. The expression "cognizable offence" is defined under the Code. The power does not enable the police officer to detain a person in view of knowledge of design to commit any other activities which do not fall within the category of "cognizable offence". The power conferred by amended sub-section (3) of section 151 of the Code is also circumscribed by the provisions of sub-section (1) of section 151 of the Code. Merely because the Judicial Magistrate is required to be satisfied that the circumstances of the case are such that release of the person is

likely to be prejudicial to the maintenance of public order does not authorise the Magistrate to import the definition of "public order" as set out in the Act. The Magistrate must confine the enquiry while ascertaining whether the circumstances of the case are such that release of the person is likely to be prejudicial to the maintenance of public order by ascertaining whether the person has a design to commit any cognizable offence. The expression "prejudicial to the maintenance of public order" must be read with reference to the "design to commit any cognizable offence."

It is not permissible to expand the ambit and scope of section 151(1) of the Code by reference to the amended sub-section (3). The State Legislature did not desire to expand the powers conferred on the Police Officer by amendment of sub-section (3), but the power to detain a person who has a design to commit any cognizable offence is retained and merely the period is extended beyond twenty four hours but within outside limit of thirty days. The Judicial Magistrate while exercising powers under sub-section (3) of section 151 of the Code, therefore, must ascertain whether the Police Officer has reasonable grounds to believe that the person has a design to commit any cognizable offences and commission of such cognizable offence would be prejudicial to the maintenance of public order. It is not permissible to take into account any other activity of the person which may be prejudicial to the maintenance of public order, unless and until it is connected with a design to commit a cognizable offence. The power to detain a person in custody cannot be exercised de-hors the design to commit any cognizable offence.

9. It is also required to be made clear that the power conferred on the Judicial Magistrate under sub-section (3) by the Legislature is a very powerful weapon and the exercise thereof should be with care and precaution. The liberty of a person is deprived because the Police Officer claims that there are reasonable grounds to believe that the person has a design to commit any cognizable offence. The judicial intervention is provided by the Legislature with the assurance that the Judicial Officer would not detain the person in custody unless and until the Judicial Magistrate reaches an objective satisfaction that the claim of the Police Officer is just and proper. The power to extend the custody of the person is not to be exercised in a mechanical fashion merely because the Police Officer claims that he has reasonable grounds to believe that the detention of the person for a period longer than twenty-four hours is necessary. The Legislature desired and that is clearly reflected in sub-section (3) that the Judicial Magistrate even after satisfaction that the detention is necessary for a duration beyond twenty-four hours shall not detain the person at a time for a period exceeding fifteen days. There is no compulsion on the Magistrate to extend the period of detention for fifteen days at a time and indeed the Magistrate should be extremely circumspect in extending the period and in no case should extend the period beyond minimum possible. The power to detain without enquiry is a drastic power and the Magistrate should be careful that these powers are not exercised by the Police Officer to the determine of the citizen. The Magistrate

should also ensure that whenever the power is exercised under sub-section (3) of section 151 of the Code, then the grounds are furnished forthwith to the person to be detained. That would enable the person so detained to make an effective representation to the Sessions Court. We hope and trust that the Judicial Magistrates would exercise their powers with circumspection and the Police Officer will not be permitted to deprive the liberty of a person without reasonable and satisfactory grounds that the person to be detained has a design to commit any cognizable offence as prescribed by law. The power conferred by section 151 both on the Police Officer and the Judicial Magistrate is of a drastic nature and the exercise thereof should be only on satisfaction that the requirements of the section are complied with. In our judgment, the proper construction of section 151 sub-section (3) as set out hereinabove would obviate any prejudice or hardship to the citizens. Even though sub-section (3) of section 151 of the Code is found inter-vires, the exercise of the powers should be in accordance with directions given in this judgement.

10. Accordingly, petition partly succeeds and respondent No. 1, State of Maharashtra is directed to pay a sum of Rs. 1,000/- to the petitioner as compensation for wrongfully handcuffing the petitioner while producing before the Judicial Magistrate. The amount of compensation shall be paid within four weeks from today. Respondent No. 1 should pay the costs of this petition. Mr. Kachare applies for stay of the operation of the order. Prayer refused.