
(1949) 06 PAT CK 0003

In the Patna High Court

Case No : Criminal Miscellaneous No's. 300, 314, 315, 322, 323, 324, 325, 328, 329, 332, 337, 338, 342, 345 to 347, 352 to 354, 356 to 358, 360, 361, 362, 363, 364, 370, 375 to 394, 395, 396 to 405 and 417 of 1949

Bidya Chaudhary and Others

APPELLANT

Vs

Province of Bihar and Others

RESPONDENT

Date of Decision : 21-06-1949

Acts Referred:

Government of India Act, 1935 — Section 88

Citation : AIR 1950 Patna 19

Hon'ble Judges : Ramaswami, J; Narayan, J

Bench : Division Bench

Advocate : Basanta Chandra Ghose, in 315, Thakur Prasad, in 337 and 417, Amala Kant Chaoudhury, in 338, D.L. Nandkeolyar, in 332, Basanta Chandra Ghosh and Umesh Chandra Prasad Sinha, in 364 and 398, Basanta Chandra Ghosh and Amala Kant Chaudhury, in 360, 362 and 363 and Basanta Chandra Ghosh, in 361, for the Appellant; Government Advocate, for the Respondent

Judgement

Ramaswami, J.—These applications are u/s 491, Criminal P. C., by Bidya Chaudhary and 57 others who allege that they are illegally and improperly detained u/s 2(1), Bihar Maintenance of Public Order Ordinance (Ord. II [2] of 1949).

2. The material facts are not in dispute. The applicants had at first been arrested under Bihar Maintenance of Public Order Act, 1947. Section 1 (3) of that Act provided that it shall remain in force for a period of one year from the date of its commencement. The proviso contained a power to extend the operation of the Act for a further period of one year by the resolution of the two Houses of Legislature of the Province, and further gave the Provincial Government the power of modification, if any, of the Act. The Federal Court decided by their judgment dated 28th May 1949, that the proviso was ultra vires of the Provincial Legislature, and the extension of the Act beyond one year was invalid. The

Federal Court also held that Bihar Act V [5] of 1949 was infructuous, as the Bihar Maintenance of Public Order Act of 1947, which it sought to amend, had come to an end when the first year expired. On 3rd June 1949, the Governor of Bihar promulgated ordinance II [2] of 1949, which re-enacted in substance the provisions of Bihar Maintenance of Public Order Act, 1947, and which purported to validate the orders of detection already made. It is the undisputed case that all the applicants have been served with orders of the Provincial Government u/s 2 (1) of the Ordinance.

3. The validity of the detention is challenged in these proceedings on the ground that the Governor of Bihar in promulgating the Ordinance in question has exceeded his legislative competence.

4. Section 88, Government of India Act is headed "Power of Governor to promulgate Ordinance during recess of Legislature", Clause (1) of the section is to the following effect:

"If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the Governor shall not, without instructions from the Governor-General, promulgate any such Ordinance if an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General, it had received assent of the Governor-General."

It is manifest that this section, while granting legislative power to a Provincial Governor, imposes an express condition or restriction limiting its exercise. The section expressly enacts that the Governor is empowered to issue Ordinance only at a time when the Legislature of the Province is not in session.

5. The argument on behalf of the applicants is that the Governor of Bihar promulgated the Ordinance on 3rd June when the Provincial Legislatures were in session, and hence acted beyond the authority conferred upon him by Section 88, Government of India Act.

6. The rule of construction as regards a constitutional instrument has been stated by Lord Selbourne in *Queen v. Burah* 5 I. A. 178 : 4 Cal. 172 :

"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further, or to enlarge

constructively those conditions and restrictions."

When, therefore, a right or power is challenged, the duty of the Court is to keep close to the words of the constitutional instrument, and see first whether the power is granted, and secondly whether there is anything else which restricts the rights so granted. If the text is explicit, the text is conclusive, alike in what it directs and in what it forbids (*A. G. for Ontario v. A. G. for Canada* 1912 A. C. 571: 81 L. J. P. C. 210).

7. Now Section 62, Government of India Act is headed "Sessions of the Legislature, prorogation and dissolution". Sub-section (2) of the section enacts that the Governor may from time to time summon the Chambers or either Chamber to meet at such time and place as he thinks fit, prorogue the Chamber or Chambers, and dissolve the Legislative Assembly. The word "session" is defined in Section 2 (1), Bihar Legislative Assembly Rules, which have been made u/s 84 (1) of the Act. The word "session" under this statutory rule means the period commencing with the first meeting of the Assembly summoned by the Governor and ending with its prorogation. The following passage from May's Parliamentary Practice (14th Edition) is particularly relevant in this context:

"A session is the period of time between the meeting of a Parliament, whether after the prorogation or dissolution, and its prorogation During the course of a session, either House may adjourn itself of its own motion to such date as it pleases. The period between the prorogation of Parliament and its reassembly in a new session is termed a "recess"; while the period between the adjournment of either House and the resumption of its sitting is generally called an "adjournment."

A prorogation terminates a session ; an adjournment is an interruption in the course of one and the same session."

8. It is undisputed that the impugned Ordinance was promulgated on 3rd June 1949. From the Notification No. 1940 G. S., dated 6th June 1949, it is patent that the Governor of Bihar prorogued the Bihar Legislative Council on 6th June 1949, by virtue of the powers conferred u/s 62(2)(b), Government of India Act. The Notification No. 1941 G. S. of the same date also states that the Governor of Bihar prorogued the Bihar Legislative Assembly on the same date. On these facts, it is manifest that the Legislature was in session on 3rd June 1949, when the Governor of Bihar promulgated the Ordinance.

9. If Section 88 of the Act is read in its context and the constitutional scope of the statute is considered, it cannot be doubted that the intention of the Legislature was that the Governor ought to be empowered to promulgate Ordinances only on the absolute condition that the Provincial Legislatures were not in session at the time. It is well-known rule of construction that an absolute enactment must be exactly obeyed, that the act permitted is lawful only if done in accordance with the conditions annexed to the statutory permission. If an absolute enactment is neglected or contravened, a Court of law will treat the

thing which is being done as invalid and altogether void. The principle is supported by important authorities. In *R. v. Loxdale*, (1758) 1 Burr. 445, it appeared that five overseers had been appointed to act for a certain parish, whereas under the Poor Relief Act, 1601, only four, three, or two overseers may be appointed.

Lord Mansfield declared the appointment invalid, and added that:

"Justices have no power to appoint overseers but by the special authority given them by Act of Parliament. Therefore this special authority must be strictly pursued, and cannot be exceeded by them."

Also in *Thwaites v. Wilding* (1883) 12 Q. B. D. 4 : 53 L. J. Q. B. 1, Brett, M. R. said of the Lodgers' Goods Protection Act, 1871:

"The words of the statute are imperative. It is said that the construction in favour of the defendants will render the statute ineffectual to protect lodgers. I do not think so; the Legislature has imposed conditions, and these conditions must be rigidly complied with in order to deprive the landlord of his remedy at common law and to bring the lodger within the protection of the statute."

In *Stradling v. Morgan* (1560) Plowd. 198 206, the question was whether an action founded upon a statute could be commenced elsewhere than before the justices of Glamorgan at their sessions, for by 34 and 35 Hen. 8 C. 26, it was enacted that:

"all actions founded upon any statutes shall be sued by original writ, to be obtained and sealed with the said original seal returnable before the justices, at their sessions, within the limits of their authorities, in manner and form before declared."

It was contended that these words had a negative meaning, that is to say, that the statute appoints the place, order, and form of such suits, and that they cannot sue in any other place or form, and therefore that this action, founded upon a statute, which is appointed to be returned before the justices of Glamorgan, at their sessions, cannot be sued or returned elsewhere or before any other justices. And so it was decided by the Court, and a verdict which had been found for the plaintiff was set aside.

10. Upon these grounds, I am of opinion that the Bihar Ordinance II [2] of 1949 is ultra vires and invalid and that all the applicants have been illegally and improperly detained under the provisions of this Ordinance.

10a. In this context, I, would adopt and adapt a passage from the opinion of Lord Shaw in *Rex v. Halliday* 1917 A. C. 260: 86 L. J.K. B. 1119:

""Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing

crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny."

11. For the reasons already given, I would order that all the applicants should be released from custody forthwith.

12. Let a certificate be issued u/s 205, Government of India Act.

Narayan, J.

13. I agree.