

(1969) 01 AHC CK 0005
In the Allahabad High Court
Case No : Writ Petition No. 712 of 1966

Dr. A.J. Faridi

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-01-1969

Acts Referred:

Constitution of India, 1950 — Article 14, 359(1)
Defence of India Act, 1971 — Section 44
Defence of India Rules, 1962 — Rule 35(6), 45

Citation : AIR 1970 All 383

Hon'ble Judges : Lakshmi Prasad, J

Bench : Single Bench

Advocate : Mohd. Husain, M.A. Haider, Bishnu Singh, S.P. Sinha, B.C. Agarwal, Ramesh Singh and Saghir Ahmed, for the Appellant; K.S. Verma, for the Respondent

Final Decision : Dismissed

Judgement

Lakshmi Prasad, J.—This is a petition under Article 226 of the Constitution. The prayer in the petition is that the following notification dated 18th August, 1966 published in the Gazette of India dated 27th August, 1966 be quashed:

"Whereas in the opinion of the Central Government the book entitled "Tashkent Declaration and the Problem of Indo-Pak Minorities" written by Dr. A. J. Faridi, and printed at Chowdhury Press, 7 Zamir Mansion, Gwynne Road, Lucknow, contains prejudicial reports as defined in Clause (7) of Rule 35 of the Defence of India Rules, 1962;

Now, therefore, in exercise of the powers conferred by Rule 45 of the Defence of India Rules, 1962, the Central Government hereby-

(a) prohibits the sale or distribution of the said book or any extract therefrom or of any translation thereof, and declares the said book and every copy or translation thereof or extract therefrom, to be forfeited to Government; and

(b) directs every person possessing any copy of the said book to deliver the same to the local police authorities."

It is a matter of common knowledge that on September 8, 1962 the Chinese" attacked the northern border of India and that constituted a threat to the security of India. That is why on October 26, 1962 the President issued a Proclamation under Article 352 of the Constitution. This Proclamation declared that a grave emergency existed whereby the security of India was threatened by external aggression. On the same day the Ordinance was promulgated by the President. This Ordinance was amended by Ordinance No. 6 of 1962 promulgated on November 3, 1962. On this day, the President issued the Order under Article 359(1), suspending the rights of citizens to move any Court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution for the period during which the proclamation of emergency issued on October 26, 1962 would be in force. On November 6, 1962 the rules framed by the Central Government were published. Then followed an amendment of the Presidential Order on November 11, 1962. By this amendment for the words and figures "Article 21" the words and figures "Articles 14 and 21" were substituted. On December 6, 1962 Rule 30 as originally framed was amended and Rule 30-A added. Last came the Act on December 12, 1962. Section 48(1) of the Act has provided for the repeal of the Ordinance Nos. 4 and 6 of 1962. Section 48(2) provides that notwithstanding such repeal, any rules made, anything done or any action taken under the aforesaid two Ordinances shall be deemed to have been made, done or taken under the Act as if this Act had commenced on October 26, 1962. That is how the rules made under the Ordinance continued to be the rules under the Act and it is under Rule 45 that the impugned action was taken when the emergency was still in force. It may here be noted that the emergency came to an end in January, 1968.

2. As is well known Indo-Pakistan war broke out in September, 1965. It came to an end as a result of an agreement reached between India and Pakistan in January, 1966 popularly called "Tashkent Declaration". The petitioner published the booklet entitled "Tashkent Declaration and the Problem of Indo-Pak Minorities" in February, 1966. According to the petitioner, Jan Sangh which is a communal body, started propaganda against the said booklet so much so that a calling attention motion regarding It was admitted by the Speaker of the U.P. Legislative Assembly on 11th April, 1966. Organizer, a weekly newspaper issued from Delhi commented adversely on this booklet in its issue dated 12th June, 1966 characterising it as a communal propaganda. Sri Atal Behari Bajpayee. one of the leaders of the Jan Sangh party and a member of the Rajya Sabha gave notice on 20th June, 1966 of the question reproduced in paragraph 17 of the petition to be answered on the floor of the Rajya Sabha. The Deputy Minister answered that question on 20th August, 1966 stating that the Government of India had proscribed the booklet. The impugned notification was actually published subsequent thereto on August 27, 1966. From these facts the inference drawn by the petitioner as formulated in paragraph 21 of the petition is

that the Central Government in taking the impugned action was influenced by the propaganda carried on by the Jan Sangh party and its action was arbitrary and mala fide.

3. The above is one set of facts as set forth in the petition. The other set of facts is to be gathered from what is stated in paragraph 22 onwards. Briefly stated the case of the petitioner is that he incurred the displeasure of Sri Syed Ali Zaheer, the then Minister for Justice in the U.P. Government, by insisting on the Nagar Mahapalika to take action against Sri Syed Ali Zaheer for the removal of the encroachment committed by him by making his boundary wall after including a portion of the municipal land within the same. As stated in the petition, questions regarding the alleged encroachment by Sri Syed Ali Zaheer were put on the floor of the U.P. Assembly on 19th February 1965 and Sri Syed Ali Zaheer got a letter published in the National Herald dated 17th March, 1965 explaining his position in regard to the accusations made against him in respect of the alleged encroachment of municipal land. It is further pointed out that before the booklet was actually proscribed by the Central Government, it was in consultation with the Law Department of the State Government of which Sri Syed Ali Zaheer was in charge in capacity of Minister for Justice and, according to the petitioner, the Law Department of the State of Uttar Pradesh after examining the book found it objectionable and recommended action against the petitioner with the result that it came to be proscribed in accordance with that recommendation.

4. The petitioner alleges that the booklet in question does not contain any objectionable matter and no reasonable person on its examination can come to a conclusion that it contains prejudicial reports as defined in Clause (7) of Rule 35 of the Defence of India Rules, 1962. In his affidavit dated 6th September, 1968 the petitioner points out that much worse publications extracts from which have been filed as annexures "A" to "F" to the said affidavit escaped action at the hands of the Central Government and accordingly the impugned action deserves to be struck down as discriminatory. The main ground on which the impugned notification is challenged is that the Central Government issued it without applying its mind and, as such, acted mala fide.

5. The petition is opposed by the Union of India, the sole opposite party in the case. A counter-affidavit sworn by Sri G. S. Kapoor, Under Secretary, Government of India, Ministry of Home Affairs, has been filed on behalf of the opposite party. In paragraph 14 of the Counter-Affidavit it is asserted that the action of the Central Government in proscribing the booklet was a bona fide exercise of the powers of the Government and the suggestion that the action of the Central Government was provoked by the question sent by Sri Atal Behari Bajpayee is denied. It is further stated that the book was under examination of Government of India long before notice of the said question was given and "action was taken after Government was satisfied that the contents of the booklet are such as are likely to disturb communal harmony". As regards the allegations made in paragraphs 33 to 39 of the petition which concern Sri Syed

Ali Zaheer paragraph 22 of the counter-affidavit says that the same do not concern the opposite party and do not call for any reply from it Then it is said:

"It is, however, stated that there is nothing on the record of the opposite party that Sri Syed Ali Zaheer took any initiative in the matter."

6. I have heard the learned counsel for the petitioner and the learned Chief Standing Counsel appearing for the opposite party. The argument of the learned counsel for the petitioner has been twofold. His first contention is that the impugned action deserves to be struck down as mala fide for the simple reason that a perusal of the impugned notification itself shows that the Central Government issued it in a casual manner without applying its mind. The other contention is that because of the failure of the opposite party to take action against worse publications referred to in the petitioner's affidavit dated 6th September, 1968 the impugned action is hit by Article 14 of the Constitution.

7. So far as the second contention is concerned, it appears to be wholly untenable. I have already shown above that the impugned action was taken when the emergency was still in force and Article 14 stood suspended by virtue of President's Order under Article 359(1) of the Constitution. As ruled by the Supreme Court in the case of Mohd. Yaqub, etc. Vs. The State of Jammu and Kashmir, , Article 14 of the Constitution could not be invoked in respect of an action taken at a time when the Article stood suspended by an Order of the President under Article 359(1) of the Constitution. Apart from that, the contention is also without any substance on merit. For an action taken according to law against a defaulter it is no answer that on some earlier occasion a similar action had not been taken in respect of a similar default. Article 14 of the Constitution is of no assistance in such circumstances, So in any view of the matter the contention being without any substance is rejected.

8. Coming to the other contention, I may at once say that there is no material before the court on the basis of which it may be possible to say that the Government acted mala fide in the matter. In view of what is specifically stated in paragraph 14 of the counter-affidavit, it is not possible to hold that in taking the impugned action the Central Government was influenced by external consideration and not by its own opinion formulated on an examination of the booklet in question. Learned counsel was at pains to show that the impugned notification itself furnished evidence of the fact that the Central Government did not apply its mind. He read the notification more than once and contended that whereas its first paragraph was only descriptive, the other paragraph was operative and that there was nothing in it to show as to which matters, if any, discussed in the booklet appeared to the Central Government, to be prejudicial reports so as to entitle it to take action under Rule 45 of the Defence of India Rules, 1962. Another argument raised in this connection was that the definition of the expression "pre-judicial report" in Clause (7) of the Defence of India Rules refers to "prejudicial act" which expression is in its turn defined in Clause (6) of Rule 35 and the said Clause (6) consists of as many as sub-Clauses (a) to (s);

and that being so it was obligatory on the Central Government to indicate that in its opinion the booklet contained prejudicial reports because it contained matter covered by such and such sub-clause or sub-clauses of Clause (6) of Rule 35. In support of the contention learned counsel placed strong reliance, on the case of Jagannath Misra Vs. State of Orissa, . That was a case of preventive detention under Rule 30(1) (b) of the Defence of India Rules, 1962, In that case the order of detention was passed on the basis that:

"That State Government is satisfied that with a view to preventing from acting in any manner prejudicial to this defence of India and Civil defence, the public safety, the maintenance of Public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India or the efficient conduct of military operations, it is necessary so to do."

The use of conjunction "or" in the relevant notification directing detention of the petitioner before the Supreme Court went a long way to indicate that in all probability the order had been passed by the Government without applying its mind to the requirement of the rule under which detention was being ordered. Obviously satisfaction is in respect of a specific matter. Rule 30 mentions various grounds on the basis of any or more of which It enables the competent authority to pass an order of detention. In a given case the competent authority may be satisfied with regard to the existence of any one or more of such grounds. It is difficult to see as to how in any case the competent authority can be satisfied in regard to the existence of some such grounds in the alternative. That appears to be the reason why the Supreme Court in that case directed an affidavit to be filed by the Minister concerned. When that affidavit was filed, it made matters worse in so far as it disclosed that even though the notification mentioned a number of grounds, the satisfaction of the Minister was only in respect of two of those grounds, namely, safety of India and the maintenance of public order. It was in these circumstances that the Supreme Court observes on page 1142:

"In these circumstances there can be little doubt that the authority concerned did not apply its mind properly before the order in question was passed in the present case. Such discrepancy between the grounds mentioned in the order and the grounds stated in the affidavit of the authority concerned can only show an amount of casualness in passing the order of detention against the provisions of Section 44 of the Act. The casualness also shows that the mind of the authority concerned was really not applied to the question of detention of the petitioner in the present case. In this view of the matter we are of opinion that the petitioner is entitled to release as the order by which he was detained is no order under the Rules for it was passed without the application of the mind of the authority concerned."

In any view, this case has no application whatsoever to the facts of the case in hand. Here the notification does not appear to suffer from any inherent defect whatsoever. Rule 45 under which action has been taken says in its Sub-rule (1):--

"Where in the opinion of the Central Government or the State Government any document made, printed or published, whether before or after the Ordinance came into force, contains any confidential Information, any information likely to assist the enemy or any prejudicial report, that Government may, by order....."

It shall thus appear that under Rule 45 one of the actions enumerated therein is to be taken as soon as in the opinion of the competent authority the document made, printed or published contains one of the three, namely, (1) any confidential information, (2) any information likely to assist the enemy and (3) any prejudicial report. Here the impugned notification clearly indicates that the booklet in question contains prejudicial reports in the opinion of the Central Government. So, prima facie the notification appears to fulfil all that is required by law. It is abundantly clear from the language of Rule 45 that the Central Government is competent to take action thereunder once it forms an opinion that the document in respect of which action is proposed contains one of the three matters stated above. The action is thus to be taken on the subjective satisfaction of the Central Government. It is wholly immaterial. If the opinion of the Central Government on which proceeds the action under Rule 45, is a reasonable opinion or otherwise. This opinion of the Central Government is not revisable by any authority. In this connection I may refer to the case of *Province of Bombay Vs. Kusaldas S. Advani and Others*, . In that case action taken under the provisions of *Bombay Land Requisition Ordinance V of 1947* had been challenged. The Government had in that case requisitioned certain land on formulating the opinion that it was necessary so to do for a certain purpose which was a public purpose. The argument raised before the Supreme Court was that the determination by the Government that a certain purpose was a public purpose was a quasi-judicial and was, as such, amenable to a writ of certiorari. The majority view repelled the contention. It is summarised in the head note in the following words:

"The decision of the Government about a public purpose is a fact which it has to ascertain or decide, and thereafter the order of requisition has to follow. The decision of the Provincial Government as to the public purpose contains no judicial element in it. The enquiries mentioned in Sections 10 and 12 are only permissive and the Government is not obliged to make them. Moreover, they do not relate to the purpose for which the land may be required. They are in respect of the condition of the land and such other matters affecting land. The words of Section 3 read with the proviso and the words of Section 4 taken along with the scheme of the whole Ordinance, do not import into the decision of the public purpose, the judicial element required to make the decision judicial or quasi-judicial. The decision of the Provincial Government about public purpose is, therefore, an administrative act, and there is no scope for an application for a writ of certiorari."

Kania C. J. observes on page 225:---

"Indeed in the judgment of the lower Court, while it is stated at one place that if

the act done by the inferior body is a judicial act, as distinguished from a ministerial act, certiorari will lie, a little later the idea has got mixed up where it is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of someone, the decision or act is quasi-judicial. This last statement overlooks the aspect that every decision of the executive generally is a decision of fact and in most cases affects the rights of someone or the other. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function. It does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it. the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari."

9. Again Das, J. observes on page 256: "To summarise. It is abundantly clear from the authorities cited above that questions of fact such as the existence of a public purpose or the interest of the public safety or the defence of the realm or the efficient prosecution of the war, or the maintenance of essential supplies and the like may well be and, indeed, are often left to the subjective opinion or satisfaction of the executive authority. Merely because such a matter involves a question of fact it does not follow at all that it must always, and Irrespective of the language of the particular enactment, be determined judicially as an objective fact When the Legislature leaves it to an executive authority to form an opinion on or to be satisfied about such a matter as a condition for the exercise of any power conferred on it and to act upon such opinion what is condition precedent is. not the actual existence of the matter but, the subjective opinion or satisfaction of the executive authority that it exists" Interpreting the language of Rule 45 in the light of the principles indicated above, there is no escape from the conclusion that in accordance with Rule 45 the Central Government became competent to proscribe the booklet in question, the moment it formed an opinion that it contained prejudicial reports and the Central Government was under no obligation to provide any objective test for the formulation of its opinion that the booklet In question contained prejudicial reports while passing an order under Rule 45 in relation to it on the score that in its opinion it contained prejudicial reports. It may be that the definition of the expression "prejudicial act" which one has to see in order to understand the meaning of the expression "prejudicial reports" consists of various sub-clauses and a particular case may fall only under one of such sub-clauses, still it does not, in my opinion, place the authority acting under Rule 45 under any obligation to say anything more than what is required by Rule 45 for taking action thereunder. Of course if the opinion formulated by the authority acting under Rule 45 is so absurd as to say that two and two make five then it may be possible to strike down the action taken under Rule 45 on the ground that the authority acted without applying its mind to the matter and hence mala fide. Such is not the position in the present case. I have been taken through the various portions of the booklet by the, learned counsel

on either side. On going through it, I am not prepared to say that the opinion the Central Government has indicated in the impugned notification is so abundantly absurd and unreasonable as to lead one to the conclusion that in all probability the Central Government did not at all apply its mind. It is certainly a possible view. Section 44 of the Defence of India Act, 1962, to which reference was made during the course of arguments by the learned counsel for the petitioner, no doubt provides that any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence, but I fail to see as to how that provision assists the petitioner in the present case. All that can be inferred from it is that the Legislature emphasized that whenever an action is taken under the provisions of the Act or the rules made thereunder and which action is to interfere with the ordinary avocations of life and the enjoyment of property, care be taken to take such action strictly in accordance with the letter of law. In so far as I am unable to say that the impugned action has been taken otherwise than in accordance with the strict requirement of the letter of law. I fail to see as to what assistance the petitioner gets from Section 44 of the Act.

10. There was yet another argument raised by the learned counsel for the petitioner and it was with reference to paragraph 14 of the counter-affidavit material portion of which I have reproduced above. It is said therein that the Central Government took action because after an examination of the booklet it was satisfied "that the contents of the booklet are such as are likely to disturb communal harmony." The argument is that if the satisfaction was that the contents of the booklet were such as were likely to disturb communal harmony then it could not be said that the booklet contained prejudicial reports because in order to constitute prejudicial report the contents should have been such as are likely "to promote feelings of enmity and hatred between different classes of persons in India" as envisaged by Sub-clause (g) of Clause (6) of Rule 35. In this connection reliance is placed on Dr. Ram Manohar Lohia Vs. State of Bihar and Others, . There the order of detention passed under Rule 30(1) (b) of the Defence of India Rules, 1962 purported to indicate that the detention was necessary "with a view to preventing from acting in any manner prejudicial to the public safety and the maintenance of law and order". Maintenance of law and order is not one of the grounds enumerated in Rule 30 as a basis for preventive detention. On the other hand, the expression used in Rule 30 is "the maintenance of public order". The Supreme Court by majority, as summarised in the head note, held:---

"Where a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. The Defence of India Rules drastically interfere with the personal liberty of people and Courts are prevented from going behind the order passed under the Rules. In these circumstances it would be legitimate to require strict

observance of the rules and if there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu."

It is thus argued that in so far as, according to the counter-affidavit itself, satisfaction of the Central Government was not in respect of the matter actually provided in Sub-clause (g) of Clause (6) of Rule 35. it must be held that there exist-ed no basis for taking action under Rule 45 The argument would have been acceptable, had it been possible to hold that the expression used In the counter-affidavit, namely, "likely to disturb communal harmony" does not convey what is conveyed by sub-clause (g) of Clause (6) of Rule 35 which defines any act as prejudicial act that is likely to promote feelings of enmity and hatred between different classes of persons in India. "Likely to disturb communal harmony" is not the same thing as "likely to result in lack of communal harmony". It is true that "lack of harmony" does not necessarily mean promotion of feelings of enmity and hatred. But the same is not true when It is said that it is likely to disturb communal harmony. Lack of harmony simpliciter means cessation of feelings of friendship but there can be no disturbance of communal harmony in the absence of feelings of enmity and hatred. If at all the expression "likely to disturb communal harmony" is stronger than what one finds in Sub-clause (g) of clause (6) of Rule 35. As I view the expression used in paragraph 14 of the counter affidavit, I am on opinion that it envisages the result of engenderment of feelings of enmity and hatred. So, it is not possible to accept the contention of the learned counsel that there is something in paragraph 14 of the counter-affidavit which takes the case of the booklet in question out of the purview of Sub-clause (g) of Clause (6) of Rule 35.

11. No other point was urged. The petition must fail and is accordingly hereby dismissed with costs.