

(1993) 04 CAL CK 0007
In the Calcutta High Court
Case No : Matter No. 414 of 1993

Dr. Anindya Mitra and Another

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 08-04-1993

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(2), 19(6), 226

Citation : (1993) 1 CALLT 436

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : S.K. Kapoor, Mrinal Kanti Lodh, S.K. Bose and S.N. Roy, for the Appellant; N.N. Gooptu, General, S.C. Ukil, Government Pleader, K.S. Roy, R.N. Kandari and Tapan Dutta, for the Respondent

Judgement

Shyamal Kumar Sen, J.—In this writ petition the petitioners have challenged the order dated 31st March, 1993, issued by the Commissioner of Police, Calcutta, "whereby the Commissioner regretted that permission cannot be accorded to the petitioners for holding a public meeting at Brigade Parade Ground on 11th April, 1993 by relaxing the prohibitory orders u/s 144 Cr.P.C. now in force in Calcutta."

2. It is the contention of the writ petitioner that the members of the petitioner No. 2 Bharatiya Janata Party are all citizens of India. The Constitution of the petitioner No. 2 admits all Indian Citizens in its fold irrespective of their caste, religion and any bias if they subscribe to the common ideals of the party.

3. The said Bharatiya Janata Party is a political party recognised by the Election Commission of India in terms of its orders under the Representation of Peoples Act, 1951 and have been given reserved symbols for its candidates contesting assembly and parliament elections throughout the country.

4. It has also been contended that the petitioner No. 2 as the political party and organisation contested successive State and Parliament Elections and its 150 candidates were elected to the House of the People of the Parliament in the

General Elections in 1991 and it has been recognised as the largest opposition Political Party in the Lok Sabha and the leader of the members elected to the Lok Sabha has been recognised and granted constitutional recognition as the leader of the opposition in the Parliament with status equivalent to that of Central Minister of the Government of India.

5. It is also the contention of the petitioners that the petitioner No. 2- Bharatiya Janata Party has a large number of followers in the State of West Bengal and the total percentage of votes polled by it in the last parliamentary General Election was about 12 per cent.

6. It has been contended that in City of Calcutta public meetings as well various other meetings convened by different political parties were and still are permitted to be held in the Brigade Parade Ground which is centrally located and also can accommodate a large number of persons. The police authorities in the past also have permitted and allowed various political parties for holding such public meetings in the said Brigade Parade Ground.

7. The petitioner No. 2 have decided to hold its National Executive Council Meeting at the City of Calcutta in between 10th April to 12th April, 1993 and entrusted the West Bengal State Committee with the responsibility of organising the said meetings. It has also been decided by the petitioner No. 2 organisation that Bhharatiya Janata Party would hold on this occasion, a public meeting at Brigade Parade Ground, Calcutta on April 11, 1993. The petitioner No. 1 being the Secretary on behalf of the petitioner No. 2 being the said party applied accordingly to the Commissioner of Police, Calcutta on March 1, 1993 for usual permissions under the Police Act and Calcutta Police Act, 1866 and all other Act in force. The representations of the petitioner No. 2 also met the Calcutta Police authoirties, the Home Secretary and the Chief Secretary to the Government of West Bengal on different dates, after filing of the said application, with the purpose of expediting the said permission for making necessary arrangements in advance for the said meeting. Neither any permission to hold the said meeting nor the permission prayed for was rejected.

8. It has been alleged in the writ petition that the appointment thereafter was sought for with the Chife Minister of West Bengal and the representatives of the petitioner No. 2 met the Chief Minister at his office at Writers" Buildings, Calcutta on March 11, 1993 and requested to direct the respondent authorities to consider and dispose of the said application and grant permission to the party to hold the public meeting on April 11, 1993 at Calcutta Brigade Parade Ground. It has been alleged that during such discussion with the Chief Minister the representatives of the parties were informed by the Chief Minister that he would on return from New Delhi on March 17, 1993, take necessary measures for appropriate actions in this matter and would inform the petitioner No. 2 organisation accordingly. The gist of the discussion held at the meeting with the Chief Minister was reported in all newspapers. It has further been alleged that the Minister for Information and Cultural Affairs Department, announced before the Press on March 11, 1993 that

the State Government would not allow the Bharatiya Janata Party to hold the meeting in the City and this declaration has been reported in all the daily's edition of all daily newspapers of the City in their daily edition, on March 12, 1993.

9. It has also been alleged in the writ petition that an announcement was made on the West Bengal Legislative Assembly on March 16, 1993, that the State Government would not allow the Bharatiya Janata Party to hold its meeting in the City and the declaration has been reported in the following day's edition of all daily newspapers of the City on March 17, 1993 including "The Statesman."

It has been contended that the Commissioner of Police is the authority under the statute to consider and dispose of the application for permission.

10. Petitioner in the writ petition filed before this Court further alleged that the statutory powers of granting such permission upon consideration of the said application under relevant provisions of the Police Act (Act V of 1961) and the Calcutta Police Act, 1866 (Act IV of 1866) and all other Act and statutory orders or notifications in force, rests with the Commissioner of Police, Calcutta and he has not applied his mind by not admitting the said application nor by rejecting it and communicating his decision to the petitioners till date. The Respondent authorities are bound and liable to act in accordance with the law and cannot disregard their statutory responsibility and instead abdicate their statutory powers and the responsibility by accepting any decisions made up for them or trust upon them by others. The Respondent authorities have therefore failed to discharge their duties and obligations in this regard.

11. Petitioner met at 5-15 P.M. on March 18, 1993 with the Chief Minister in accordance with the previous arrangement and the Chief Minister stated what the Information and Cultural Affairs Minister announced 3 day's earlier that the Government would not permit holding of any public meeting by the petitioner party in Calcutta.

12. The State Government have in the meantime announced through Press the decision of holding the Panchayat Elections in the State and elections in a large number of Municipalities of this State and Bye-election in 2 State Assembly Constituency including Chowringhee Assembly Constituency. The Secretary, Panchayat Department, Government of West Bengal, has issued a notification No. 756/I/Panch/IE-6/93 dated the 10th March, 1993 setting on the process of the said Panchayat Election throughout the State with a time-table of the said Election fixed to be held on 30th May, 1993. The Secretary, Municipal Affairs Department has also issued a notification No. 97(25)/C-4/MIE-7/93 dated the 17th March, 1993 fixing the schedule of elections in 13 Municipalities of the State fixed to be held on 10th May, 1993.

13. It is the contention of the petitioner that the petitioner No. 2 have decided to participate in the Panchayat, the Municipal Elections and Assembly bye-elections have taken upon a programme of public campaign and public meetings in

support of its election programmes and the candidates throughout the State and the concerned municipalities. It has also been decided to inaugurate the said election campaign by holding a public meeting at Brigade Parade Ground on the 11th April, 1993 at 2 P.M. to be addressed by Shri Lal Krishna Advani, M.P. and leader of the opposition in the Lok Sabha and by Shri Sikandar Bhakt, M.P. and leader of the opposition at Rajya Sabha.

14. On March 19, 1993, another application was made to the Commissioner of Police, Calcutta, with copies endorsed to the respondent No. 2 the Secretary to the Government of West Bengal, Home Department and respondent No. 3 the Chief Secretary to the Government of West Bengal, seeking permission under relevant provision of the Police Act, the Calcutta Police Act and other statutory orders or notifications in force, for holding the said Public meeting at Brigade Parade Ground, Calcutta on and for using microphone at the said meeting. In the said application for permission, the Commissioner of Police was requested to grant his permission within 72 hours in order to enable the petitioner No. 2 to go ahead for making all preparations including publicity for the said meeting. It has been alleged that in spite of personal meeting, reminders and calls given over telephone, the respondent authorities have not responded with any reply.

15. A writ application was moved on 26th March, 1993, since no action was taken by the Commissioner of Police, Calcutta whereupon an order was passed by me on 26th March, 1993 inter alia, to the following effect :

"The Court : By consent of the parties the matter is treated as on the day's list as Motion (New) and is disposed of in the manner following :

Let the Commissioner of Police consider the application made by the petitioner on 19.3.1993 and dispose of the same by passing a reasoned order in accordance with law and communicate the same to the petitioner by 31st March, 1993.

The writ petition at this stage need not be proceeded against the respondent Nos. 7 and 8.

No affidavit-in-opposition has been filed. The allegations made, in the petition are not admitted.

There shall be no order as to costs."

16. On March 31, 1993 at about 6 P.M. the petitioner No. 1 received a communication signed by the Commissioner of Police, Calcutta, on the same date whereby the Commissioner of Police expressed his regret to accord permission for holding a public meeting at the Brigade Parade ground on 11th April, 1993 by relaxing the prohibitory orders u/s 144 Cr. P.C. The reason given for such refusal as appears from paragraph 2 of the said letter is set out herebelow :

"2. In view of the fragile communal balance and tense law and order situation, now prevailing in Calcutta and its suburbs, the holding of a public meeting by BJP

at this Juncture, will be prejudicial to the maintenance of Communal harmony and public order, peace and tranquility."

It has been alleged that the petitioners have not been given any opportunity of hearing personally by the Commissioner of Police.

17. The petitioners being aggrieved by the said order again moved another writ petition challenging the said validity of the said order on 31st March, 1993. The said writ application was moved on 1st April, 1993 when the following order was passed :

"The Court: Let this matter be taken up tomorrow, on the prayer of Government pleader. The Commissioner of Police, Calcutta is directed to disclose before this Court on what basis he has come to the conclusion that there is fragile communal balance and tense law and order situation now prevailing in Calcutta and its suburbs and holding of public meeting by B.J.P. will be prejudicial to the maintenance of Communal harmony and public order, peace and tranquility. Let all records which the Commissioner of Police considered in arriving at his decision will be produced in Court tomorrow.

The Commissioner of Police and all parties to act on a signed copy of the minutes of this order on usual undertaking."

18. It has been mentioned in the writ petition that the Constitution of Bharatiya Janata party nowhere provides that it is intended for any particular community. It has further been alleged that the petitioner has several members belonging to various communities including Hindu, Muslim, Christian, Parsi, Jain and Sikh. It has also been alleged that it is never the object of the Bharatiya Janata Party to espouse the cause of a particular community. It has further been alleged that the order of 31st March, 1993, refusing to grant the permission only smacks of a pre-meditated mind on the part of the State of West Bengal and the Police Authorities and they have purported to pass the said order in a mechanical manner without any application of mind and also in a discriminating manner.

The said order according to the petitioner is discriminatory as a. meeting was permitted at Shahid Minar by Ganatantrik Mahila Samiti-a wing of CPI(M).

19. It is the contention of the petitioner that under the Election Rules of the country any party has a right to hold the meetings for the purpose of Election and, therefore, by refusing to accord permission the respondent authority has acted in an arbitrary manner and contrary to the relevant acts and rules.

20. It has been contended by Mr. Kapur, learned Advocate for the petitioner that the order passed by the Commissioner refusing to accord permission to hold meeting contains mere mechanical recitals and/or a virtual reproduction of the language of Section 144 Cr. P.C. According to him, the Court should take judicial notice that law and order situation in Calcutta from 9th February, 1993 has not been bad in any way. There is no evidence of any riot or any aflamed incident in any locality of Calcutta which can be said to be a disturbance of public peace or

breach of peace, danger of human life or property. It has also been submitted that the Commissioner promulgated the order dated 8th February, 1993 which was published in Calcutta Police Gazette dated 9th February, 1993 being prohibitory order u/s 144 Cr. P.C. for prevention of disturbance of public peace and breach of peace and/or danger to human life or property. There is no complaint in the said order or any data on warrant for the conclusion that the order was promulgated to restrict any action by the BJP. The said order was passed more than a month before the instant application was made to the Commissioner for permission to hold a meeting. It has been submitted that no nexus exists or can be shown to exist between the said order and the application of the BJP to hold the meeting. It has also been submitted that admittedly, the purpose for which the meeting is sought to be held is a lawful purpose, to wit the inauguration of an election campaign. Nobody can deny that the party has a right in law to participate in the election. The petitioner party is not a banned party. The petitioner party by its constitution professes allegiance to the Constitution of India and its members. The petitioner party is recognised by the Election Commission and its right to participate in the election cannot be denied.

21. It was further been submitted that there is total non-application of mind by the Commissioner. The Commissioner has been unable to give particulars, even a single instance in West Bengal which would suggest that the petitioner party was guilty of inflaming communal tension or adversely affecting the law and order situation. Some vague references were made to incidents outside West Bengal in course of argument. Those matters, it is submitted, are extraneous and irrelevant for the question at hand, which is concerned with the Commissioner's duty to permit holding of a meeting in West Bengal. The Commissioner cannot express any concern with matters transpiring in other States or elsewhere in India. His concern can only be the holding of the meeting at Brigade Parade Ground. It has further been submitted that the order passed by the Commissioner suffers from total non- application of mind.

22. It has also been submitted that the Commissioner has referred to secret reports clandestine propaganda, possibility of a "holocaste" and other "facts" and if such factors are examined it will be found that all of them are "hypothecal and imaginary considerations", and vague, indefinite and problematic apprehensions.

23. An affidavit has been affirmed by Dr. Anindya Gopal Mitra on 6th April, 1993, being the supplementary affidavit. In the said supplementary affidavit filed pursuant to the leave of the Court the order issued u/s 144 of the Criminal Procedure Code, 1973 by the Commissioner of Police and published in the Official Gazette on 9th February, 1993, has been challenged.

24. It has been alleged in the said supplementary affidavit that the said purported order dated 9th February, 1993, had nothing to do with the petitioner party or its members and was not warranted by their conduct or cause by any acts or deeds related to the petitioner party or its members.

25. It has been submitted that the said order is ex facie a blanket order passed in circumstances not concerning the petitioner party.

It has also been submitted that the power u/s 144 can be exercised only "in an emergency" or "in an extraordinary situation". No such emergency has been shown to be existing.

26. It has further been submitted that the reasons shown by the Commissioner are all bad and there is no factual basis for the same. Nothing to show that the petitioner party or its members were responsible for any communal tension or law and order situation in the State. No material and the reasons given by the Commissioner are based on irrelevant and extraneous consideration.

It has also been submitted that no ground exists justifying that the mere holding of an election meeting would lead to communal violence.

27. It has been stated in the said affidavit that there is no question of destruction of any place of worship in Calcutta by members of the petitioner party and all allegations in this behalf are pretentious, sham and misleading.

It has further been alleged that the said Order u/s 144 is being used in a discriminatory manner against the petitioner party. Other parties have been allowed to hold the meeting.

28. It has also been submitted that the Commissioner has failed to take into account the fact that the purported order dated 9th February, 1993, is bound to expire before 11th April, 1993 and therefore cannot be relevant or material factor.

It has been submitted in the said affidavit that the said order being bad has to be struck down.

29. Mr. Kapoor, learned Advocate for the petitioners has submitted that fundamental rights of the petitioners have been infringed by such refusal to accord permission to hold the meeting by the Commissioner of Police, Calcutta. It has also been contended that right to hold meeting, right to assemble and right to move and peaceably fundamental rights estimated in our Constitution.

30. He referred to Article 19(1)(a)(b) & (e) of the Constitution. He also referred to Article 19(2), Constitution of India and submitted that enjoyment of such fundamental rights, however, may be curtailed on the basis of reasonable restriction that may be imposed on the basis of any existing law now in operation or by enacting any law in the interest of sovereignty, security of State etc. as provided in the said Article 19(2). Accordingly he submitted that the State Government should disclose the laws on the basis of which such reasonable restriction if any has been imposed.

31. It has been contended by Mr. Kapoor that the order passed by the Commissioner is vague. It has also been submitted that no facts have been disclosed to show nexus with the reasons alleged in the order for not according permission to the petitioners to hold such meeting, nor any facts disclosed in

support of the conclusion. He has also submitted that Section 144 Cr. P.C. cannot be passed in any omnibus blanket. It has been contended that the subjective opinion of the Commissioner must satisfy the test of reasonableness.

32. An affidavit affirmed by Tushar Kanti Talukdar, Commissioner of Police on 7.4.93 intended to be used as opposition to the said application has been filed in Court pursuant to the leave granted on 7.4.93 (hereinafter referred to as the said affidavit). It has been alleged in the said affidavit that in view of the changed situation after the demolition of Babri Masjid at Ajodhya on 6.12.1992 and the resultant communal violence in many places of the country an order u/s 144 of the Code of Criminal Procedure imposing certain restrictions was issued on December 10, 1992. It has also been alleged in the said affidavit that after the spate of violence seemed somewhat to abate many organisations including political parties sought permission for staging processions as well as for holding meetings in the City of Calcutta in the interest of communal harmony in such occasions the prohibitory order u/s 144 Cr. P.C. was relaxed and permission was given. The BJP however made an application to hold a meeting on 4.1.93. Since it was not mentioned by the said party that the said meeting or processions were organised for communal harmony, permission was not granted. Subsequently, the BJP was granted permission on its application for relaxing the existing order u/s 144 Cr. P.C. to enable them to hold a meeting in the Esplanade East area, Calcutta on the occasion of the birthday of Swami Vivekananda, which was sought to be celebrated as Sourya Divas. Such permission was granted. It has further been alleged in the said affidavit that the speakers, however, spoke very little on Vivekananda and launched into political diatribes against other political parties like Congress, Communist parties and Janta Dal accusing them of fermenting communal tensions by pursuing policies of anti-Hinduism and of appeasement only of Muslims alleging that Muslim riot victims of Sitamahri in Bihar were granted relief at the rate of Rs. 2 lakhs per family, while the Hindu riot victims of Assam were paid only Rs. 5,000/- per family. The accused the other political parties of anti-Hinduism and of double standards for allegedly having been silent when Hindu temples were allegedly destroyed in Kashmir and for protesting against the demolition of the Babri Masjid. The said speakers also claimed that the disputed structure at Ajodhya was not a Mosque and that it was the claim of the other political parties including the Prime Minister that the said structure was a mosque which had been demolished, which provoked the Muslims and culminated in communal riots. A copy of the Special Branch Officers' report of the said meeting to the same effect has also been annexed. Subsequently, the BJP however, obtained permission for holding another meeting at Esplanade East, Calcutta on 2.2.93 which was to be addressed by Kalyan Singh, the former Chief Minister of Uttar Pradesh, heading a BJP Government. Such permission was granted and a meeting was duly held on 2.2.93. At the said meeting Sri Kalyan Singh, declared inter alia that he was not at all unhappy or repentant at the demolition of the structure at Ajodhya on 6.12.92. He has further alleged that the fact that the structure was demolished and the debris

cleared in 5 hours" time suggested that God's will and help were behind the demolition and it could be an "Act of God." The report of the Special Branch Officer reporting the said lecture has been produced in Court at the time of hearing and true copy has been annexed to the said affidavit. The Commissioner considered that such an approach of the BJP was clearly divisive and in the wake of the Commissioner's Report of fragile communal balance which continued to subsist in the City and other parts of the country it was felt necessary to promulgate orders u/s 144 of the Code of Criminal Procedure for prevention of disturbance of Public tranquility and breach of peace and/or danger to human life and property. Therefore, as an Executive Magistrate prohibitive order was passed with effect from 8.2.93 prohibiting assembly of five or more persons, or processions etc. The BJP thereafter on March 1, 1993 made another application for permission to hold a meeting at the Brigade Parade Ground. Subsequently another application was made on March 18, 1993. It is already on record that on 31st March, 1993 pursuant to the order of this Court the Commissioner passed an order communicating the reasons refusing to accord permission to the petitioner to hold meeting. It has been alleged in the said affidavit that the said order was passed by the Commissioner after he had gone through the secret Special Branch Officers' report on the communal situation in the city and elsewhere in the country. It has already been alleged in the said report that it was stated inter alia that in both the public meeting held by BJP under permission granted by the Commissioner of Police on 12th January, 1993 and 2.2.93 the speakers mainly chose to speak on communal lines and chose to criticise other political parties as already noted. It has further been alleged in the said report which further revealed that the Hindu fundamentalists organisations like Viswa Hindu Parishad (V.H.P.), Bajrang Dal and the Rashtriya Sevak Sangh (R.S.S.) since banned under the Unlawful Activities (Prevention) Act, 1967, were the main driving forces behind all BJP activities and that important leaders of the R.S.S., V.H.P. and Bajrang Dal and a good number of Kar Sevaks were likely to attend the open rally of the BJP at Brigade Parade Ground. Reference was also made to a speech by an important leader of BJP Smt. Uma Bharati made at the Town Hall at Dum Dum on 31.3.93 which according to the Commissioner of Police was exciting. He also expressed apprehension in his affidavit that in the event such similar type of speeches are delivered that will cause communal tensions and create law and order problem and he was of the view that prohibitory orders cannot be relaxed for holding meeting of BJP at Brigade Parade Ground.

33. Learned Advocate General submitted on the other hand that the relevant notification was issued on 11th May, 1992 appointing Shri T. K. Talukdar as Executive Magistrate for District of South 24-Parganas and also for Calcutta authorising him to exercise all power of Executive Magistrate u/s 144. He also referred to Section 144 Cr. P.C. and submitted that notification were issued and published in Calcutta Police Gazette on 9th December, 1992 by Commissioner of Police and after the expiry of two months from said date another notification was issued by Commissioner of Police promulgating prohibitory order u/s 144. He

submitted that in the instant case the application for permission to hold meeting by BJP was duly considered by the Commissioner of Police. The Commissioner took into consideration several materials on the basis of secret information report of the Special Branch and arrived at his finding. He further referred to Newspaper report on the speeches of the BJP leaders at the public meetings held on January 12 to February 2, 1993 in Calcutta. He further submitted that the decision based on Commissioner's subjective satisfaction cannot be scrutinised. Under such circumstances, writ court should not interfere as the writ court cannot sit in appeal over the decision of the Commissioner of Police.

34. It has further been submitted by learned Advocate General that only in case of jurisdictional and apparent errors it is open to the High Court to interfere in writ proceeding. He also submitted that the writ Court should not reassess evidence. In this connection, he referred to Supreme Court decision in *The State of Madras Vs. G. Sundaram*, and *Beant Singh Vs. Union of India (UOI)* and Others, .

35. Learned Advocate General referring to Article 19(2) submitted that u/s 144 Cr. P.C. prohibitory order has been issued by the Commissioner of Police as Executive Magistrate by Notification which has¹ already been noted. The last such notification admittedly expired and spent its force on April 8, 1993. It is stated that another notification will be made in the official Gazette on April 9, 1993 and the said notification issued by or on behalf of the Governor though not gazetted on the date is produced before the Court on April 6, 1993 which admittedly shows that the Commissioner of Police when he passed the said order dated March 31, 1993 presupposed that a notification would be issued since in his order be recorded that permission cannot be accoded to BJP for holding a public meeting at Brigade Parade Ground on April 11, 1993 by relaxing the prohibitory orders u/s 144 of the Code of Criminal Procedure now in force in Calcutta. The Commissioner at the material time i.e. on March 31, 1993 had no material on record before him to consider the scope of relaxation of prohibitory orders for the meeting to be held on April 11, 1993 since the said prohibitory order which was in force on March 31, 1993 will cease to have its validity after April 8, 1993. When the question was raised on April 5, 1993 at the closing stage of the argument, learned Advocate General was also not aware that any such promulgation will be made again by the Governor.

36. I have considered the submissions of the parties, the records produced and the decisions cited from the Bar. It appears from perusal of the Notification published in the Calcutta Police Gazette dated May 12, 1992 that the Commissioner of Police, Calcutta was appointed to be the Executive Magistrate in the district of South 24-Parganas to exercise powers within the limits of Calcutta and suburbs of Calcutta. Pursuant to the said appointment as Executive Magistrate the Commissioner of Police, Calcutta issued notification which were published in the Calcutta Police Gazette. The said Notifications issued being one dated December 9, 1992 published in December 18, 1992 and the other issued

on February 8, 1992 published in February 9, 1993 were produced in Court. In both the said Notifications similar restrictions were imposed prohibiting assembly of five or more persons or any procession, or carrying of lathie or other dangerous weapons etc. were made. In both the said Notifications it has been mentioned that it appears from the trend of events prevailing in the city of Calcutta and within the limits of the suburbs of the City of Calcutta that there is apprehension or disruption of public tranquility and breach of peace and danger to human life and property may take place both in the town of Calcutta and within the limits of suburbs of Calcutta. In view of the aforesaid the Commissioner of Police considered it necessary to promulgate the prohibitory orders imposing restrictions already mentioned. The said prohibitory orders do not specifically point to any political party including BJP from whom any such danger may be suspected.

37. In spite of the aforesaid, however, the Commissioner granted permission to BJP to hold meetings twice as already noted—first on January 12, 1993 on account of Swami Vivekananda's birth day and the other on February 2, 1993. Both the meetings were held at Esplanade East, Calcutta which is not very far away from Brigade Parade Ground. Although it has been alleged that inciting communal speeches were made by the speakers at the said meeting, during the said meeting or immediately thereafter there is no evidence of any untoward incident nor there is any evidence that the said meeting held by BJP caused a communal stir in Calcutta or created law and order problem. The secret report did not reveal that the BJP is involved in any untoward incident in Calcutta or communal clashes ensued in which members of the BJP may be involved or law and order problem has been created after the said meetings of BJP. No incident was cited either in the affidavit of the Commissioner or in the secret report showing that the act of BJP as political party has affected the law and order situation in Calcutta. Reference has been made to the Ajodhya incident as already noted. BJP held meetings with the permission of the Commissioner of Police which did not create any problem of law and order in Calcutta or its suburbs. What particular problem will be created if the meeting is held at Brigade Parade Ground has also not been disclosed. The secret reports only revealed certain apprehensions which are hypothetical in nature, vague since no instance was cited to show that after the speeches there was actual communal clash or law and order problems as a result of such speeches in any part of Calcutta after such meeting or even as of today. It is open to the Commissioner to take appropriate action to prevent such persons whose speech may have been considered to be inciting in accordance with law or to proceed against him in accordance with law, if the Commissioner is so advised. This, however, does not authorise the Commissioner to impose total prohibition on future meeting of the BJP. It appears, however, that no action or no preventive step has also been taken by the Commissioner, although it has been alleged that some of the leaders of the BJP in such meeting made speeches which may have incited the communal violence. BJP is a recognised political party. It has right to held

meeting and also to participate in Election and for that purpose, it is willing to start its election campaign. No. doubt the fundamental right recognised under Article 19(6) to assemble peaceably without arms is subject to restrictions under Article 19(2) of the Constitution of India. Article 19(2), however, provides as follows:

"19(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

Such reasonable restriction must be within the framework of law as envisaged in the Constitution.

38. Be that as it may, a document stated to be an order passed by or on behalf of the Governor was produced in Court on April 6, whereby the order passed by the Commissioner of Police being an Executive Magistrate was directed to remain in force for a further period of two months for maintaining peace and tranquillity in Calcutta. It was mentioned in the said order as follows:

"AND WHEREAS having regard to the overall situation and reports received there is immediate apprehension of disturbance of public tranquillity and breach of peace and danger to human life and property and the State Government considers it necessary that for preventing breach of public peace and tranquillity and for preventing danger to human life, the order passed by the said Commissioner of Police, being an Executive Magistrate should remain in force for a further period of two months for maintaining peace and tranquillity;

AND WHEREAS the Governor considers it necessary so to do for preventing danger to human life and safety;

NOW, THEREFORE, in exercise of the power conferred by the proviso to sub-section (4) of Section 144 of the Code of Criminal Procedure, 1973 (2 of 1974) the Governor is pleased hereby to direct that the order made by the said Commissioner of Police, Calcutta, and Executive Magistrate both for the Metropolitan area of Calcutta and the district of South 24-Parganas within the limits of the suburbs of the city of Calcutta u/s 144 of the Code of Criminal Procedure, 1973 (2 of 1974) shall remain in force for a further period of two months from the 8th April, 1993."

39. It is significant that the said order was issued at a time when the specific point was raised that the earlier prohibitory order passed by the Commissioner has spent its force and the order passed by the Commissioner suffers from that serious lacunae. The said order therefore was made, in my view, to remove the lacunae in the order of the Commissioner of Police when the said prohibitory

order as also the validity of the order passed u/s 144 is the subject-matter of challenge although it is true that in the petition vires of the said orders were not taken as the petitioner was not aware under which provision the said prohibitory order was issued. However, since the same was disclosed at the time of hearing the petitioner obtained leave to file affidavit challenging the same and filed its supplementary affidavit challenging the vires of the said order and respondent also filed Affidavit-in- opposition pursuant to leave of court.

40. Under such circumstances, it appears to me that such an act on the part of the State to bring about an order is intended to cure the defect only or lacunae in the order of the Commissioner dated March 31, 1993 and challenged in the instant petition. An affidavit has also been filed subsequent thereafter on behalf of the State.

41. It may be noted in this connection that sub-section (4) of Section 144 of the Code of Criminal Procedure provides as follows:

"Public order includes interest of the "general public".-It is significant to note that Section 144 (new) nowhere uses the expression "general public". Some of the objects for securing which an order thereunder can be passed are, "to prevent obstruction, annoyance, injury, "etc. No doubt, the prevention of such activities would be in the "public interest", but it would be no less in the interest of maintenance of "public order"."

42. The proviso to sub-section (4) which contemplates a consideration on the part of the State Government to the effect that it is necessary that the order, as in the instant case, issued by the Commissioner shall remain in force for preventing danger of human life, health or safety or prevent any riot or any affray. As already noted on April 5, 1988 the State Government was unaware of the position if such an order is going to be passed.

Several decisions have been cited from the bar:

1. In the case of Superintendent, Central Prison, Fategarh and Anr. v. Dr. Ram Monohar Lohia reported in AIR 1960 SC 636 it has been held in that case that limitation imposed in the interest of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with the public order, but not one farfetched hypothetical or problemetical or too remote in the chain of its relation with the public order.

43. It has also been held at paragraph 18 of page 641 to the following effect which is set out below:

"(18) The foregoing discussion yields, the following results: (1) "Public Order" is synonymous with public safety and tranquillity; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, the question of severability in the context of an offending provision, and reasonable nexus between the speech and the public order; (3) Section 3, as it now stands, does not establish in most of the cases

comprehended by it any such nexus, (4) there is a conflict of decision on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of and reject the rest."

In my view, the decision in the aforesaid case lends support to the conclusion that the right to enjoyment of fundamental rights cannot be taken away on conjectural and hypothetical basis. As I have already noted that no instance has been cited resulting in actual law and order problem from the BJP's meeting already held apart from the quotations from the speeches.

2. Prem Chand (Paniwala) Vs. Union of India (UOI) and Others, . In the above case it was held that any Police apprehension is not enough for passing order of externment. Some ground or other is not adequate. There must be clear and present danger based upon credible material which makes the movements and acts of person in question alarming or dangerous or fraught with violence. Likewise, there must be sufficient reason to believe that the person proceeded against is so desperate and dangerous that his mere presence in the locality or in part thereof is hazardous to the community and its safety. A stringent test must be applied in order to avoid easy possibility to use of abuse of powers to the detriment of fundamental freedom. Natural justice must be fairly complied with and vague allegations and secret hearings are gross violation of the provisions of Articles 14 and 19 of the Constitution. The Act permits externment provided the action is bona fide. All power including the Police power must be informed by fairness if it is to survive judicial scrutiny.

3. Reference may also be made to Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, . In this aforesaid decision Supreme Court observed object of Section 144 is to preserve public peace and tranquillity and as such attempt should be made to regulate the rights instead of prohibiting the right to hold procession totally.

44. In the instant case it cannot be said that there is sufficient reason to believe that total prohibition of the meeting is called for in view of the fact that the meetings were already held and no actual problem of law and order arose from that time onwards with which the BJP can be directly connected i.e. after the two meetings held on 12.1.93 and 2.2.93.

4. Dr. Ram Manohar Lohia Vs. State of Bihar and Others, .

Learned Advocate General relied upon this decision to show that the order

passed by the Commissioner of Police based upon subjective satisfaction is not liable to judicial scrutiny. In my view, the said judgment can not be of any assistance to him in the facts and circumstances already noted.

It is quite true that the Court should not sit in appeal over the decision of the Commissioner, however, in the instant case since there is error apparent on the face of the record and there is also jurisdictional error in the decision of the Commissioner and as such there is scope for interference and that the decision relied upon by the learned Advocate General do not at all be of any assistance to him.

49. In this connection I may take note of the judgment and decision in the case of M.A. Rasheed and Others Vs. The State of Kerala, .

In the case of M. A. Rasheed and Ors. v. The State of Kerala (supra) it was held by the Supreme Court at paragraphs 9 and 10 of the said report to the following effect:-

"Administrative decision in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The Courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the court's own opinion of what is reasonable to the criterion of what a reasonable body might have decided. The courts will find out whether conditions precedent to the formation of the opinion have a factual basis."

50. In Rohtas Industries Vs. S.D. Agarwal and Others, an order u/s 237(b)(i) and (ii) of the Companies Act for investigation of the affairs of the company was challenged on the ground that though the opinion of the Government is subjective, the existence of the circumstances is a condition precedent to the formation of the opinion. It was contended that the Court was not precluded from going behind the recitals of the existence of such circumstances in the order, but could determine whether the circumstances did in fact exist. This Court said that if the opinion of an administrative agency is the condition precedent to the exercise of the power, the relevant matter is the opinion of the agency and not the grounds on which the opinion is founded. If it is established that there were no materials at all upon which the authority could form the requisite opinion, the Court may infer that the authority passed the order without applying its mind. The opinion is displaced as a relevant opinion if it could not be formed by any sensible person on the material before him."

51. In the facts and circumstances of this case it appears that the Commissioner of Police was not justified in issuing the said order dated March 31, 1993 refusing to accord permission to the petitioners to hold their Meeting thereby imposing total prohibition. In my view, the Commissioner of Police instead of totally prohibiting the holding of Meeting may impose necessary restrictions and take such preventive measures as he may consider fit and proper while allowing such

Meeting to be held.

52. The said order issued by the Commissioner of Police on March 31, 1993 is accordingly quashed and set aside and necessary permission be" accorded to the petitioners on the basis of application dated March 19, 1993. This order however, will not prevent the Commissioner of Police to impose necessary regulatory measures.

The writ petition is accordingly disposed of.

There will be no order as to costs.

53. Learned Government Pleader prays for stay of operation of this order. In view of such prayer it is directed that since the Meeting is fixed on April 11, 1993 the order passed to-day need not be implemented till April 9, 1993.

All parties to act on the signed copy of the operative portion of this judgment.