

(2003) 02 KAR CK 0058
In the Karnataka High Court
Case No : Criminal Petition No. 636 of 2003

Dr. Praveen Bhai Thogadia

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 13-02-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 20, 20 (2), 482

Citation : (2003) CriLJ 1769 : (2003) ILR (Kar) 3175 : (2003) 3 KarLJ 435

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : K.M. Nataraj, for the Appellant; V.Y. Kumar, High Court Government Pleader, for the Respondent

Judgement

K. Sreedhar Rao, J.—The order of Additional District Magistrate, Dakshina Kannada District passed in No. MAG (2) CR 352/2002-03, dated 7-2-2003 is in challenge in these proceedings. Under the order, the petitioner is debarred from entering the district of Dakshina Kannada from 6 a.m. on 10-2-2003 till 6 a.m. 25-2-2003 for a period of 15 days. A mammoth function under name "Bhruhat Hindu Samajotsav" is organised by the organisers belonging to Hindu community at Mangalore on 13-2-2003. Several religious Heads of the Mutt and leaders of the other Hindu organisations including this petitioner are shown as the participants in the meet. On 7-2-2003 a permission for holding the meet is obtained by the organisers from the District Magistrate, Mangalore. So also necessary permission from the Police and Corporation was obtained. The function is scheduled in the Nehru Maidan at Mangalore on 13-2-2003.

2. The impugned order passed by the Additional District Magistrate coincides with the permission granted by the District Magistrate to hold the function. The contents of the impugned order disclose that Dakshina Kannada District has become communally sensitive area and there have been several communal clashes in the past from the year 1988 resulting in several deaths and damage to the public and private properties. The district population has an heterogeneous

complexion consisting of Hindus, Muslims, Christians etc. The expected participants is estimated around 2 lakhs attending the function from the neighbouring and other districts in the State. According to the order, it is said that the petitioner during his visit to Chickmagalore on 18-12-2002 on the eve of Batta Jayanthi in Bababudanagiri had delivered communally inciting speech. The Additional District Magistrate feels that a similar inciting speech, in Mangalore by the petitioner in the function organised would result in stoking communal feelings vitiating the harmonious social atmosphere.

3. Sri V.Y. Kumar, High Court Government Pleader filed objection statement to the petition along with list of documents in support of the impugned order.

4. Sri V.Y. Kumar, High Court Government Pleader apart from canvassing arguments on the merits of the order raised two technical objections to defeat the right of the petitioner to maintain the petition u/s 482 of the Cr. P.C.

5. The decisions of the Supreme Court in State of Bihar Vs. Murad Ali Khan and Others, and in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, cited at the Bar to bring home the point that the powers u/s 482 of the Cr. P.C. have to be sparingly exercised and inherent powers cannot be invoked without exhausting alternate remedies provided by the statute whereas, the provisions of Sub-sections (5) and (6) of Section 144 enables an in-built statutory opportunity for the aggrieved to apply to the Magistrate or to the Government for revocation of the order. In the instant case without exhausting the statutory remedy under Sub-sections (5) and (6) of Section 144 invoking of inherent powers is without jurisdiction.

6. Per contra Sri KM. Nataraj, learned Counsel for the petitioner contended that the State and the District Magistrate to whom he has to approach are themselves the respondents in the proceedings. Therefore, a very little fair play on their part could be expected. Besides submitted that the purpose of the visit of the petitioner is to participate in the meeting scheduled on 13-2-2003. The notices came to be served only on 10-2-2003 on the petitioner at Madras and on the local unit of the organisers on 11-2-2003. The time available to test the alternate remedy under Sub-sections (5) and (6) is so meager that the petitioner cannot risk himself of losing the opportunity of his participation and in the event of adverse orders, he would virtually have no time to approach this Court.

7. The decisions cited at the Bar do not directly cover the point whether Sub-sections (5) and (6) of Section 144 constitute an alternate remedy and without exhausting inherent powers cannot be invoked. It is the settled proposition that any order or judgment of any Court or the functionaries under the Code of Criminal Procedure could be made amenable to the scrutiny u/s 482. The remedy under Sub-sections (5) and (6) of Section 144 although provides an opportunity for the aggrieved to make an application for revocation of the order, the same cannot be construed to take away the rights of the aggrieved person to invoke the inherent powers when the order passed is a nullity, illegal and made in abuse

of the process of law. That apart, I find that time available to the petitioner to undergo process of making representation under Sub-sections (5) and (6) of Section 144 is so scant and could have made his cause infructuous. Because of such delicate situation, I find nothing improper on the part of petitioner approaching this Court u/s 482 of the Cr. P.C.

8. Sri V.Y. Kumar, learned High Court Government Pleader strenuously contended that there has been a deliberate attempt of misrepresentation of facts by the petitioner at the time of obtaining the interim orders from this Court. He contends that the district administration in all its fairness has complied with the letter and spirit of the provision of law to give fair opportunity and has made efforts to serve the order personally on the petitioner at his residence at Gujarat. As he was absent, it was affixed on his house on 9-2-2003. The police authorities were able to get at the petitioner at Chennai in the forenoon of 10-2-2003, personally the order was served. The original of the order although in Kannada, a translated text of the English version is delivered to make him know the reasons for which he is being debarred. There has been no attempt on the part of the district administration in discretely avoiding earliest service in any manner.

9. Sri V.Y. Kumar, High Court Government Pleader took a serious objection to the misrepresentation of facts that the order was served to the local unit only on 11-2-2003. It is further contended that there was no legal duty on the district administration to serve the copy of the order on the local unit at Mangalore but as a part of fair-play a copy was served on the local unit, thus stoutly refuted the allegations that the district administration was dishonest in not serving the order immediately.

10. Per contra, Sri KM. Nataraj, learned Counsel for the petitioner submitted that he had instructions from the local unit that order was served on him on 11-2-2003 and as far as the petitioner is concerned, he was served personally only on 10-2-2003 and on 11-2-2003, the petition is moved. Therefore, he submits that there is no deliberate mis-statement. The service made at the residence by affixture on 9-2-2003 is not a personal service and not within the knowledge of his party or the members of the local unit at Mangalore. May be sans mala fide intention or motives a representation was made that the order was served to the local unit only on 11-2-2003 but, I find the party instructing the Counsel should have been more responsible in informing the true state of facts, otherwise the manner in which the facts were submitted on the date the petition was entertained bore a tendency of suggesting an inference of deliberate delay in service of the notice. However, after hearing High Court Government Pleader Sri V.Y. Kumar for the State, I find that there has been a total and absolute fair-play on the part of district administration in sincerely trying to communicate the order at the earliest personally on the petitioner.

11. On merits, Sri V.Y. Kumar, High Court Government Pleader strenuously contended that the public speech delivered by the petitioner at Chickmagalore on 18-12-2002 is in Hindi, the tape-recorded cassette of the speech along with the

Kannada transcription is produced. With extensive reference to the speech made at Chickmagalore, it is submitted that a case is registered against the petitioner at Chickmagalore in Crime No. 256 of 2002 on the file of Chickmagalore Town Police for committing the offences punishable under Sections 153-A, 295-A, 143 and 504 read with Section 149 of the IPC and the case is under investigation. Further, he extensively referred to the material portion of the speech to bring home the point that the tenor of language and derogatory manner in which Muslim community is addressed is highly objectionable and as a preventive measure, with the given experience it would not be wise to risk to allow the petitioner to repeat his performance at Mangalore.

12. Sri V.Y. Kumar, High Court Government Pleader also submitted a list of details of communal riots that have taken place in Mangalore since Surathkal incident that happen in 1998 in about 4 incidents of assaults resulting in murder in Cr. No. 52 of 2001 of Bantwal Police Station, Cr. No. 90 of 2001 of Mangalore North Police Station, Cr. No. 112 of 2001 of Bantwal Police Station and Cr. No. 106 of 2001 of Surathkal Police Station have been cited to show that the Mangalore District has become communally sensitive and on account of timely action of the district administration, untoward incidents have not taken place. It is also mentioned that the "Bundh Call" given by Bajarangdal and Hindu Fundamental Organisers pursuant to Godhra incident sporadic incident of disturbance had taken place at Bantwal and cases are registered in Crime Nos. 42, 43 and 45 of 2002 of Bantwal Town Police Station and two cases, one case in Crime No. 69 of 2002 in Mangalore Rural Police Station and Crime No. 55 of 2002 in Mangalore City Police Station. Pursuant to the bundh call given with respect to Swaminarayan Mandir incident, no untoward incidents are reported. The district administration has deftly handled the situation.

13. Sri KM. Nataraj, learned Counsel for the petitioner repelling the contentions of the State contended that the incidents of assault and murder relied on by the State have nothing to do with the petitioner and there is no material to show that the said incidents have assumed communal colour. That apart, submitted that according to the submission made as of now, Mangalore District and the city are peaceful. No untoward incidents are reported even after Swaminarayan Mandir incident.

14. The decision of the Supreme Court in Madhu Limaye Vs. Sub-Divisional Magistrate, Monghyr and Others, is relied on. In para 25, it is held thus:

"25. The gist of action u/s 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequences sufficiently grave. Without it the exercise of power would have no justification. It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order u/s

144, Criminal Procedure Code cannot be passed without taking evidence: see *Mst. Jagrupa Kumari v. Chotay Narain Singh* 1936 Cri. L.J. 95 which in our opinion is correct in laying down this proposition. These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. Insofar as the other parts of the section are concerned the keynote of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualises as permissible in the interest of public order, or in the interest of the general public. We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order".

Placing reliance on the ratio, it is contended that there is no grave disturbing situation; only on hypothetical assumption of likelihood of disturbances, the District Magistrate cannot pass an order u/s 144 of the Cr. P.C. on political consideration; Section 144 cannot be used as an oppressive tool to curb political criticism and political opposition.

15. Regarding the speech made at Chickmagalore, Sri KM. Nataraj, learned Counsel for the petitioner submitted that it was purely a political speech with reference to political issues which is a subject-matter of debate for the past several years and that after the speech no untoward events have taken place. Only for political reasons, a case is registered against the petitioner. The contention that the speech at Chickmagalore had the propensity of stoking communal feelings gets belied by the fact that no untoward incident has taken place after the speech until now. The concerned Police have not made any attempt to arrest the petitioner in relation to the crime committed at Chickmagalore.

16. I feel, it is not proper to express any opinion on the speech made at Chickmagalore. Since a criminal case is already registered and investigation is underway, any opinion expressed may have an adverse impact on the criminal case registered and this is not an appropriate forum to decide the criminal liability of the petitioner but for limited purpose of this case, it could be said that the speech is replete with several issues which have acquired political dimensions and are being hackneyed demands on the part of certain sections of the Hindu organisations. The contentions raised in the speech have also been widely debated in the course of several general elections. Despite such repeated utterness, fortunately, the Indian populace is more mature and democratic. Barring few handful of instances in the recent history, there has been no barbaric reaction, on the part of the different communities despite serious political

differences. The trait of democratic society is measured by the test of endurance of reasonable criticism and tolerating the dissent. These virtues are not merely expected from the leadership in a democratic polity even at a plebian level, this culture is required for a democratic civil society. With pride we can say, the Indian populace have these virtues in abundance. The allegation that the fiery speeches of the petitioner is going to incite a communal violence need not be viewed too seriously. The people of Karnataka have not viewed the speech at Chickmagalore seriously. The same is evident from the fact that no untoward events have taken place in Chickmagalore or elsewhere in Karnataka.

17. It is appropriate to advert to the views expressed by the Division Bench of Bombay High Court in *Manohar Gajanan Joshi v. S.B. Kulkarni* 1989 Cri.LJ. 1364 in para 8 at page 1369 is as follows:

"8. We think that communal harmony in this great country does not depend upon whims of an individual or a group of individuals and the common citizens to whichever community they belong, believe and practice living in peace together. The citizens of this country are not so fickle minded as to be carried away by the presence of a person in their midst".

18. The district administration apprehends that by permitting the petitioner to address the public meeting is likely to result in communal tensions for the reason that he is prone to make the derogatory remarks against the Muslim and Christian communities which constitute a sizable population in the district. Fortunately, we hope that the people of Dakshina Kannada display the same amount of sobriety and maturity as the people of Chickmagalore district have displayed by being indifferent to the alleged objectionable speech made at Chickmagalore.

19. I also see a point in the contention of the petitioner that on the one hand the District Magistrate grants permission for holding the function in which the petitioner is one of the participants, on the other hand the Additional District Magistrate on the same day simultaneously passes an order u/s 144 of the Cr. P.C. The situation is taken to climax and there is a large gathering. If the petitioner is prevented from participating in the public meeting, it may equally have an adverse consequence creating a serious problem to the district administration more so, in view of the magnitude of gathering.

20. The Counsel for the petitioner of course in the course of arguments for the first time contended that the Additional District Magistrate had no jurisdiction to pass the impugned order. In this regard it is necessary to refer to the provisions of Section 20 of the Cr. P.C. The relevant provisions of Sub-sections (1) and (2) of Section 20 of the Cr. P.C. reads as follows:

"20. Executive Magistrates.--(1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force as may be directed by the State Government".

From the reading of the aforesaid provisions, it is clear that the Government may appoint as many persons as it thinks fit to be Executive Magistrate and shall appoint one of them to be the District Magistrate and further appoint any Executive Magistrate as Additional District Magistrate and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force as may be directed by the State Government. The provision of Section 144 of the Cr. P.C. also declares that the District Magistrate, a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf are entitled to exercise powers u/s 144 of the Cr, P.C. The Additional District Magistrate comes within the category of any other Executive Magistrate u/s 144 and they have to be specially empowered by a notification for exercise of powers u/s 144. So also under Sub-section (2) of Section 20, the Executive Magistrate could be appointed as an Additional District Magistrate and such Magistrate meaning thereby such Additional District Magistrate shall have such of the powers of the District Magistrate under this Code or under any other law for the time being in force as may be directed by the Government. The emphasis by words "such Magistrate shall have such of the powers of a District Magistrate under this Code or any other law" would make it clear that Additional. District Magistrate appointed shall have to be by a notification to be conferred specifically the nature of powers which the Additional District Magistrate could exercise under the Code or any other law for the time being in force. So also u/s 144, the Executive Magistrate has to be specifically empowered by an order of the Government. The contention of the Sri V.Y. Kumar, learned High Court Government Pleader that by designating any Executive Magistrate as Additional District Magistrate will clothe him with all the powers of the District Magistrate without need of any specific notification in that behalf appears to be untenable contention.

21. Further, Sri V.Y. Kumar, High Court Government Pleader produced the two notifications issued by the Government of Karnataka which are in the following manner:

"GOVERNMENT OF KARNATAKA

No. HD 10 PCR 74 Karnataka Government Secretariat, Bangalore, dated 27th March, 1974 NOTIFICATION III

S.O. 539.--In exercise of the powers conferred by Sub-section (2) of Section 20 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), and in suppression of Government Notification Nos. HD 17 PCR 65, dated 4th May, 1968 and HD 33 PCR 73, dated the 6th December, 1973, the Government of Karnataka hereby appoints with effect from 1st April, 1974, the Special Deputy

Commissioner of a district and the Headquarters Assistant to the Deputy Commissioner of a district who are appointed as Executive Magistrates in Government Notification No. HD 10 PCR 74, dated 27th March, 1974 to be Additional District Magistrate in such district.

By order and in the name of the Governor of Karnataka"

"GOVERNMENT OF KARNATAKA

No. HD 25 PCR 74 Karnataka Government Secretariat, Vidhana Soudha, Bangalore, dated 9th July, 1974 NOTIFICATION IX

In exercise of the powers conferred by Sub-section (1) of Section 144 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), the Government of Karnataka hereby specially empowers all Executive Magistrates appointed in Notification No. HD 10 PCR 74(1), dated 27-5-1974 for the purposes of the said section.

By order and in the name of the Governor of Karnataka"

22. From the notification dated 27-3-1974, I find that the Additional Magistrate, Dakshina Kannada has not been specially empowered with specific powers under Sub-section (1) of Section 144 of the Cr. P.C. Under the first notification, the Special Deputy Commissioner and the Headquarters Assistant to the Deputy Commissioner have been designated as Additional District Magistrate in the district who are appointed as Executive Magistrate by the earlier notification. In the said notification there is no specific vesting of any of the powers of the District Magistrate under the Code or under any other law. Another notification produced dated 9th July, 1974 declares that all Executive Magistrates appointed under Notification No. HD 10 PCR 74(1), dated 27-5-1974 are conferred with powers under Sub-section (1) of Section 144.

23. On careful reading of both notifications, I find that the notification dated 9th July, 1974 has no reference to the notification dated 27th March, 1974. Under the above notifications the Executive Magistrates are vested with powers u/s 144 who are appointed under the notification dated 27-5-1974 which is altogether a different notification and not relatable to the notification dated 27th March, 1974. The second respondent is appointed as Additional District Magistrate under notification dated 27th March, 1974. The notification dated 27-5-1974 is not produced. Therefore, as of now from the material whatever produced, I find that the Additional District Magistrate of Dakshina Kannada has not been empowered by any special notification with the powers under Sub-section (1) of Section 144 of the Cr. P.C. In that view, I find the order passed by the second respondent is without jurisdiction and the notifications relied on by the State would not show the proper conferment of the powers under Sub-section (1) of Section 144 of the Cr. P.C. Therefore, both on the ground of want of jurisdiction and for the other reasons stated above, I am inclined to hold that the order passed by the second respondent is bad in law and is liable to be set aside. In that view, the prayer

made by the state to direct the petitioner to pay compensation of Rs. 3,00,000/- u/s 357 of the Cr. P.C. is not tenable.

24. The impugned order is set aside. The petitioner is free to attend and participate in the public function to which he is invited. However, it is directed that the petitioner shall not indulge in making derogatory remarks against any religion or any community which constitutes an offence under Sections 153-A, 153-B and 295-A of the IPC and which has a tendency of hurting the sentiments of the persons belonging, to any religious faith or any community.

25. Request for hand delivery of the operative portion of the order is granted.