

(2003) 12 PAT CK 0044
In the Patna High Court
Case No : Cr. W.J.C. No. 256 of 2003

Dr. Praveen Bhai Togadia

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 02-12-2003

Acts Referred:

Citation : (2003) 12 PAT CK 0044

Final Decision : Dismissed

Judgement

S.N. Jha and B.N.P. Singh, JJ.—These two writ petitions have been heard together and are disposed of by this common order.

2. The Petitioners, the International General Secretary and Vice President, respectively, of the Vishwa Hindu Parishad, have approached this Court for a writ of habeas corpus/certiorari quashing the externment order u/s 3(3) of the Bihar Control of Crimes Act, 1981 (in short "the Act") dated 15.8.2003 in Cr.W.J.C. No. 256/2003 and 16.8.2003 in Cr.W.J.C. No. 257/2003, as well as restraint order u/s 144(2) of the Code of Criminal Procedure dated 14.8.2003. They also seek mandamus to bring them back to Patna and allow them free movement in any part of the State of Bihar.

3. The facts of the two cases are almost the same except the date of the externment order as indicated above Cr.W.J.C. No. 256/2003, however, was argued as the representative case and the relevant facts are noticed from the record of that case.

4. The case of the Petitioner in a nutshell is that he came on a two-day visit to Bihar on 15.8.2003 after proper intimation to the concerned officials of the State Government but no sooner than the aircraft landed at the Patna Airport he was served with show cause notice in the aircraft itself, and without giving any opportunity to file show cause much less a reasonable opportunity as enjoined u/s 3(1) of the Act; and further without giving any opportunity to consult a lawyer of his choice as provided in the section, the externment order was served upon

him and he was forced to return to Delhi by the same aircraft in gross violation of the statutory rights under the Act as well as the fundamental rights under the Constitution of India.

5. At this stage it may be stated that the Respondents have praised a preliminary objection to the maintainability of the petition seeking writ of habeas corpus. It is said that the Petitioner not being in detention the writ of habeas corpus cannot be issued and therefore the petitions are fit to be summarily dismissed. It is relevant to mention here that while allowing time to the Respondents to file counter affidavit, the question of maintainability of the petition was left open.

6. Dealing with the preliminary objection Shri Tarakant Jha, learned Counsel for the Petitioners, submitted that writ of habeas corpus can be issued even where person is not in custody and in support of the plea he placed reliance on S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others, Counsel submitted that even if this Court upholds the preliminary objection of the Respondents, as the Petitioners have also prayed for quashing of the externment order as well as the restraint order u/s 144(2) Code of Criminal Procedure by writ of certiorari the petition cannot be dismissed as a whole on the ground that the Petitioners are not in actual detention. Relying on a Full Bench decision of this Court in Brajnandan Sharma Vs. The State of Bihar, counsel submitted that it is open to the court to mould the relief(s) and issue appropriate writ/writs.

7. We will first deal with the question of maintainability of the writ petition as habeas corpus petition. Having heard counsel for the parties on the point, we find enough force in the submission that the petitions are not maintainable so far as they seek writ of habeas corpus. Such writ lies where the person is in illegal detention and that too on the date of final hearing of the case. The facts of the case of S.M.D. Kiran Pasha (supra) were completely different. Kiran Pasha had earlier filed a writ petition in the High Court upon being summoned to the police station for being photographed and the High Court was pleased to issue direction as prayed for in his favour. The Excise authorities of the State thereafter lodged cases against him in which he was granted bail. Apprehending detention under the relevant Act, namely, Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, he again moved the Andhra Pradesh High Court alleging that there was a move to implicate him in successive cases out of political vendetta. A Single Judge of the High Court issued interim order for a period of 15 days on the basis of the cases already registered. However, two days after he was served with a detention order along with grounds of detention and also taken into custody but released after four days. After the ground of detention was served, he amended his pleadings in the pending writ petition seeking direction upon the Respondents to refrain from making any order detaining under the said Act. The High Court dismissed the writ petition as being infructuous. The Supreme Court, on appeal, referred to two decisions of the Bombay High Court and Gujarat High Court, respectively, with approval, in the

cases of *Jayantilal Bhagwandas Shah v. State of Maharashtra* (1981) 1 Cri.LJ 767; and *Vedprakash Devkinandan Chiripal v. State of Gujarat* AIR 1987 Gujarat 253. In the former case, similar objection raised on behalf of the State to the maintainability of the writ petition was rejected by the High Court observing:

We cannot countenance and do not accept the Advocate General's submission that the High Courts are impotent to give relief against the prospect of illegal detention and must first require the intended detenu to surrender to the illegal detention. We are satisfied that the High Courts may under the provisions of Article 226 issue a direction, order and writ in the nature of mandamus and/or certiorari quashing an illegal order of detention and may by direction, order and writ in the nature of prohibition enjoin the person threatening the illegal detention from executing the threat.

The Supreme Court approved these observations observing, "we are inclined to agree with this view as we feel that refusal to interfere, in such a case may amount to denial of the fundamental right itself."

In the Gujarat case, the person concerned was detained under the provisions of Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act, 1980. He, however, absconded leading to notification in the official gazette u/s 7(1)(b) of the Act. At this stage, he moved the High Court under Article 226 of the Constitution praying for a writ of habeas corpus or a writ of mandamus. The question was whether the petition would be maintainable before the detenu had been served with the order of detention and detained in custody. Relying on decisions in *A.K. Gopalan v. State of Madras* AIR 1950 Supreme Court 27; and *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla*, the Gujarat High Court took the view that "before detention, if writ of mandamus is moved for challenging unauthorised detention order which is already passed on the ground that the order is a nullity because it is passed (a) by an incompetent person or (b) it is mala fide order, or (c) it is contrary to the legal procedure prescribed for passing such order, or (d) it is otherwise a nullity for any other reason, for example, passed against a wrong person, it cannot be said that such challenge would be per se not maintainable". Approving these observations, the Supreme Court observed that where there is challenge to an existing order of detention which is posing an imminent threat to a fundamental right of the named person guaranteed under Article 21, there could be no reason why in such exceptional and rare case, detention order already made, either served or yet to be served and the person being still free, could not be legally brought under challenge.

8. We have referred to the decision in *Kiran Pasha* at length in view of the heavy reliance placed on it on behalf of the Petitioners. The decision, it would appear, is not an authority on the point of maintainability of the writ petition as a habeas corpus petition. The Supreme Court upheld the maintainability of the petition for other purposes, such as quashing of an order by writ of certiorari or mandamus.

9. The question which then arises for consideration is whether the externment order can be quashed by a writ of certiorari or a mandamus can be issued to bring back the Petitioner to Patna and set him free to move in any part of the State including the district of Patna as prayed for vide relief (b) in the writ petition. While considering detention cases it has unanimously been held by Courts including the Apex Court that the preventive detention of a person is the result of subjective satisfaction of the detaining authority and the same cannot be subject matter of judicial review under Article 226 of the Constitution. We are inclined to think that the same principle will govern externment cases too.

10. It was submitted that the impugned externment order was not the independent decision of the District Magistrate, Patna based on his subjective satisfaction, rather it was the collective decision of different functionaries of the State Government and a part of concerted effort not to allow the Petitioner to enter the State. Reference was made to the minutes of the committee headed by the Chief Secretary dated 12.8.2003 and 14.8.2003 enclosed as Annexures M and M/1 to the counter affidavit. We have carefully gone through the contents of the minutes. From a bare reading thereof it is manifest that all that was decided in the meeting was to take preventive and precautionary measures to maintain law and order as there was likelihood of breach of peace etc. on account of visit of Dr. Praveen Bhai Togadia, the Petitioner in Cr.W.J.C.256/2003. The minutes also refer to likelihood of breach of public order at the instance of CPI (ML) and a student of organisation (AISA). No decision was taken in those meetings to restrain the Petitioner by taking recourse to Section 3(3) of the Act. The District Magistrate Patna in para 41 of the counter affidavit has stated in no uncertain terms that decision to initiate proceeding u/s 3 of the Act was entirely his own on the basis of reports coming to his notice. It is true that the District Magistrate was present at the aforesaid meetings on 12.8.2003 and 14.8.2003 but it does not mean that the decision to execute externment power was not this decision. In the counter affidavit the District Magistrate has stated facts and enclosed materials on the basis of which he took the impugned action. This Court can only look into relevancy of the materials and not adequacy thereof. If the District Magistrate in his wisdom thought that passing externment order u/s 3(3) of the Act was the proper precautionary and preventive step, we are afraid, it would not be possible for this Court to sit in appeal over his wisdom while making judicial review of the externment order.

11. Learned Counsel then referred to procedural safeguards provided in Section 3 of the Act and submitted that whereas Section 3 enjoins upon the authority to give a reasonable opportunity to file show cause, besides opportunity to consult a counsel of his choice, no such opportunity was given. In fact, after the aircraft carrying the Petitioner landed at the Patna airport he was served with show cause notice and within no time thereafter the detention order, within a span of half an hour which was scheduled time of stop-over of the aircraft at the Patna Airport. According to the counsel, in the circumstances it was well nigh impossible for any person to consult any lawyer and, and much less, prepare

show cause.

12. We agree in principle that though this Court cannot question the wisdom of the District Magistrate in issuing externment order like an appellate authority, the safeguards provided in Section 3 of the Act have to be observed and where this is not done, the order may be struck down as being violative of not only the procedural requirements but also the rules of natural justice and, indeed, the Constitution itself. The point for consideration is whether there has been any procedural violation so as to warrant interference by this Court. Before answering the question it would be apt to quote Section 3 of the Act so far as relevant, as under:

3. Externment etc. of anti-social elements.- (1) Where it appears to the District Magistrate that-

(a) any person is an anti-social element, and

(b)

the District Magistrate shall by notice in writing inform him of the general nature of the material allegation against him in respect of Clauses (a) and (b) and shall give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an no order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires and also of examining any other witnesses that he may wish to produce in respect of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) The District Magistrate on being satisfied that the conditions specified in Clauses (a) and (b) of Sub-section (1) exist, may by order in writing.

(a) direct him to remove himself outside the district or part thereof, as the case may be, by such route, if any, and within such time as may be specified in the order and to resist from entering the district or the specified part thereof, until, the expiry of such period, not exceeding six months as may be specified in the order.

(b)

until the expiry of such period, not exceeding six months, as may be specified in the order.

13. On a plain reading of the above provisions it would appear that the Act contemplates (a) giving a reasonable opportunity to the person sought to be externed of tendering an explanation regarding the facts leading to formation of prima facie opinion by the District Magistrate and issuance of show cause notice, (b) such person has a right to consult and be defended by a counsel of his

choice, (c) he has to be given a reasonable opportunity to examine himself (if he so desires) and, further, witness that he may wish to produce in support of his explanation. In the instant case the grievance of Petitioner relates to denial of opportunity of filing show cause and consulting a lawyer of his choice. In this regard, the case of the Respondents as stated in the counter affidavit is that no such request was made by the Petitioner after the Petitioner was served with a show cause u/s 3(1). On behalf of the Petitioners it was submitted that giving show cause notice was a farce because the Petitioner was almost simultaneously served the final order u/s 3(3) of the Act.

14. The procedural safeguards provided in Section 3 of the Act are intended to ensure compliance of rules of natural justice in conformity with the fundamental rights under Part III of the Constitution of India. Every citizen has freedom of movement and speech and expression; however, the rights are subject to reasonable restriction as may be imposed by law. The power of externment u/s 3 of the Act is a restriction on fundamental right but a reasonable restriction. There is no challenge to the constitutional validity of the. externment provisions and, therefore, it is not necessary to go into that aspect in the cases. As far as the requirement of provisions of Section 3 is concerned, there cannot be two opinions that the person sought to be externed has to be given a reasonable opportunity in the matter of his externment. What is however, noticeable is that the requirement is to give opportunity of "tendering explanation" in contradistinction to filing of show cause a phrase often used in the statutes. The dictionary meaning of the term "tender" as a verb is "to offer or to give something to somebody". The legislature, perhaps, intended to provide a different procedure. As is well known, rules of natural justice are not strait-jacket formulae to be uniformly applied in each and every case with same precision. It is not a static doctrine de hors the prevailing circumstances at a given point of time. Where the authority is of the view that the mischief cannot be prevented by starting a regular proceeding, giving a show cause notice, to the person followed by regular hearing in which the witness may be examined and it may defeat the desired object of proposed action, the action may not be questioned on the ground of non-observance of the regular procedure. On a plain reading of the section it appears that the statute contemplates examination of witnesses if the person concerned so desires, but adherence to detailed procedure may in a given case defeat the object. What the Court has to consider is whether in the facts and circumstances of the case the action was arbitrary or in bad faith. From the itinerary of the Petitioner's visit it appears that soon after his arrival at Patna at 9.15A.M. followed by flag hoisting at 10 A.M. at Phulwarisharif, he was to hold a press conference at 11.30 A.M. The time available to the District Magistrate was so short that recourse to the regular proceeding giving opportunity to the Petitioner to file show cause in writing, examine fitness etc. would have made the whole exercise futile and meaningless. If any action had to be taken to revert the Petitioner from holding press conference or public meeting, it had to be done within an hour or so. We do not in the circumstances think the action of the

District Magistrate was arbitrary in passing the externment order soon after serving the notice. In his affidavit the District Magistrate has stated that the Petitioner did not express any desire to consult lawyer of his choice nor he gave any explanation. These are, if we may say so, disputed question and in view of what we have already stated above it is not necessary to go further into this aspect of the case.

15. In *Pandharinath Shridhar Rangnekar Vs. Dy. Commr. of Police, The State of Maharashtra*, while considering the question as to the contents of the show cause notice in the matter of externment, the Apex Court observed that a proposed externe is entitled, before an order of externment is passed, to know the material allegations, generally, he is not entitled to be informed of specific particulars relating to the material allegations. As seen above, Section 3 of the Act also contemplates giving notice informing the person of the general nature of material allegations against him. In the circumstances, we are of the view that there has been no violation of statutory norms to warrant interference by this Court.

16. Learned Counsel for the Petitioners submitted that even if it be accepted that the District Magistrate was justified in coming to the conclusion that the Petitioner deserved to be externed he could merely send the Petitioner beyond the district of Patna, he could not send him beyond the State. It was pointed out that as per the itinerary the Petitioner was supposed to go to Muzaffarpur on 16.8.2003 and from there board the train for Calcutta and, therefore, if the District Magistrate wanted to take preventive measures to prevent the Petitioner from holding press conference and meeting he could only extern him beyond the territory of Patna district. The submission, indeed, looks attractive. In the counter affidavit the District Magistrate has stated that Section 3(3) of the Act empowers the District Magistrate while directing a person to remove himself outside the district, to specify in the order the route and the time within which he must remove himself. The Petitioner had arrived at Patna by air. He has no place of residence in the State and, therefore, he was asked to leave Patna by the same air route by the first available flight. As the circumstances would have it the flight was bound for Delhi from where the Petitioner had come to Patna. If the destination of the flight were elsewhere, say, in the another district of the State of Bihar or adjoining State, perhaps, the position could have been different, but as the flight was Delhi bound flight, the District Magistrate had no option but to ask him to return to the same place. Having given our anxious consideration to the rival submissions we are of the view that even if the plea of the Petitioner on this point were to be accepted, the question as to whether the Petitioner could have been externed to adjoining district or not is a side issue which does not go to the root of the matter. The main issue is whether the decision to extern the Petitioner was illegal and arbitrary. We have already answered the question in the negative and we do not propose to go into this side issue further in this case.

17. We have not addressed ourselves to the validity or otherwise of the restraint

order u/s 144(2) Code of Criminal Procedure as the same has lost its force by efflux of time after sixty days.

18. In the case of Acharya Giriraj Kishore, the Petitioner in Cr.W.J.C. No. 257/2003, Shri Tarakant Jha submitted that the impugned action is sought to be defended by reiterating facts relevant to the case of Dr. Praveen Bhai Togadia. In the counter affidavit in Cr.WJC 257/2003 it has been stated that the Special Branch on 16.8.2003 submitted report stating about sudden programme of the Petitioner to carry on the job of Dr. Praveen Bhai Togadia. It was reported that the Petitioner had a secret plan of visiting Phulwarisharif which was sensitive for communal tension in the recent past to complete the unfinished work of Dr. Praveen Bhai Togadia after his externment a day earlier. The externment of Acharya Giriraj Kishore thus appears to be follow up of the earlier externment of Dr. Praveen Bhai Togadia and, therefore, if the same facts have been reiterated, they cannot be said to be irrelevant for the purpose of his case.

19. In the result, for the reasons stated above, we find no merit in the writ petitions which are accordingly dismissed.