

(1993) 01 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 2337 of 1992

Girija Baruah

APPELLANT

Vs

Union of India and Ors.

RESPONDENT

Date of Decision : 08-01-1993

Acts Referred:

Armed Forces (Special Powers) Act, 1958 — Section 4(c), 4(c)
Constitution of India, 1950 — Article 226, 226

Citation : (1993) 1 GLJ 169 : (1993) 1 GLR 101

Hon'ble Judges : U.L.Bhat, C.J.; R.K. Manisana Singh, J and W.A. Shishak, J

Bench : Full Bench

Advocate : A.M. Majumdar, S.N. Medhi, N.M. Lahiri, N. Dutta, M.K. Sharma,
A.R. Barthakur, A. Choudhary, M. Das, Advocates appearing for Parties

Judgement

U. L. Bhat, C. J.

1. Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking a writ of Mandamus directing respondents 2 and 3 representing Army authorities not to visit her residence and create disturbance to the domestic peace of her family. In her earlier writ petition Civil Rule No. 2402 of 1991 this Court passed an interim order directing that petitioner's son Utpal Kumar Barua shall not be arrested without permission of the Court and subsequently made the interim order absolute. In the present writ petition she alleges that Army personnel are visiting her house in search of her another son Dulal Baruah and her husband Rajendra Kumar Baruah with a view to arrest them. One of us (Manisana, J.) who heard petitioner's prayer for an order restraining the Army authorities from arresting her husband and eldest son felt that the question whether such an order could be passed requires examination by a larger Bench. Since similar orders had been passed by a Division Bench, the Chief Justice placed the matter before a Full Bench of three Judges. In view of the importance of the question arising for decision, we issued notice to Advocates General of Meghalaya, Assam Arunachal Pradesh and Nagaland and

the Government Advocates representing Mizoram, Tripura and Manipur Governments. We have heard Sri SN Medhi, learned counsel for the petitioner, Sri AH Saikia, learned Additional Central Government Standing Counsel, Sri NM Lahiri, Advocate General, Meghalaya, Sri AR Barthakur, Advocate General, Assam, Sri AM Mazumdar, Advocate General, Arunachal Pradesh and Sri NC JPhukan, learned Government Advocate, Mizoram.

2. The question referred to the larger Bench is whether this Court can pass any order directing the Army authority exercising jurisdiction under relevant laws not to arrest any person without the permission of this Court.

3. Armed Forces (Special Powers) Act, 1958 (for short the Act) enables certain special powers to be conferred upon members of the Armed Forces in disturbed areas in the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. By virtue of section 3, Governor of a State, Administrator of a Union Territory and the Central Government in either case, may, by notification in Official Gazette declare the whole or such part of the State or Union Territory to be a disturbed area if of the opinion that the whole or any part of such State or Union Territory is in such a disturbed or dangerous condition that the use of Armed Force in aid of the civil power is necessary. Section 4 confers on any Commissioned Officer, Warrant Officer, noncommissioned officer or any other person of equivalent rank in the Armed Forces in disturbed areas, the powers enumerated in clauses (a) to (d). Clause (a) empowers officers of Armed Forces in contingencies contemplated therein to use force. Clause (b) authorises them in certain contingencies to destroy and arms dump or fortified position or shelter or structures. Clause (c) empowers such members of Armed Forces in a disturbed area to arrest without warrant any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and to use such force as may be necessary to effect the arrest. Clause (d) empowers the officers to enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premise, and for that purpose to use such force as may be necessary. Section 5 requires that any person so arrested and taken into custody shall be made over to the Officer in charge of the nearest Police Station with the least possible delay, together with a report of the circumstances occasioning the arrest.

4. Learned counsel for the petitioner contends that the power of arrest conferred on an officer of Armed Forces is an extraordinary power to be used in disturbed conditions and in disturbed areas, it must be interpreted strictly and the power can be exercised only if the stipulated conditions precedent are present and it is open to the Court to satisfy itself whether such conditions are present and if not satisfied, the Court can interfere and restrain arrest. Clause (c) of section 4 contemplates three conditions, namely, a person has committed a cognizable

offence, a reasonable suspicion exists that he has committed a cognizable offence or a reasonable suspicion exists that he is about to commit a cognizable offence. The contention is that this Court, under Article 226 of the Constitution, can call for the materials, examine them and satisfy itself whether the proposed arrest is lawful and pass appropriate orders. Learned Central Government Standing Counsel rebutted these contentions and argued that the High Court under Article 226 of the Constitution of India does not have and will not exercise such power. The learned Advocates General and Government Advocates did not support this view and contended that the Act has been enacted to deal with extraordinary situation affecting law, order and peace in the region and at the same time the constitutional protection of life and liberty of citizens must be respected and both these aspects must be borne in mind by the Court. According to them though the Court will not ordinarily interfere with the functions and powers conferred on officers of Armed Forces under section 4 of the Act, Court is not powerless to interfere where a person is sought to be deprived of his liberty on an unfounded suspicion. They further contended that while the Court can examine the fact situation with a view to so satisfy itself and interdict arrest in a rare case, the Court does not have the power to direct that arrest can be made only after obtaining its permission.

5. The constitutionality of the Assam Disturbed Areas Act, 1955 and Armed Forces (Assam and Manipur) Special Powers Act, 1958, which contained similar provisions was challenged in several writ petitions before this Court. The Supreme Court transferred these petitions to the Delhi High Court which disposed of the same in the decision of *Inderjit Barua vs. State of Assam & another*, AIR 1983 Delhi 513 upholding the constitutionality of the Acts. A Full Bench of this Court in the *I Peoples Union for Human Rights vs. Union of India & others*, (1991) 1 GLR 456 : 1991 (1) GLJ 179, held that the decision of the Delhi High Court has binding effect on this Court. The Court also held that the Army authority acting under the provisions of those Acts can arrest a person without any invitation on the part of and without reference to the Police authority of the State in disturbed areas. In *Nosghitombi vs. Reishang Keishig*, (1982) 1 GLR 755 and *Naga People Movement for Human Rights vs. Union of India*, (1988) 1 GLR 139 [1988 (1) GLJ 122] the Court noticed that the task of security forces when called upon to fight insurgency is very difficult and the legislatures struck a balance between the crushing of violence and crushing of liberty by providing that the arrested person has to be made over to the nearest Police Station with least possible delay. This was reiterated in *The Civil Liberties & Human Rights Organisation (CLAHRO) vs. PL Kukrety & others*, (1988) 2 GLJ 137. In *Purnima Baruah vs. Union of India & others*, (1991) 1 GLR 375 : 1991 (1) GLJ 259 and the *II Peoples Union for Human Rights vs. Union of India*, (1991) 2 GLR 1 : [1991 (2) GLJ 189], it was held that under section 5 of the Act it is the duty of the Army authority to make over the arrested person to the Officer in charge of the nearest Police Station with least possible delay. Interpreting a similar provision in the Armed Forces (Assam and Manipur) Special Powers Act, 1958 the Supreme

Court observed in VL Robins vs. Deputy Commissioner, Aijal, Assam Law Report 1971 Supreme Court 4 :

"What is the least possible delay in a case depends upon the facts, that is to say, how, where and in what circumstances the arrest was effected. From the affidavit of Mr. Poon, it prima facie appears that the petitioner is connected with the Mizo Hostiles who are waging war against India. It was, therefore, necessary to question him about his associates, his stores of arms and like matters. The difficulty of the terrain, the presence of hostile elements in the area must be considered in this connection. Although it seems to us that the Armed Forces delayed some what his surrender to the Civil Authorities, which is not the intention of the law, there is not too much delay."

A Division Bench of this Court in Bacha Bora vs. State of Assam, (1991) 2 GLR 119 :1991 (I) GLJ 283, held that the words "least possible delay" mean "within the shortest possible time" though no arbitrary time limit can be set down as it may not be possible in many cases to affirmatively say or precisely quantify the period of time by reference to hours, dates or months and whenever the question arises for decision for computing the period of time, the Court has to have regard to the particular circumstances of the case, for example, physical impossibility or otherwise to make over the arrested person to the nearest Police Station and how and under what circumstances the arrest was effected.

6. Clause (c) of section 4 of the Act contemplates three contingencies. Where a person has committed a cognizable offence, undoubtedly there will be some materials on the basis of which a conclusion to that effect is arrived at. Clause (c) also refers to existence of reasonable suspicion either that a person has committed a cognizable offence or that he is about to commit a cognizable offence. The legislature used the words "reasonable suspicion exists" and not words like "reason to believe" or "satisfaction" which are words importing stronger conviction. The expression "suspicion" is explained in Black's Law Dictionary, 5th Edition at page 1298 thus :

"The act of suspecting, or the state of being suspected; imagination, generally of something ill; distrust; mistrust; doubt. The apprehension of something without proof or upon slight evidence. Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to proof."

7. As observed in Altshuler vs. Coburn, 57 NW 836, 38 Neb. 881, quoted in Volume 36 of Permanent Edition of "Words and Phrases":

"An attempt to give a specific meaning to the word "reasonable" is trying to count what is nor number, and measure what is not space."

It is stated in Rexroth vs. Holloway, 90 NE 87, 88, 45 Ind. App. 36 (quoted at page 414 of the above volume) the word "reasonable" is a term difficult of definition, and usually it must be considered with reference to the facts of the particular controversy in determining its force and latitude. ."Reasonable" could

only mean in conformity with reason or rational or according to the dictates of reason. The expression is explained at page 1138 of Black's Law Dictionary, 5th Edition, as follows :

"Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable." The expression "reasonable suspicion" has been explained thus at the same page :

"Reasonable suspicion which will justify officer in stopping defendant in public place is quantum of knowledge sufficient to induce ordinarily prudent and cautious man under circumstances to believe criminal activity is at hand."

8. The same words in the Criminal Procedure Code in force in Malaysia were construed by the Privy Council in *Shaabao Bin Hussein & others vs. Chong Fook kam & another*, (1969) 3 All England Reporter 1626. Lord Devlin observed :

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which their Lordships have just noticed, to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without prima facie proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that if he has not, he has to act promptly to verify it...

The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years ... Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion

can take into account matters that could no be put in evidence at all Suspicion can take into account also matters which, though admissible could not form part of a prima facie case." (emphasis supplied)

9. The words "reasonable" and "suspicion" are themselves easy of comprehension but difficult of definition. The task is rendered more difficult by their use in juxtaposition with each other. It is evident that the word "suspicion" has been used to indicate that what is required is not belief, evidence or proof. The juxtaposition of the word "reasonable" does not alter the meaning of the word "suspicion". There must be suspicion either that a person has committed a cognizable offence or that he is about to commit a cognizable offence. The suspicion should not be baseless or based on mere intuition. It should be based upon some materials, though they may not amount to legal evidence or proof. If the circumstances as revealed in the Army authorities' report or the subsequent questioning by police lead to the inference that the person is involved in the commission of a cognizable offence it is the duty of the police to register a case deal with the arrested person in accordance with the procedure prescribed in the Criminal Procedure Code. If they are of the opinion that he is about to commit a cognizable offence it is open to them to deal with him under the preventive provisions of the Code of Criminal Procedure or any other law for the time being in force.

10. We will now advert to the decisions relied on by learned counsel for the petitioner. In *Saindino Jakhro vs. Emperor*, AIR 1934 Sind 197, while dealing with the power of arrest without warrant under section 54, Criminal Procedure Code, 1898, one of the Judges of the Division Bench observed that section 54 gave wide powers to police and ought to be rigorously construed.

11. Reliance is also placed on the decision in *SMD Kiran Pasha vs. Government of Andhra Pradesh & others*, (1990) 1 SCC 328. In that case excise authorities registered some cases against the appellant under an Act which authorised detention of bottleggers etc Appellant filed writ petition on 6.6.88 alleging politic avendetta and a Single Judge passed an interim order directing the respondents not to take the appellant under preventive custody for a period of 15 days. On 10.6.88 he was served detention order dated 3.6.88 as well as grounds of detention, taken into custody and detained in jail, but was released after four days. The appellant thereupon filed a miscellaneous petition as an additional affidavit seeking a direction to respondents to refrain from making an order detaining him under the provisions of that Act and an interim direction was issued. He submitted an additional affidavit challenging the order of detention. The High Court ultimately held that as the order of detention was made before the writ petition was filed it had become infructuous, and that there were no extraordinary or special reasons to depart from the normal rule that in such a case the appellant should first surrender and move for a writ of habeas corpus This order was challenged before the Supreme Court. The Supreme Court observed :

"Resort to Article 226 after the right to personal liberty is already violated is different from the previolation protection. Postviolation resort to Article 226 is for remedy against violation and for restoration of the right, while previolation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right... If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right,"

12. In *Government of India vs. Alka Subhash Gadi*, (1992 Supp I SCC 496: 1991 I JT (SC) 549 the Supreme Court held that judicial review being a part of the basic structure of the Constitution, the power of the High Court under Article 226 of the Constitution cannot be circumscribed in any way by any law including detention law. The detention order can be challenged at any stage and the artificial distinction between predecisional and post decisional challenge is inconsistent with and alien to this wide powers conferred under Articles 226 and 32. The Supreme Court also indicated that the jurisdiction by its very nature is to be used sparingly and Courts cannot disregard timehonoured and welltested judicial selfrestraints and norms in the exercise of these powers and laid down the parameters within which the power of judicial review can be exercised, namely, (i) that the impugned order has not been passed under the Act under which it is purported to have been passed; (ii) that it is sought to be executed against a wrong person; (iii) that it is passed for a wrong purpose; (iv) that it is passed on vague, extraneous and irrelevant grounds; and (v) that the authority which passed it had no authority to do so. This decision was followed in *State of Tamilnadu vs. PK Shamsudeen*, AIR 1992 SC 1937.

13 In the above cases, the authority concerned exercising jurisdiction under statute on due application of mind to relevant materials passed orders of detention. The order of detention certainly is capable of being subjected to judicial review in a habeas corpus petition. In rare and exceptional cases it may also be examined by the Court at the preexecution if age through the scope of examination is very narrow and limited. The present case does not deal with a detention order on statutory grounds, but with the proposed action of arresting a person against whom, reasonable suspicion allegedly exists that he, has committed a cognizable offence or is about to commit a cognizable offence. The authority is to act on; "reasonable suspicion" which is quite different from the "satisfaction of the detaining authority under the preventive detection laws. Reasonable suspicion is not prima facie proof or reasonable belief but implies weaker or less conviction. It may be based on evidence or on materials which may be incapable of being placed before a Court under the law of evidence.

14. Armed forces have been conferred certain extraordinary powers under the Act with a view to aid the civil authority. Such powers have been conferred on the basis that the ground situation in a disturbed area is so bad and chaotic and the law and order situation is so poor that civil authority cannot always be trusted to arrest persons who have committed cognizable offences or against whom reasonable suspicion exists that they have committed cognizable offences or they are about to commit cognizable offences. The legislature thought it fit that Armed forces under those circumstances must act in aid of the civil authority. This has been done for the wellbeing of the people. At the same time legislature has mandated that those arrested should be made over to the civil authority with the least possible delay. This is how the legislature sought to maintain balance between conflicting claims of public interest and individual liberty. The existing law protects people who are taken into custody by civil police.

15. Investigation is the statutory function of the civil police authority. Arrest is part of the process of investigation and is a step in aid of investigation, as also prevention. The Privy Council in *Emperor vs. Khwaja Nazir Ahmed*, AIR 1945 PC 18, in the context of the inherent power of High Courts in interfering with investigation, observed :

"Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India,...there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and, it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the continuation of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function always, of course, subject to the right of the Court to intervene in an appropriate case when moved under section 491, Criminal Procedure Code, to give directions in the nature of habeas corpus.

This position has been reiterated by the Supreme Court in *Jehan Singh vs. Delhi Administration* (1974) 4 SCC 522; *Kurukshetra University vs State of Haryana*, (1977) 4 SCC 451; *State of Bihar vs JAC Saldanha* (1980) 1 SCC 554; *Eastern Spinning Mills and Virender Kumar Sharda vs. Rajiv Poddar*, AIR 1985 SC 1646; *State of Haryana vs. Bhajan Lal*, 1992 supp (1) SCC 335. In *M/s Jayant Vitamins Ltd vs. Chaitanyakumar & another*, AIR 1992 SC 1980, Court observed:

"Investigation into an offence is a statutory function of the police and the superintendence thereof is vested in the State Government and the Court is not justified without any compelling and justifiable reason to interfere with the investigation.

Where investigation is complete, Courts will naturally have opportunity to examine the results of investigation at the stage of taking cognizance and even at subsequent stage of framing charge. In exceptional cases, the High Court under Article 226 of the Constitution of India may quash an FIR. Our attention has not been invited to any considered decision of Any Court stepping in almost at the commencement of the investigation process and restraining an arrest. Where cognizable offence has been committed it may be necessary to arrest him without delay either to prevent him from escaping or from repeating the crime or from intimidating witnesses or for other relevant reasons. The Army authority can act in this behalf where such reasonable suspicion exists. Where there is reasonable suspicion that a person may commit cognizable offence it may be absolutely necessary to arrest him in order to prevent him from committing the crime. This is a power vested in ordinary civil police under the Code of Criminal Procedure. This power has been conferred on specified Army authorities by virtue of the Act. We do not think, merely because the repository of the power is different from the civil police authority, the Court should alter its approach to the question of interfering with contemplated arrest which is a step-in aid of investigation or of prevention of cognizable offence.

16. Jurisdiction of the High Court under Article 226 of the Constitution of India is wide enough to prevent a contemplated arrest for strong and compelling reasons. However, ordinarily, the High Court will not step in and interfere at that stage. Incalculable harm may result if a justifiable arrest is restrained or if an unjustified and motivated arrest is allowed to be made. It must be borne in mind that what is sought is Court's intervention in exercise of executive discretion in a field and at a stage where the Court may not be well equipped to render a proper decision and this factor will naturally have an impact on the exercise of its power by the Court. The High Court is not powerless to interfere in a case of contemplated arrest; at the same time the High Court will not, except in exceptional circumstances and for strong and compelling reasons, interfere and invariably the High Court will hear both sides before arriving at a decision, even prima facie decision.

17. The question referred to the Full Bench takes in yet another aspect namely, whether the Court can direct the Army authority not to arrest any person without the previous permission of the Court.

18. Ours is a republican democratic State governed by a fundamental law in the shape of a written Constitution. Separation of powers between the three organs of the State is a fundamental aspect of the Constitution. The Constitution delineates and demarcates the jurisdictions and the spheres of activities of each organ. The Constitution also provides for contingencies where one organ can legitimately interfere in the activity of the other and where one organ has to consult the other organ. High Court has power of judicial review of executive action under Article 226 of the Constitution, wherever the founding fathers thought that previous consultation or concurrence of one organ by other is

necessary they have provided for the same in the Constitution. It is not required of executive to have prior consultation with or take the permission of the judiciary or any other organ in taking action in matters not so provided for in the Constitution or the laws. The power of arrest is part of the police power of the State. This is recognised and provided for in the Code of Criminal Procedure. That power is conferred on the Army authority in certain disturbed areas in certain contingencies. Neither the civil authority nor the Army authority can be required to take prior permission of the judiciary before performing any executive action except to the extent laid down in law. The Code of Criminal Procedure requires that sanction of the criminal Court must be obtained to arrest a person or to conduct a search. The Code and the Act provide for circumstances where arrest or search can be conducted without sanction of the Court. Therefore, insistence on the civil police authority or the Army authority to take prior permission of the Court for arresting a person whom they are authorised to arrest without sanction of Court, would violate the provisions of the Code of Criminal Procedure and the Act. The High Court under Article 226 of the Constitution cannot, therefore, require the Army authority to take its permission before arresting any person.

19. Learned counsel for the petitioner referred to the Gujarat Judicial Officers' case reported in (1991) 4 SCC 406 and prayed that the High Court may lay down similar guidelines in regard to the exercise of powers under section 4 (c) of the Act. The Supreme Court was dealing with the case of wrongful assault, arrest and handcuffing and tying of a judicial officer by police officers, under the provisions of the Contempt of Courts Act and in the course of the judgment prescribed guidelines to be followed in the case of arrest and detention of a judicial officer. Guidelines were given in the context of the special position that is occupied by a judicial officer in the constitutional scheme of democracy in this country. We do not agree that it would be advisable, useful or necessary to issue any guidelines in regard to the exercise of power under section 4 (c) of the Act. The guidelines which are implicit in the provision are adequate to control the exercise of power and safeguard the interest of the citizens.

20. We hold that the High Court, under Article 226 of the Constitution, has jurisdiction to issue an appropriate direction interdicting a contemplated arrest by Army authorities under section 4 (c) of the Arms and Forces (Special Powers) Act, 1958, but it will not do so except in exceptional circumstances and for strong and compelling reasons and invariably the High Court will hear both sides before arriving at a decision, even prima facie decision. We further hold that the High Court cannot direct the Army authority not to arrest any person without previous permission of the Court. The Reference is answered accordingly.