
(2009) 07 BOM CK 0148

In the Bombay High Court

Case No : Criminal Writ Petition No. 835 of 2009

Govind @ Bhai Ganesh Tilve

APPELLANT

Vs

Vikram Kumar, District Magistrate, The State of Maharashtra
and Election Commission

RESPONDENT

Date of Decision : 10-07-2009

Acts Referred:

Arms Act, 1959 — Section 17
Constitution of India, 1950 — Article 324
Criminal Procedure Code, 1973 (CrPC) — Section 107, 144
Penal Code, 1860 (IPC) — Section 143, 147, 188, 323, 342

Citation : (2009) 07 BOM CK 0148

Hon'ble Judges : Ranjana Desai, J;R.G. Ketkar, J

Bench : Division Bench

Advocate : S.R. Chitnis, instructed by V.R. Raje, for the Appellant; Heena Shah and H.V. Mehta, Pradeep Rajagopal and Malar Manoharan, instructed by Rekha Rajagopal, for Respondent 3, S.R. Borulkar, Public Prosecutor and U.V. Kejariwal, Assistant Public Prosecutor, for the Respondent

Judgement

Ranjana Desai, J.—Rule. The respondents waive service. By consent of the parties, Rule is made returnable forthwith.

2. The petitioner claims to be a social worker. He has agricultural lands at Kolgaon, Taluka Sawantwadi, District Sindhudurg. The petitioner has an arms licence issued by the District Magistrate, Sindhudurg, who is respondent 1 herein. The said licence is renewed upto 31/12/2011. The said licence has been granted for the protection of the petitioner's agricultural lands.

3. The petitioner received notice dated 17/3/2009 issued by the 1st respondent. The notice stated that the Police Superintendent Sindhudurg had brought to the notice of the 1st respondent that Election Commission has declared election programme for parliamentary elections and, therefore, it is necessary to pass order u/s 144 of the Criminal Procedure Code ("the Code") directing that persons who have arms licence should not be allowed to possess or move around with

arms during the elections to ensure that fearless atmosphere is created during elections. The notice further stated that the respondent is also of the confirmed opinion that it is necessary to restrain arms licence holders from possessing and carrying arms during parliamentary elections to prevent attempt to create fear in the minds of the voters by use of arms through personal and political feuds and to ensure that elections take place in peaceful, fearless and just atmosphere so that people exercise their right to vote fearlessly. The notice further stated that in the circumstances order u/s 144 of the Code is issued banning arms licence holders from possessing or moving around with arms between 1/4/2009 to 23/5/2009. The notice directed all arms licence holders in Sindhudurg to surrender their arms at the nearest police station on or before 1/4/09. In this petition the petitioner has challenged the said notice ("impugned notice" for convenience).

4. This petition along with other petitions was heard by us prior to elections. The information sought by us was not furnished by the Election Commission and, therefore, the petitions could not be disposed of prior to elections. We could have disposed of the petitions as infructuous as elections are now over, but we cannot do so because prosecutions have been launched against the petitioners in some of the petitions for not having abided by the direction to surrender arms which is impugned in these petitions. The contentions raised by the petitioners will have to be, therefore, considered. Besides the petitions raise certain important points which need to be dealt with.

5. Before we deal with rival contentions it must be noted that in the petition a solemn statement is made that the petitioner is a social worker and he does not fall in any of the categories laid down by the Election Commission in its letter dated 13/3/96 which is referred to in the impugned notice. The three categories laid down in the letter dated 13/3/96 are (a) persons released on bail, (b) persons having history of criminal offences and (c) persons previously involved in rioting at any time but especially during the election period. An impression is, therefore, created that the petitioner has no antecedents. Affidavit-in-reply has been filed by Shri Nandgaonkar, Residence Deputy Collector. Shri Nandgaonkar has stated in the affidavit that CR No. 54/2008 under Sections 143, 147, 342, 353, 323, 427, 504 and 506 of IPC was registered against the petitioner at Sawantwadi Police Station. The petitioner was arrested in the said case and released on bail. The said case is pending trial. It is further stated that CR No. 06/1995 was registered against the petitioner u/s 188 of the IPC. In that case the petitioner was acquitted. It is also stated that Chapter Case being Case No. 55 of 2008 was initiated against the petitioner and others u/s 107 of the Code. We are distressed to note that there is not a whisper about the above cases in the petition. On the contrary the petitioner has made false averments to misguide this Court. We deprecate this conduct of the petitioner.

6. The petitioner has assailed the impugned notice on several counts. According to the petitioner having regard to the provisions of the Arms Act 1959 ("Arms

Act") the 1st respondent could not have initiated action u/s 144 of the Code. It is the petitioner's case that Section 17 of the Arms Act provides for surrender of licence. Therefore, order issued by the respondent u/s 144 of the Code is without authority of law. Respondent 1 is not conferred with any such powers under the Arms Act and hence resort to Section 144 of the Code is uncalled for. The petitioner has placed reliance on judgment of the Division Bench of this Court (Pandya & Parkar, JJ.) in Ramakant Ovalekar v. R.N. Pradhan Criminal Writ Petition No. 62 of 1995 and other companion writ petitions decided on 15/7/99 and judgment of this Court in Ganesh Thakur v. Sr. Inspector, Boisar Police Station, Thane and Ors. 2000 All MR (Crim.) 928.

7. Mr. Chitnis, learned Senior Counsel for the petitioner reiterated all the submissions urged in the petition. Mr. Chitnis submitted in Ramakant Ovalekar's case in similar circumstances this Court quashed the order directing surrender of arms relying on judgment of this Court in Maharashtra Wine Merchants Association and Others etc. Vs. The State of Maharashtra and Another, . It is urged in the petition and also argued by Mr. Chitnis that in Ramakant Ovalekar's case it is held that under the rules framed under the Arms Act, licence cannot be taken away without there being power under the Arms Act and respondent 1 could not have taken away licence u/s 144 of the Code.

8. We tried hard to find out any such exposition of law in the judgment in Ramakant Ovalekar's case. We could not locate it. In any case reliance placed on this judgment is wholly misplaced. In this case the Division Bench has referred to the judgment of learned Single Judge (Dhanuka, J.) in Maharashtra Wine Merchant's case. It is pertinent to note that Justice Dhanuka has not decided any issue finally. He has merely issued Rule and granted interim relief. All observations made by Justice Dhanuka are of an interim nature. Mr. Chitnis has not been able to tell us what was the final order passed in Maharashtra Wine Merchant's case. Moreover while relying on Maharashtra Wine Merchant's case, in Ramakant Ovalekar's case, the Division Bench has observed that Justice Dhanuka has struck down the Election Commissioner's Order ordering closure of wine shops during election period. With respect, we must observe that this is an incorrect observation because Justice Dhanuka has merely observed that prima facie the said order is ultravires and has stayed it pending disposal of the writ petition. In Ramakant Ovalekar's case the Election Commission was not represented by any lawyer. It is unfortunate that the above facts were not pointed out to the Division Bench by learned Counsel for the petitioner or learned APP. In our opinion, since judgment of this Court in Ramakant Ovalekar's case proceeds on a wrong assumption and it is solely based on an interim order, the petitioner cannot draw any support from it.

9. We shall now come to the judgment of this Court in Ganesh Thakur's case. In that case the petitioner had challenged the order issued by the State directing him to surrender arms during election period. The said order was based on the Election Commission's letter dated 13/3/96 which is referred to in the impugned

notice. This judgment, therefore, has relevance to the present case.

10. It is necessary to reproduce relevant paragraphs of the Election Commissions letter dated 13/3/96.

In exercise of the powers conferred on the Commissioner under Article 324 of the Constitution of India and all other powers enabling it in this behalf and in supersession of all other instructions, the Commission hereby orders that the following instructions shall be observed during all future elections;

1. Issue of licence for arms will be totally prohibited during the period commencing with the date of announcement of elections. This ban will continue to be operative till the completion of the election as notified.

2. The police should be directed to be vigilant and asked to start mopping up operations of the areas infested with known goonda and other bad elements right from the date of announcement of elections. During such mopping up operations special attentions should be paid to unearth and seize unlicensed arms and ammunition. A very thorough search and seizure by the State Police of unlicensed arms and places of indigenous manufacture of arms and ammunition shall be carried out and persons involved shall be arrested. While unearthing and seizure of unlicensed weapons is a normal ongoing responsibility of the police, it shall be vigorously intensified during the election period. Inter-state and intra-State movements of trucks and commercial vehicles shall be strictly checked with a view to preventing smuggling of arms and ammunition and anti-social elements. Raids should be carried out regularly and intensively on underground arms factories.

3. Immediately after the announcement of elections, District Magistrates shall make a detailed and individual review and assessment (in accordance with the prevalent state laws) of all licence holders so that licensed arms in those cases where they consider it essential are impounded in order to ensure maintenance of law and order so essential for ensuring free and fair elections. These arms should be deposited with the district authorities. Among cases which may need to be reviewed are the following.

(1) persons released on bail;

(2) persons having a history of criminal offences; and

(3) persons previously involved in rioting at any time any but especially during the election period. (The above categories are only illustrative and not exhaustive).

4. After such review, all such license -holders who are identified, shall be directed to deposit their arms with the District Administration during the period of one week from the last date for withdrawal of candidatures.

5. The District Administration shall make foolproof arrangements for keeping the deposited fire arms in safe custody. Proper receipt must be given to the licence

holders depositing the fire arms. It shall be the bounden duty of the District Administration to ensure that all fire arms deposited with the Administration are returned to the licence holders immediately after one week after the declaration of results.

6. Prohibitory orders u/s 144 of the Criminal Procedure Code, 1973, shall be issued banning the carrying of licensed arms as soon as an election is announced and should be effective till the declaration of results.

11. This order is issued under Article 324 of the Constitution of India which vests Superintendence, direction and control of elections in the Election Commission. Under Clause 6 a direction is issued that prohibitory orders u/s 144 of the Code be issued banning the carrying of licensed arms as soon as an election is announced and should be effective till declaration of results. It is pursuant to this direction that order u/s 144 of the Code is issued by the 1st respondent. Therefore, we unhesitantly reject the submission that because Section 17 provides for surrender of licence, the 1st respondent could not have issued order u/s 144 of the Code or that the 1st respondent has not been entrusted with any powers under the Arms Act. The Election Commission and at its instance the respondent have followed the Constitutional mandate and they cannot be faulted for it. In Ganesh Thakur's case this Court has taken a similar view.

12. We shall now come to the most crucial aspect of the case. Clause 3 of the letter dated 13/3/96 directs that immediately after the announcement of the elections, District Magistrate shall make a detailed and individual review and assessment of all license holders so that licensed arms in those cases where they consider it essential are impounded in order to ensure maintenance of law and order during elections (emphasis supplied). Clause 3 gives cases which need to be reviewed. Clause 4 states that after such review all such license holders who are identified, shall be directed to deposit their arms. Implicit in this is the restriction imposed on the District Magistrates not to arbitrarily direct all arms licence holders to deposit their arms with the district authorities. Review is mandatory to identify cases where it is essential to impound arms so that only those persons can be directed to surrender arms. A law abiding citizen to whom a licence to possess arms is issued for his safety may take an order directing him to surrender his arm as an affront to his dignity and status. In Ganesh Thakur's case admittedly no such review and assessment was made and the petitioner therein was directed to surrender the arms. This court, therefore, set aside the direction and ordered that "as and when necessary during the period of election, if the powers are to be exercised in respect of the fire arms u/s 144 of the Code as per the Election Commission's guidelines, the Screening Committee shall be formed and after categorizing the three classes referred to in the guidelines the action as per the said guidelines shall be taken".

13. Affidavit-in-reply has been filed on behalf of the Election Commission by Shri Channe, Deputy Secretary and Joint Election Officer Maharashtra State. He has clarified in his affidavit that for the Lok Sabha elections of 2009, the directives in

force are dated 24/3/2009 and 1/4/2009 which are the same as directives contained in letter dated 13/3/96. Copies of the said directives are annexed to the affidavit. After comparing them, we find that material Clauses of all these directives are the same. Shri Channe has referred to the judgment of this Court in Ganesh Thakur and stated that as per the said judgment Screening Committee has to carry out review of all arms licences and it is only thereafter that the District Magistrate may order the deposit of arms. Mr. Channe has stated that that is the intention of the instructions issued by the Election Commission of India.

14. In his affidavit Shri Nandgaokar, Residence Deputy Collector has stated that a Screening Committee was formed under the Chairmanship of Collector, Superintendent of Police, Sindhudurg, Additional Superintendent of Police, Sindhudurge, Additional District Magistrate Sindhudurg and Deputy Election Officer Sindhudurg were members of the said Committee. It is further stated that the Screening Committee held meetings on 23/3/2009 and 26/3/2009 in which applications pertaining to return of arms were scrutinized and some of the arms were returned. There is no categorical statement that the Screening Committee first reviewed the cases and then called upon arms licence holders to deposit arms. The course adopted by the 1st respondent is, therefore, contrary to the directives issued by the Election Commission and contrary to the judgment of this Court in Ganesh Thakur's case. The impugned notice dated 17/3/2009 will have to be therefore, set aside and is accordingly set aside qua the petitioner.

15. A grievance was also made before us that the arms which are surrendered are not kept in safe custody. They are dumped in the police station and in the process they get damaged. This is denied by the respondents. In this connection, we may only remind the respondents that the directives issued by the Election Commission state that the District Administration shall ensure that foolproof arrangements are made for keeping the deposited arms in safe custody. Some of the arms are very expensive. Fear expressed before us is justified. We expect the respondents to ensure that the arms are kept in safe custody so that they are not damaged.

16. Before we close, we must express our extreme dissatisfaction about the manner in which the 1st and 2nd respondents have ignored the directives issued by the Election Commission and the judgment of this Court in Ganesh Thakur's case. Several orders issued for the same purpose were set aside during last elections on the ground that Screening Committee was not in place and there was no prior review and assessment of arms licence holders. Once again similar mistakes are committed. There appears to be a lack of coordination and communication between the Election Commission and the State and its officers. The State has not perhaps, understood the significance of the Election Commission's directives. Such approach may lead to unsavoury incidents during elections. The Election Commission must ensure that its directives are adhered to strictly by the State and its officers. The Screening Committees must be in place.

The review and assessment of arms licence holders must be done post haste and then notice must be issued to the shortlisted arms licence holders to deposit arms. In deference to Article 324 of the Constitution the Election Commission must supervise the steps taken by the State and reprimand those who do not abide by its directives.

17. Since the need to direct licence holders who fall in the categories mentioned in the directions of the Election Commission arises at the time of every parliamentary election and the experience has shown that review and assessment of arms ("screening" for convenience) is not done by the Scrutiny Committees in terms of the directives of the Election Commission and as per the judgment of this Court in Ganesh Thakur's case, which leads to setting aside of almost all the orders directing deposit of arms which is likely to jeopardise peaceful holding of elections Mr. Rajgopal, learned Counsel for the Election Commission of India has requested this Court to lay down guidelines. In fact after consulting the Election Commission and the State Authorities, Mr. Rajgopal and Mr. Borulkar, learned Public Prosecutor have given us time-frame, which the Election Commission of India desires, should be laid down by us for the Screening Committees to abide by. We have taken on record a copy of the letter addressed by the Election Commission of India to Mr. Rajagopal dated 29/6/2009 and marked it "X". We are informed that the Election Commission of India desires that Scrutiny Committees should be in place. Mr. S.R. Chitnis, learned Senior Counsel and all other Counsel also requested us to translate the Election Commission of India's suggestions into guidelines.

18. In the circumstances, we lay down the following guidelines:

a) There shall be a Screening Committee in every District and in every Commissionerate area. In the District the Screening Committee shall consist of the District Magistrate and the Superintendent of Police. In the Commissionerate area it shall consist of the Commissioner of Police and Joint/Additional Commissioner of Police (Admn.)

b) The Screening Committee shall commence the work of screening from the day of declaration of dates of election by the Election Commission.

c) Cases of all the licence holders as laid down by the Election Commission in its directive shall be placed before the Screening Committee. The categories are;

i) persons released on bail;

ii) persons having a history of criminal offences; and

iii) persons involved in rioting at any time but especially during the election period. The Screening Committee shall bear in mind that the above categories are only illustrative and not exhaustive.

d) The Screening Committee shall complete the exercise of screening in respect of licences placed before it as far as possible before the 1st date of filing of

nominations.

e) On receipt of report from the Screening Committee, the licensing authority shall issue notice before the last date fixed for withdrawal of candidature to the individual licence holder for depositing his arms and inform the licence holder that failure to deposit the arms as directed would result in prosecution u/s 188 of the I.P.C. as stated in Clause (h).

f) The licence holder thereafter shall deposit his arms forthwith and in any case within a period of seven days from the date of receipt of the notice. The Licensing Authority shall give proper receipt to the licence holder.

g) The decision taken by the Screening Committee shall be final.

h) Any licence holder who fails to deposit arms within the period specified above shall be liable for prosecution u/s 188 of Indian Penal Code.

i) All the arms so deposited with the administration be returned to the licence holder within a period of one week after declaration of election results.

j) The above time-frame should be adhered to as far as possible.

19. The guidelines state that the time-frame should be adhered to as far as possible, obviously to ensure that the object behind issuing guidelines is not defeated and the entire exercise is not questioned because of minor deviation in the time-frame. But that does not absolve the officers who upset the time-frame. We make it clear that if the above time-frame is not abided by, the competent authority shall take action in accordance with law against the erring officers.

20. The petition is disposed of.