

(1998) 03 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 234 of 1995

Harbans Singh Rania

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 30-03-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21

Citation : (1999) 1 SriLJ 38 : (1999) SriLJ 38

Hon'ble Judges : T.S.Doabia, J

Bench : Single Bench

Advocate : Anil Sethi , A.Kapoor, Advocates appearing for the Parties

Judgement

1. ""Every man's house is his castle"" and in Semayne's case (1604) 5 Co Rep 91a:Sm. L.C.(13th Edn.) 104 at P. 105 where this was applied it

was stated that ""the house of everyone is to him his castle and fortress as well as for his defence against injury and violence as for his repose

It is above concept which the petitioner seeks to enforce by resorting to Article 226 of the Constitution of India.

2. The petitioners are seeking directions from this court to the effect that the respondents should not conduct domiciliary visits as their visits

interfere with the liberty of the petitioners.

3. The respondent State submits that a First Information Report has been registered on a verbal report of one Gulab Din. The case is said to have

been registered under Sections 436/302 of the Penal Code at police Station Chennai. It is submitted that as investigation was to be held, therefore,

the petitioners were called to the Police Station. It is submitted that no action was taken with a view to arrest the petitioners The State authorities

are further aware of the fact that bail orders were passed by this Court with regard to the offences enumerated above in FIR No:20 of 1995. On

25.05.199F>, interim directions were given to the police parties not to make domiciliary visits over the persons and property of the petitioners.

The stand of the state is simple. It is stated that the petitioners are being asked to associate with investigation of the case, which is being conducted

by the State authorities.

4. Legal position be examined.

The origin of fundamental rights can be traced back to the year 1215 when the great barons of England , who had assembled at Runnymede

forced from the hands of the unwilling King John the glorious charter of popular liberties known as Magna Carta. The 39th Chapter of this great

constitutional document contained the pledge that ""No freeman shall be taken or imprisoned or disposed or outlawed or banished or in any way

destroyed.... except by the lawful judgment of his peers and by the law of the land."" Magna Carta was reaffirmed from time to time by successive

English Monarchs and in 1354 Edward III recognised the liberties and customs which the people had enjoyed in the past and declared in Chapter

3 of 28 Edward III that ""no man of what estate or condition that he be, shall be put out of land or tenement nor taken nor imprisoned nor

disinherited nor put to death without being brought in answer by due process of law,"" The expression ""Law of the land"" and ""due process of law

which appear in these documents appear to be synonym)us and to guarantee that Sovereign shall net proceed against the life, liberty or property

of a feudal lord except in conformity with the usages of ancient custom or the common law. The object of this chapter of Magna Carta was to

prevent the King from acting against the person or property of a baron except by a prosecution or suit instituted or conducted according to the

prescribed forms and solemnities for ascertaining the guilt or determining the title to the property. When the feudal system disappeared from

England, the procedural protection which was afforded to barons was extended to commoners and Magna Carta became a real charter of liberties

for the people of England. In his famous institutes, Sir Edward Coke expressed the view that Magna Carta had embodied certain fundamental

principles of right and justice, and that the common law contained a further

expression of the same principles. Magna Carta and the common law, he contended, were the supreme law of the land and controlled both the King and Parliament.

In his commentary on Dr. Bonham's case (16108 Coke's Rep 107a at p.118(a) the eminent jurist observed as follows:

And it appears in our books, that in many cases, the common law will control Acts of Parliament and some times adjudge them to be utterly void,

for when an Act of Parliament is against common rights or reason or repugnant or impossible to be performed, the common law will control it and

adjudge such Act to be void.

5. The public opinion in the United States was profoundly affected by the view expressed by Coke and these views quoted by the colonists in

justifying resistance to British Parliament. The colonists continued to adhere to the idea that a statute which is opposed to common right and reason

is void and that it is the duty of the judges to declare it to be so. In 1791, due process passed into the Federal Constitution with the adoption of the

Fifth Amendment which provided that ""No person shall.... be deprived of life, liberty or property without due process of law

6, The above narration represents the slow progress of the concept of "liberty of life"" and the need to protect it. It was this concept which found

incorporated in the chapter of Fundamental rights and particularly in Article 21 which lays down:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Frankfurter J in Wolf V. Colorado (1948}

338 US 25 observed:

The security of one's privacy against arbitrary intrusion by the police.... is basic to a free society. It is, therefore, implicit in ""the concept of liberty

and as such enforceable against the State through the Due process Clause, The knock at the door, whether by day or by night, as a prelude to a

search without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as

inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English speaking peoples.

And unauthorised intrusion into a person's home and the disturbance caused to

him thereby, is as it were thy violation of a common law right of a man an ultimate essential or ordered liberty; if riot of the very concept of civilisation.

7. Thus it can safely be observed that any attempt by the State to intrude into privacy of a citizen has to be supported by authority of law. The term authority of law"" would mean the law enacted by Legislature. An executive order would fall outside the scope of term of law.

8. As a matter of fact the Supreme Court of India in the case reported as Khark Singh vs. State of U.P. reported in AIR 1963 SC 1295 observed

that mere executive or administrative order or instructions are not law within the meaning of Article 21. Reference may also be made to an earliest

decision of the Supreme Court of India reported as A K.Gopalan Vs. State of Madras AIR 1950 SC 27. In the above case it was held in

categoric terms that the procedure established by Law means ""enacted law"". In para 18(a) of the report it was observed;

It is obvious that in that clause ""law"" must mean enacted law. The object of dealing with property under a different Article appears more to

provide the exceptions found in Art. 31(2) to (6), rather than to give the word ""law"" a different meaning than the one given in Art.21. The word

established"" according to the Oxford Dictionary means ""to fix"" set tie. institute or ordain by enactment or agreement. The word ""established"" itself

suggests an agency which fixes the limits. According to the dictionary this agency can be either the legislature or an agreement between the parties.

There is, therefore, no justification to give the meaning of ""jus"" to ""Law"" in Art. 21.

In para 109 it was again observed: ""Giving full effect to these principles, however, I am unable to agree that the term ""Law"" in Art 21 means the

immutable and universal principles of natural justice. ""Procedure established by law"" must be taken to refer to a procedure which has a statutory

origin, for no procedure is known or can be said to have been established by such vague and uncertain principles of natural justice."" In my opinion

'law"" in Art 21 means ""positive or State made Law

9. The term ""Liberty as user in the Constitutional provision connotes something more than mere freedom from physical restraints or the chains of a

prison .Charles Warren and Louis D.Brandes while dealing with the concept of

right to privacy thought that law should provide both a criminal and private law remedy to protect man's inviolate personality against the intrusive behaviour of state. Once a civilization has made a distinction between the "outer" and the "inner" man between the life of the soul and the life of body, between the spiritual and the material, between the sacred and the profane between realm of God and the realm of caesar between Church and State, between rights inherent and inalienable and rights that are in the power of Government to give and take away between public and private, between society and solitude. It becomes impossible to avoid the idea of privacy by whatever name it may be called the idea of a "private" space in which man may become and remain himself. See privacy and the law. A philosophical prelude by Milton R. Konvitz in 31 Law Contemporary Problems (1966) p 272, 273.

10. The Supreme Court of India took notice of what was said by the above authors in Govind V. State of M.P. AIR 1975 SC 1378 and

observed that there can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuits of happiness and

realise the significance of man, spiritual nature of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be

found in material things and therefore, they must be deemed to have conferred upon the individual as against the government a sphere where he

should be left alone. Reference was made again to privacy freedom and respect for persons by Benn in a book J Pennock and J Chapman Eds,

privacy Memos XIII, I, 1516 to the following excerpt.

The liberal individualist tradition has stressed, in particular, three personal ideals, to each of which corresponds a range of private affairs. The first!

is the deal of personal relations: the second, the Lockian idea of the politically free man in a minimally regulated society, the third, the Kantian idea

of the morally autonomous man, acting on principles that he accepts a rational.

In Munn V. S. (1876) 94 US 113 Fields J, while dealing with the concept of Liberty observed:

By the term liberty as used in the provision something more is meant than mere freedom from physical restraint or the bounds of a prison. Earlier it

was mentioned.

The provision equally prohibits the mutilation of the body or amputation of an

arm or leg or the putting out of an eye or the destruction of an other organ of the body through which the soul communicates with the outer world.

11. The above observations were considered by the Supreme Court in the case reported as Kharak Singh Vs. State of U.P. 1963 SC 1295.

Karak Singh was challenged in a decoity case. He was released under section 169 of the code of Criminal Procedure Code 1898 On the basis of

the acquisitions made against him police opened a history sheet in regard to him. This was done under chapter XII of U.R police Regulations.

Regulation 236 provided as under:

Without prejudice to. the right of Superintendents of police to put into practice any legal measures, such as shadowing in cities, by which they find

they can keep in touch with suspects in particular localities or special circumstance, surveillance may be most practical purposes be defined as

consisting of one or more of the following measures;

a). Secret picketing of the house or approaches to the house of suspects:

b). domiciliary visits at night:

c). through periodical inquiries by officers not below the rank of subinspector into reputed habits, associations, income, expenses and occupation:

d). the reporting by constables and chaukidars of movements and absences from home.

e). the verification of movements and absence by means of inquiry slips.

f). the collection and record on a history sheet of all information bearing on conduct. The Supreme Court of India was of the view:

i). Secret picketing of the house of a suspect or keeping watch over his movements under police surveillance does not amount to deprivation of

personal liberty:

ii). same would be the position when a suspect is shadowed by the police and watch is kept over his activities. However,

iii). domiciliary visits to the house of a suspect at night involving the intrusion into the privacy of his home were held to amount to deprivation of his

personal liberty as it is likely to disturb him in his sleep etc.

12. The matter was again considered by the Supreme Court of India in a case arising from the State of Madhya Pradesh. This is reported as

Govind Vs. State AIR 1975 SC 1379. In this case history sheet was opened under

paragraph regulation 856 of police regulations. In para 11 of the judgment regulation 855 and 856 were held to have the force of law. Great stress was laid on the concept of dignity to live in privacy. It was observed that this includes right to protect personal intimacies of home, the family, marriage, motherhood etc. As a matter of fact the right to privacy was sought to be equated with freedom to live one's life without governments interference. Some of the observations made in Govind's case (Supra) are relevant and he noticed:

There can be no doubt that privacy dignity claims deserve to be examined with care and to be denied only when an important countervailing interest shown to be superior. If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be compelling as well as a permissible state interest, the characterization of a fundamental privacy right would be far claimed right as less significance. The question whether enforcement of morality is a state interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore, we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees." In the application of the Constitution our contemplation cannot only be of what has been but what may be time works changes and brings into existence new conditions.

Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet too broad a definition of privacy raises questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It, therefore, relates to and overlaps with the concept of liberty.

The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest

in autonomy must also be placed in the context of other rights and values.

Any right in privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood; procreation and child

rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics

of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a

claimed right must be fundamental right implicit in the concept of ordered liberty.

Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped

with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government" a

phrase coined by professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as

contributing to the right to privacy. "There are two possible theories for protecting privacy of home. The first is that activities in the home harm

others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such

harm" is not constitutionally need protectable by the State. The second is that individuals a place of sanctuary where they can be free from

societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image

they want to be accepted as themselves. An image that may reflect the values of their peers rather than the realities of their natures: see 25

Stanford Law Rev 1161 at 1187.

13. The Court however ultimately concluded . The right to privacy in any event will necessarily have to go through a process of case by case

development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom

of speech creates an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think

that the right is absolute.

Having reached this conclusion we are satisfied that drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen

will be made if Regulations 855 and 856 were to be read widely. The interpretation the

rule in harmony with the Constitution of the powers vested in the police by the two Regulations earlier read becomes necessary, if they are to be saved at all. Our founding fathers were thorough; opposed to a police Raj even as our history of the struggle for freedom has borne eloquent testimony to it. The relevant Article of the Constitution we have adverted to earlier behave us therefore to narrow down the scope for play of the two Regulations. We proceed to give direction and restriction to the application of the said regulations with the caveat that if any action were taken beyond the boundaries so set. The citizen will be entitled to attach such action as unconstitutional and void.

'Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbra! zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it; for what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by "law". We think that the procedure is reasonable having regard to the provisions of Regulation 353 (C) 857. Even if we hold that Article 19 (1) (d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19 (5) does not apply in terms as the right to privacy of movement cannot be absolute a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid.

When there are two interpretations, one wide and unconstitutional, the other narrower but within constitutional bounds. This Court will read down the overflowing expressions to make them valid. So read the two regulations are more restricted than counsel for the petitioner sought to impress upon us. Regulation 855 in our view, empowers surveillance only of persons

against whom reasonable materials exist to induce the opinion that they show a determination to lead a life of crime in this context being confined to such as involve public peace or security risks. Mere convictions in criminal cases where nothing gravely imperils safety of society can be regarded as warranting surveillance under these Regulations similarly, domiciliary visits and picketing by the police should be reduced to the rarest cases of danger to community security and not whim of a police officer. In truth, legality apart, these regulations ill accord with the essence of personal freedoms and the State will do well to revise these old police regulations verging perilously near unconstitutionality.

14. It be again seen that Rule of Audi Alteram Partem is not attracted to such a case. Thus, in *Malak Singh etc Vs. State of Punjab and Haryana* and others AIR 1981 SC 760, it was observed that an entry in the surveillance register of a habitual offenders made on the basis of history sheet is confidential. It was held observance of the principle of natural justice, apart from not serving the needs of justice may lead to undesirable results if the source of information being disclosed. The rule audi alteram partem was held to be not attracted in such cases. One safeguard was indicated. It was observed that while it may not be necessary to supply the ground of belief that the person to be entered in the surveillance register is a habitual offender etc. to the persons concerned, it may in some cases be necessary to satisfy the court that there are grounds to entertain such reasonable belief and that there is no illegal interference in the life of a citizen under the guise of surveillance.

15. From the above mentioned decisions it becomes apparent that in these matters:

- i). principles of natural justice are not attracted.
- ii) regulations permitting surveillance do interfere with the personal freedom and should be resorted to only where public peace or security is involved.
- iii). mere convictions in criminal case where nothing gravely imperils safety of society can not be regarded as warranting surveillance under these regulations. In the present case the petitioners are on bail.

16. Some of the ideals dealing with human rights would remain ideals only because the state in its endeavor to protect the fabric of social life has to

resort to imposing of some restrictions and if these restrictions are reasonable then no grievance can be made. The European Convention of Human

Rights makes a brave attempt to bring out this problem. Article. 8 of the constitution which came into force on 3rd September 1953 and as noticed

in ""Privacy and Human Rights"" EdA.H Rohotson 176 be noticed:

1). every one has the right to respect for his private and family life his home and his correspondence.

2). There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary

in a democratic society in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or

crime for the protection of health or morals or for the protection of the rights and freedoms of others.

17. In the present case it is clear

i). that a First Information Report has been registered.

ii). The petitioners are on bail.

iii). It is not the case that the ""Security of State"" or Public Order"" in any way is endangered on account of the activities of the petitioners.

iv). The case of the State is

a), that beyond ""Investigation"" no other step is being taken.

b). that there is no intrusion into the privacy of the petitioners.

18. In view of the above, this petition which was admitted and taken up for final disposal with the consent of the parties is disposed of with the

direction that the respondents would confine themselves to the well known parameters of the scope of investigation and would not disturb the

privacy of the petitioners with ""domiciliary visits,