

(1980) 04 GAU CK 0001
In the Gauhati High Court
Case No : Civil Rule No. 182 of 1980

Indrajit Baruah

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 18-04-1980

Acts Referred:

Armed Forces (Assam and Manipur) Special Powers Act, 1958 — Section 4
Assam Disturbed Areas Act, 1955 — Section 4
Constitution of India, 1950 — Article 14, 19

Citation : AIR 1981 Guw 6

Hon'ble Judges : K.N. Saikia, J

Bench : Single Bench

Advocate : P.G. Barua, D. Goswami, N.N. Kataki, D.K. Kakoti and N.K. Sinha, for the Appellant; K. Parasaran, Solicitor General of India, P.K. Baruah, Sr. Government Advocate and D.N. Choudhury, Government Advocate, for the Respondent

Judgement

K.N. Saikia, J.—Heard the learned Solicitor-General for the Union of India and the State of Assam. Heard Mr. P. G. Barua, learned counsel for the petitioner. Respectfully perused the order dated 16-4-1980 passed by the Hon"ble Supreme Court in SLP (Civil) No. 4377 of 1980. Perused the impugned order dated 7-4-1980 granting ex parte stay in Civil Rule No. 182 of 1980,

2. The petitioner in Civil Rule No. 182 of 1980 impugns the two notifications, namely, PLA. 20/80/19 and PLA, 20/80/20 dated 5-4-1980. The petitioner also challenges the vires of the Assam Act 19 of 1955, the Assam Disturbed Areas Act, 1955, and the Armed Forces (Assam and Manipur) Special Powers Act, 1958 as amended by Armed Forces (Assam and Manipur) Special Powers (Amendment) Act 1972, on which the two impugned notifications are based. The following are the texts of the two notifications:

"No. PLA. 20/80/19. -- Whereas a situation prejudicial to the integrity and security of the State by promotion of disorder and disturbances of the peace and

tranquillity in the areas mentioned in the Schedule below is sought to be created:

And whereas the Governor of Assam after careful consideration of all the facts and circumstances is satisfied that in order to make adequate provisions for suppression of disorder and maintenance of public order, it is necessary to declare those areas as disturbed areas:

Now, therefore, in exercise of the powers conferred by Section 3 of the Assam Disturbed Areas Act, 1955 (Act No. XIX of 1955) the Governor of Assam is pleased to declare the areas mentioned in the Schedule below as disturbed areas under the said Act for a period of two months with effect from 6th (sixth) April, 1980.

SCHEDULE

The whole of the State of Assam excluding North Cachar Hills District and the areas already notified as Disturbed Areas u/s 3 of the Assam Disturbed Areas Act, 1955 (Act No. XIX of 1955) and u/s 3 of the Armed Forces (Special Powers) Act, 1958 under Government Notifications No. PLB. 25/80/10, dated 27th February 1980 and No. PLB. 25/80/11, dated 27th February, 1980 respectively."

"No. PLA. 20/80/20. -- Whereas the Governor of Assam after careful consideration of all facts and circumstances is of opinion that the areas mentioned in the Schedule below are in such a disturbed or dangerous condition that the use of Armed Forces in aid of civil power is necessary :

Now, therefore, in exercise of the powers conferred by Section 3 of the Armed Forces (Special Powers) Act, 1958 as amended, the Governor of Assam is pleased to declare the areas mentioned in the Schedule below as disturbed areas within the meaning and for the purpose of the said Act for a period of two months with effect from 6th (sixth) April, 1980.

SCHEDULE

The whole of the State of Assam excluding North Cachar Hills District and the areas already notified as Disturbed Areas u/s 3 of the Assam Disturbed Areas Act, 1955 (Act No. XIX of 1955) and u/s 3 of the Armed Forces (Special Powers) Act, 1958 under Government Notifications No. PLB. 25/80/10, dated 27th February 1980 and No. PLB. 25/80/11, dated 27th February 1980 respectively."

3. The operation of the two notifications was stayed by the impugned order dated 7-4-1980. The State of Assam and the Union of India filed a SLP (Civil) No. 4377 of 1980 before the Supreme Court of India, on which their Lordships of the Supreme Court by order dated 16-4-1980 were pleased to direct this High Court to dispose of the stay application after hearing both the sides today, the 18th April, 1980. Their Lordships further directed that this High Court may consider the materials placed before the Supreme Court as the materials placed before this Court and also give liberty to the parties to produce such other materials as they desire to produce. The directives of their Lordships have been fully complied

with and the parties have been given full opportunity to produce further materials, and the writ petitioner has, today, filed an additional affidavit,

4. The learned Solicitor-General fairly confines himself to two questions, namely, prima facie case and the balance of convenience, and takes me through the materials placed before the Hon"ble Supreme Court in the Special Leave petition. On the basis of these materials as also the materials appearing in the writ petition as well as the affidavits, it is submitted, inter alia, that there is a prima facie case justifying the issue of the impugned notifications on the basis of the provisions of the two Acts, in view of the disturbance in public order and as an anticipatory and preventive measure. The provisions of the Act do not suffer from any repugnancy to the provisions of the Constitution and the notifications being based thereupon, cannot be assailed.

5. Placing the provisions of the two Acts, particularly, Section 4 of the Assam Disturbed Areas Act, 1955, it is submitted that it fully conforms to the provisions of the Constitution. The said section may be quoted:

"Powers to fire upon persons contravening certain Orders. -- Any Magistrate or Police Officer not below the rank of Sub-Inspector or Havildar in case of the Armed Branch of the Police or any officer of the Assam Rifles not below the rank of Havildar, may, if in his opinion, it is necessary so to do for the maintenance of public order, after giving such warning, if any as he may consider necessary, fire upon, or otherwise use force even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in a disturbed area, prohibiting the assembly of five or more persons or the carrying of weapons or things capable of being used as weapons or fire-arms, ammunition and explosive substances."

6. Provisions of Section 4 Clause (a) of the Armed Forces Special Powers Act, 1958, is to the following effect:--

"Any Commissioned Officer, Warrant Officer, non-commissioned Officer or any other person of equivalent rank in the armed forces may, in a disturbed area --

(a) if he is of opinion that it is necessary so to do for maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms ammunition or explosive substances."

7. It is seen that under the above provisions, any Magistrate or Police Officer not below the rank of Sub-Inspector or Havildar in case of the Armed Branch of the Police or any officer of the Assam Rifles not below the rank of Havildar, any Commissioned Officer, Warrant Officer, etc., may, if in his opinion, it is necessary so to do for the maintenance of public order, after giving such warning, if any, as

he may consider necessary, fire upon, or otherwise use force even to the causing of death.

8. u/s 4(a) of the Armed Forces Special Powers Act, 1958, any Commissioned Officer, Warrant Officer etc. can take similar action.

9. The provisions have to be tested by the acid test of reasonability of restriction to fundamental rights; and the court has been assigned the role of a sentinel on the "qui vive". While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. Reasonableness cannot be judged by abstract standard or general pattern, but only in a setting. No general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

10. Considering all the above factors, this Court has to examine whether sufficient safeguards have been provided, say for representation by the aggrieved party, and the substantive as well as procedural safeguards which must under such circumstances, be strictly observed. In cases of problems creating public disorders, the Court has to strike a balance between fundamental rights on the one hand and objective to be achieved on the other. The nature and type of disorder has to be taken into consideration. Whether it is in the nature of "law and order", "public order" or "Security of State" as envisaged in *Babulal Parate Vs. State of Maharashtra and Others*, and *The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia*, and/or *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, the peace and harmony of the society has to be maintained. The vedic concept of "rita" i.e. peace and harmony in the society under which each man may pursue his activities within his own "swadha", may also have to be remembered. Three sets of provisions are to be found, namely, under the provisions of the Criminal Procedure Code, under the emergency provisions of Articles 352 to 359 of the Constitution, as also under the provisions of these Disturbed Areas Acts, In these cases the test of reasonableness has to be applied. We also should remember that in India, the American doctrine of preferred position is not applicable as such; and a statute until declared invalid remains valid, and the onus of proof is on him who challenges its vires. From the materials placed by the writ petitioner himself before this Court as also before the Supreme Court, it cannot be said that there is no kind of disturbances to public tranquillity, serenity or "rita" in the State for sometime. Be that as it may, the provisions prima facie do not provide procedural and substantive safeguards, particularly in view of the fact that it enables a police or armed force officer to decide and go to the extent of firing upon to the causing of death. No provision for appeal has been envisaged and, indeed, there cannot be appeal or revision after one has already been dead. Considering all these facts and circumstances,

the vires of these two provisions appears to be examinable which will be done in the writ petition. Pending disposal of the writ petition, if these two provisions are allowed to be taken resort to, it may cause immense harm to the society bringing in a trail of consequences beyond repair. It, therefore, appears to be reasonable that those portions of these two Acts be stayed pending disposal of the writ petition.

11. As regards the other provisions of these two Acts, the learned counsel for both sides have placed them and fairly agree that so far as the exercise of powers u/s 5 of the Assam Disturbed Areas Act, 19-55, is concerned, it appears to be desirable and this portion should not be stayed. As regards the provisions of Clauses (b), (c) and (d) of Section 4 of the Armed Forces Special Powers Act, 1958, Mr. Barua submits with some force that these three provisions may also be similarly stayed. But on careful examination of the provisions, Mr. Barua also fairly agrees, that some of these provisions are desirable and the rest may not be so easily separable and in that view these three clauses cannot be stayed. However, as regards the provisions in Clauses (c) and (d) Mr. Barua feelingly depicts some recent experiences in North Kamrup where this Act was applied. Let us hope and trust that despite those provisions remaining in the statute book, such experience shall not recur.

12. Accordingly, it is ordered that the impugned ex parte stay order dated 7-4-1980 shall be superseded by this order. The operation of Section 4 of the Assam Disturbed Areas Act, 1955, and of Section 4(a) of the Armed Forces (Special Powers) Act, 1958 (as amended in 1972), is hereby stayed. The two impugned notifications will take effect, but no power shall be exercised under the provisions of Section 4 of the Disturbed Areas Act, 1955 and Section 4(a) of the Armed Forces (Special Powers) Act, 1958, which are hereby stayed. Adequate precaution shall be taken to prevent abuse of the provisions of Clauses (c) and (d) of Section 4 of the Armed Forces (Special Powers) Act, 1958.

13. In view of the urgency of the matter, let the writ petition be disposed of expeditiously. Ordered accordingly.