

(1965) 01 GUJ CK 0003

In the Gujarat High Court

Case No : Spl. Criminal Application No. 35 of 1964

Ismailbhai Gafoorbhai Vora

APPELLANT

Vs

R. Parthasarthy, District Magistrate, Kaira and Another

RESPONDENT

Date of Decision : 12-01-1965

Acts Referred:

Bombay Police Act, 1951 — Section 56, 59
Constitution of India, 1950 — Article 19(1)(d), 19(1)(e), 21, 22, 352
Defence of India Act, 1962 — Section 3, 40, 40(2)
Defence of India Rules, 1962 — Rule 30, 30(1), 30(1)(b)
Emergency Powers Regulations, 1956 — Regulation 47
Emergency Regulations — Regulation 16(1)

Citation : AIR 1966 Guj 62 : (1966) CriLJ 405 : (1965) GLR 382

Hon'ble Judges : J.M. Shelat, C.J.;J.B. Mehta, J

Bench : Division Bench

Advocate : B.K. Amin, for the Appellant; A.D. Desai, Asst. Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Shelat, C.J.—This is a petition challenging the order No. P. O. L./D.IP-1962 passed on December 3, 1964 by the District Magistrate, Kaira a District, detaining the petitioner under Rule 30(1)(b) of the Defence of India Rules. 1962.

2. According to the petitioner, he was at the material time, working as a petition-writer in Kapadvanj, District Kaira, and has been so working for the last about fifteen years. Prior to April 1963, one Mahamadmiya Nanamiya was his partner in his aforesaid business. But, the said Mahamadmiya ceased to be his partner as from April 1963 and set up a competing bus ness. According to the petitioner, as a result of the dissolution of his partnership, the said Mahamadmiya began to have a grudge against him and since April 1963, has been bringing the petitioner into different troubles & difficulties. It is also the case of the petitioner that there has been some hostility between him and some of the senior lawyers at Kapadvanj, as a consequence of which both he and the said lawyers have filed

against each other certain chapter cases and these chapter cases have been going on ever since 1859. According to the petitioner, in the general elections to the Legislative Assembly in 1962, he stood as a candidate from the constituency of Kapadvanj. One Nagindas V. Gandhi, the then President of the Bar Association, had also stood as a rival candidate. Though the petitioner withdrew from the contest, enmity developed between him and the said Nagindas and the said Nagindas and the said Mahamadmiya thereafter instigated the members of the Bar at Kapadvanj to harass him. In August 1969, a meeting of the Bar Association of Kapadvanj, which was presided over by the said Nagindas, passed unanimous resolution declaring the petitioner a tout. Proceedings thereafter were taken against him under the provisions of the Bombay Pleaders Act and ultimately, by an order dated November 13, 1964 the learned District Judge, Kaira, declared him to be a tout and directed that his name should be entered in the list of touts. In consequence of the aforesaid order, the Additional Mamletdar of Kapadvanj, by an order dated July 31, 1964 prohibited the petitioner from entering the premises of the revenue court at Kapadvanj. Aggrieved by the order of the learned District Judge, the petitioner filed a suit on October 26, 1984, in the Court of the Civil Judge, Senior Division, Nadiad, for a declaration that the orders passed by the learned District Judge and the Additional Mamlatdar were illegal and void and for other consequential reliefs. The suit is still pending, but the petitioner as the plaintiff therein has obtained an order of interim injunction against the enforcement of the aforesaid orders. It is the case of the petitioner that in pursuance of the policy of harassment, the Sub-Divisional Magistrate, Nadiad, served upon him a notice dated March 6, 1964 under Sections 66 and 59 of the Bombay Police Act, 1951, calling upon him to show cause why he should not be externed from the District of Ahmedabad (Rural). Baroda and the Punch Mahals for a period of two years Various negations were made in that show cause notice including such offences its blackmailing, attempts to assault, misappropriation, rape and extortion. On April 7, 1964 the petitioner gave his reply to the said notice denying the various allegations made against him and proposing that he would examine defence witnesses in the said proceedings. Besides his written statement, the petitioner examined defence witnesses and by an order dated August, 18, 1964 the Sub Divisional Magistrate, who held the enquiry against the petitioner, held, after considering the evidence led before him, that the externment proceedings should be dropped. It was after all these proceedings were taken against him, and, according to him at the instance of his enemies, that the District Magistrate, Kaira, by his order dated December, 3, 1964, made under Rule 30 of the Defence of India Rules, 1962, directed that the petitioner should be detained in the Baroda Central Prison. The order stated that the District Magistrate was satisfied with respect to the petitioner that "with a view to preventing him from acting in any manner prejudicial to the maintenance of public order and public safety it is necessary to make an order to detain the said Shri Ismail D Gafoor Vohra of Kapadvanj". In pursuance of this order, the petitioner was arrested on December 4, 1964 and taken to the Baroda Central Prison and was in that prison till he was removed recently in Sabarmati Jail at

Ahmedabad. It is this order which the petition has challenged in this petition.

3. Three contentions have been raised by the petitioner in his petition against the impugned order, (1) that the order violates his fundamental rights guaranteed under Article 19(1)(d) and 19(1)(e) of the Constitution. (2) that the order is mala fide in the sense that it is passed against him in consequence of the enmity existing between him and the several persons mentioned hereinabove, and (3) that the order is invalid by reason of the fact that the power conferred upon the State Government u/s 40 of the Defence of India Act, 1962 and the Defence of India Rules, 1962 has not been properly delegated to the District Magistrate. His contention is that whereas the power of detention has been delegated by the Government of Gujarat to the District Magistrates, the condition precedent to such power of detention, namely, the requisite satisfaction, has not been delegated to the District Magistrates and therefore such satisfaction being necessary condition precedent to the exercise of the power of detention not having been enjoined upon the District Magistrates, no valid order of detention could be passed against him by the District Magistrate, Kaira.

4. In order to appreciate these contentions, it is necessary to recite certain facts. As is well known as a result of the Chinese aggression on September 8, 1962, the President of India declared an emergency under the provisions of Article 352 of the Constitution on October 26, 1962. On the same day the Defence of India Ordinance, being Ordinance IV of 1962, was promulgated. On November 3, 1962, the President of India issued an order under Article 259 suspending the fundamental rights guaranteed to the citizens of this country under Articles 21 and 22. In pursuance of the said Ordinance, the Central Government promulgated on November 6, 1962 the Defence of India Rules. On December 6, 1962 these rules were amended by adding therein a new rule being Rule 30-A. The Defence of India Act LI of 1962. was thereafter enacted and was brought into force as from December 12, 1962 and which substituted Ordinance IV of 1962.

5. As stated earlier, the petition challenges the Impugned order on three grounds. But Mr. Amin who appears for the petitioner stated that in view of the decision of the Supreme Court in *Makhan Singh Vs. State of Punjab* (and connected appeals), he would not press the first contention urged in the petition with regard to the invalidity of the impugned order on the ground of its violating the petitioner's fundamental rights under Article 19(1)(d) and (c). In view of that statement, we have, therefore, to consider the remaining two contentions taken in the petition and urged by Mr. Amin. Before we proceed, however, to consider the two contentions, it would be expedient to keep before our mind the relevant provisions of the Defence of India Act and certain rules contained in the Defence of India Rules. Section 3 of the Act empowers the Central Government by notification in the Official Gazette to make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military

operations or for maintaining supplies and services essential to the life of the community. Sub-section (2) provides that without prejudice to the generality of the powers conferred by Sub-section (1), the rules may provide for, and may empower any authority to make orders providing for, all or any of the matters therein stated. Clause (15) of Sub-section (2) then provides that such rules may, notwithstanding anything in any other law for the time being in force, provide for the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate) suspects, on grounds appearing to that authority to be reasonable, of being of hostile origin of having acted, acting being about to act or being likely to act in a manner prejudicial to the defence of India and civil defence, etc.. or with respect to whom that authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner Sub-section (3) inter alia also provides that such rules may further confer powers and impose duties upon any State Government or officers and authorities of any State Government as respects any matter, notwithstanding that the matter is one in respect of which the State Legislature has no power to make laws. Section 40 authorises the Central Government to delegate any power or duty which by the Act or by any rules made thereunder is conferred or imposed upon the Central Government in such circumstances and under such conditions, if any, as may be specified in the direction and also to direct that such powers be exercised or discharged also by any officer or authority subordinate to the Central Government or by any State Government or by any officer or authority subordinate to such Government or by any other authority. Sub-section (2) of Section 40 empowers the State Government to direct that any power or duty which by the Act or any rules thereunder is conferred or imposed on the State Government or which, being by the Act or any rules conferred or imposed on the Central Government has been directed under Sub-section (1) to be exercised or discharged by the State Government shall be exercised or discharged by any officer or authority not being an officer or authority subordinate to the Central Government. Section 45 provides that no order made in exercise of any power conferred by or under the Act shall be called in question in any court and further that where an order purports to have been made and signed by any authority in exercise of any power conferred by or under the Act, a court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority. The Defence of India Rules, made in pursuance of the power reserved u/s 3 of the Act, were promulgated by a notification of the Government of India dated November, 5, 1962 and published in the Gazette of India dated November 5, 1962. Rule 30 deals with restriction of movements of suspected persons, restriction orders and detention orders and inter alia provides that the Central Government or the State Government, if it is satisfied with respect to any particular persons that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, etc., it is necessary

so to do, may make an order directing that he be detained. Rule 30-A, which, as aforesaid was added later on, provides for the review of detention orders, i.e. orders passed under Clause (b) of Sub-rule (1) of Rule 30, and States that every detention order shall be reviewed in accordance with provisions thereafter contained. Clause (4) of that rule, which is relevant for the purposes of this petition, provides that a detention order made by an officer (who shall in no case be lower in rank than that of a District Magistrate) empowered by the State Government shall be reviewed in the case of an order made by an Officer empowered by the State Government by a reviewing authority consisting of any two Officers from amongst the officers of the State Government specified therein. It is thus clear that under Sub-section (2) of Section 40, the State Government has the power to direct that any power or duty which by the Act or the rules made thereunder is conferred or imposed on the State Government or which the Central Government directs under Sub-section (1) to be exercised or discharged by the State Government, shall be exercised or discharged by any officer or authority not being an officer or authority subordinate to the Central Government. In pursuance of the power reserved to it u/s 40(2), the Government of Gujarat, by an order in the Home and Civil Supplies Department (Special) and dated August 28, 1964, directed that the powers conferred on it by Rule 36 of the Defence of India Rules, 1962, "shall be exercisable also by the Commissioner of Police, Ahmedabad City, and all District Magistrates within the limits of their respective jurisdictions." The order specified certain conditions, but it is not necessary to detain ourselves on those conditions as they are not relevant for the purposes of this petition. It was in pursuance of this order and the direction contained therein that the respondent passed the impugned order. There is, therefore, no difficulty in the District Magistrate, Kaira, exercising the power of ordering detention under Rule 30(1) (b) and the impugned order, having undisputedly been passed under the power conferred upon the District Magistrates, must be held to be an order with jurisdiction.

6. The contention, however, urged by Mr. Amin was that though the State Government has the power u/s 40(2) to direct that any of the powers conferred upon it shall be exercised by any officer or authority named by it, the order dated August 28, 1964, whereby such power was conferred upon the District Magistrates, merely delegates the power of detention. Mr. Amin urged that such direction or delegation would not be sufficient, for the State Government ought by that order to have delegated its duty of satisfaction, namely, that it was necessary that a particular individual should be detained with a view to preventing him from acting in any manner prejudicial inter alia to public safety or the maintenance of public order. He contended that inasmuch as such a duty was also not conferred or enjoined upon the District Magistrates, any order of detention that may be passed by such District Magistrates would not be valid inasmuch as the duty of satisfaction would still remain with the State Government. A District Magistrate passing an order of detention, therefore, would not be imposed with the duty of satisfaction and therefore, if he were to

pass an order of detention under such an order, he would not be complying with the condition precedent laid down in Rule 30, namely, of satisfaction that such an order is necessary to prevent the person concerned from acting in any manner prejudicial to the public safety or the maintenance of public order. Such an order, according to him, would not comply with the requirements of Rule 30 and would therefore be contrary to the provisions of that rule. In our view, the contention raised by Mr. Amin that the order dated August 28, 1964 merely delegates the power of the State Government under Rule 30 read with Section 40(2), meaning thereby the power to pass an order of detention only but does not mean at the same time the duty of satisfaction, is not sustainable. The power of directing detention and the duty of satisfaction as regards the several matters contained in Rule 30 are so connected and interwoven together as to make the exercise of the power one integrated act. If the power to direct detention is directed to be exercised by the District Magistrates under the aforesaid order, such power must be treated as taking along with it the concomitant duty of satisfaction. We are supported in this conclusion by the decision in *Edward-Liso-Mungoni v. Attorney General of Northern Rhodesia* 1960 AC 336, where an identical question was raised and where a similar detention order and a similar instrument of delegation of powers came for consideration. The Emergency Regulations of Northern Rhodesia contained an express provision enabling the Governor to delegate his powers thereunder. An authority to make detention orders was given by Regulation 16(1) of the Emergency Regulations which provided that whenever the Governor was satisfied that for the purpose of maintaining public order it was necessary to exercise control over any person, he might make an order against such person directing that such person be detained, and thereupon that person shall not be arrested and detained. Under that Regulation, the Governor, however, could not make a detention order unless he was first satisfied as to the matters contained in that Regulation. That satisfaction was a duty cast upon him to be satisfied before such an order could be made. In pursuance of the power to delegate, the Governor issued an instrument of delegation of powers which provided that in exercise of the powers conferred by Regulation 47 of the said Emergency Powers Regulations, 1956, "all the powers conferred upon the Governor by the provisions of the said Regulations..... are hereby delegated to the officer for the time being carrying out the duties of the Provincial Commissioner, Western Province." The question was whether in the absence of any express words imposing the duty of satisfaction upon the Provincial Commissioner, there was valid delegation and the Provincial Commissioner could pass the impugned order of detention. Lord Denning, speaking for the Privy Council, held that the powers and the duty under Regulation 16(1) were so interwoven that it was not possible to split one from the other so as to put the duty on one person and the power in another; the regulation contained not so much a duty, but rather a power coupled with a duty, and he who exercised the power had to carry out the duty. In delegating his functions under Regulation 16(1) the Governor could delegate both the power and duty together to one and the same person--he could not delegate the power to another and keep the duty

to himself. The requirement that he was to be satisfied was a condition or limitation on the exercise of the power, and when Regulation 47 authorised him to delegate the power to any person, it authorised him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they were also duties. Accordingly, the detention order made by the Provincial Commissioner was held valid. A case where a similar point arose is also to be found in *Hazrat Syed Shah Mastershid Ali Al Quadari Vs. The Commissioner of Wakfs, West Bengal*, where the Supreme Court approved the observations made by Lord Denning in *Mungoni's case* 1960 AC 336 and observed that where powers and duties were interconnected and it was not possible to separate one from the other in such wise that powers might be delegated while duties were retained and vice versa, the delegation of powers took with it the duties.

7. As already stated, Sub-section (2) of Section 40 empowers the State Government to direct that any power or duty which the Act or the rules confer or impose on the State Government shall be exercised or discharged by any officer or authority specified in an order made by such State Government. The State Government, therefore, was entitled and had the authority to pass the aforesaid order dated August 28, 1964 directing therein the District Magistrates under the State of Gujarat to exercise the powers conferred upon the State Government under Rule 30 within their respective jurisdictions. That position is not disputed. It is no doubt true that under Rule 30, the power of detention can be exercised only if the condition precedent as to satisfaction is complied with. Is it then possible to say, as was sought to be argued by Mr. Amin, that the order dated August 28, 1964 merely directs the District Magistrates to exercise the power of detention but does not direct them to comply with the condition precedent as to satisfaction? In our view there can be no doubt that the power of detention and the duty of satisfaction are so interlinked with each other that it is impossible to divorce one from the other. Therefore, the power conferred under the order of August 28, 1964 must be said to carry with it the duty of satisfaction which constitutes a limitation or a condition precedent to the exercise of the power. If, therefore, the power it directed to be exercised by the District Magistrates, that power must carry along with it the concomitant duty of satisfaction. That being the position, it is not possible to say that because the order dated August 28, 1964 does not expressly direct the District Magistrates to comply with the duty of satisfaction, no such duty was carried along with the power conferred thereunder or that therefore the District Magistrate, Kaira, was not competent to pass the impugned order or that the impugned order is for that reason invalid. The contention raised by Mr. Amin, therefore, has to be rejected.

8. The next contention urged by Mr. Amin was that the impugned order is invalid as it was passed mala fide. What Mr. Amin sought to urge was that the petitioner had excited considerable animosity in certain influential circles Kapadvanj, namely, the senior members of the Bar at that place who, according to the petitioner, were bent upon persecuting him. Mr. Amin contended that if we were

to take into consideration the background in which the impugned order was passed, it would be clear that the order was passed not because the District Magistrate was satisfied that it was necessary to pass such an order for the purpose of preventing the petitioner from acting in any manner prejudicial to the maintenance of public order and public safety but that it was passed for extraneous reasons, namely, the enmity which existed between the petitioner and the said Mahamadmiya and others and that the District Magistrate allowed himself to be Influenced by the several proceedings which were taken against the petitioner prior to December 3, 1964. The contention urged by Mr. Amin really comes to this that the District Magistrate look into consideration, (1) the suit filed by the petitioner for a declaration that the order passed by the learned District Judge was Invalid, and (2) the externment proceedings which were initiated against the petitioner by the Sub Divisional Magistrate, Nadiad, Paragraph 18 of the petition, where the contention of mala fide has been taken, merely avers that from the history of proceedings taken against the petitioner it was clear that the impugned order had nothing whatever to do with the defence of India or with the question of the public order or public safety and that the impugned order was passed as a result of the aforesaid proceedings having been instituted against the petitioner. It must, however, be borne in mind that there is no allegation in paragraph 18 or in any other part of the petition to the effect that the respondent acted as a result of any influence having been borne upon him by the persons alleged to be influential persons at Kapadvanj or at Nadiad, nor is there any allegation that there was any connection between such persons and the respondent or between the respondent and the proceedings under which the petitioner was declared to be a tout and externment proceedings were taken against him. There does not also appear to be any justification for any inference that the District Magistrate allowed himself to be weighed by stay of the proceedings instituted against the petitioner. It is obvious that so far as the petitioner's suit is concerned, the District Magistrate had had nothing to do either with the suit or with any of the contentions raised therein, and so far as the externment proceedings are concerned, it was the Sub-Divisional Magistrate working under the District Magistrate who quashed the show cause notice issued against the petitioner under the provisions of the Police Act. The show cause notice thus having been quashed by his own subordinate officer, there would be no warrant for drawing an inference that those proceedings could possibly have influenced the District Magistrate in arriving at the necessary satisfaction under Rule 30 or in passing the impugned order. As held by the High Court of Patna in *Kamla Kant Azad Vs. Emperor*, , the presumption is that in exercising the power of detention (under a rule similar to the one before us), the authority had acted regularly, i.e. that before making any such order he had satisfied himself on the materials placed before him that it was necessary to detain the individual named in the order with a view to preventing him from acting in a manner prejudicial to the public order or public safety. Such a presumption, no doubt, is a rebuttable presumption. But if the petitioner desires to rebut such a presumption. the onus is upon him to show that the order of detention made against him, although on

its face it appears to be a valid order, is not in fact what it purports to be and in consequence, his detention is unlawful. The onus, therefore, would be upon the petitioner to show that in point of fact the order was not a valid order, i.e. in exercising the power which he had, the detaining authority had not in law acted bona fide. In paragraph 12 of the affidavit in reply, the district Magistrate has specifically stated that the order was not passed by him on the ground that the petitioner was declared a tout or on any of the grounds mentioned in the show cause notice in the aforesaid externment proceedings find that the grounds upon which he had arrived at the necessary satisfaction were other than those grounds and which he considered to be prejudicial to the maintenance of public order and public safety and that the allegation as to mala fides was, therefore, without any foundation. There is no reason, nor has any been shown by Mr. Amin, for us to reject these averments in the affidavit, nor has Mr. Amin been able to point out to us any reliable material from which it would be possible for us to draw any inference against the District Magistrate of his having acted in a mala fide manner. As already pointed out, the District Magistrate had had nothing to do either with the petitioner's suit or with the externment proceedings initiated against him, nor is there any material to show that any of the allegedly influential persons had approached or influenced the District Magistrate before he passed the impugned order. That being the position, it is impossible for us to hold that the action taken by the District Magistrate was mala fide or that the impugned order passed by him was in any way invalid on the grounds urged by Mr. Amin. The petition, therefore, fails and must be dismissed. Rule discharged with costs.