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**(1953) 02 GAU CK 0006**  
**In the Gauhati High Court**

Khagendra Nath Barbora

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision :** 24-02-1953

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 79

**Citation :** AIR 1954 Guw 62 : (1954) CriLJ 381

**Hon'ble Judges :** Ram Labhaya, Acting C.J.;Deka, J

**Bench :** Division Bench

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**Judgement**

Ram Labhaya, Ag. C.J.

1. The petitioner in this case was found guilty and convicted u/s 2(8), Assam Maintenance of Public Order Act, 1947 as amended. He was sentenced to rigorous imprisonment for four months and was also ordered to pay a fine of Rs. 100/-, On appeal to the Sessions Judge, U. A. D. the conviction was maintained but the unserved part of the sentence of imprisonment was remitted. The sentence of fine was allowed to stand. He has assailed the validity of the order by a revision petition to this Court.

2. The conviction has been recorded u/s 2(8), Assam Maintenance of Public Order Act but it is agreed that this is due to a clerical mistake. The conviction was meant to be u/s 2(7) of the same Act.

3. The facts leading to this petition are as follows : On 23-10-1951 an order was passed by the District Magistrate of Sibsagar in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order u/s 2(1), Clauses (b), (c), (d), (e) and (f) directing him to remain and reside in village Borahibari, P. S. Amguri, district Sibsagar and not to go outside the limits of the village without the written permission of the District Magistrate, Sibsagar. There were other conditions of the order. The condition with, which we are concerned at this stage is No. (5) which required the petitioner to report in person to the officer in charge of the Amguri P. S. every monday between the

hours of 10 a. m. to 4 p. m. The petitioner admittedly failed to report in accordance with the requirements of this clause and was prosecuted for the contravention of the order of the District Magistrate of Sibsagar dated 23-10-1951.

4. In the Courts below the validity not only of the order but of the Act under which the order was passed was challenged. At this stage the learned Counsel for the petitioner has pressed three points namely (1) that by reason of their failure to produce the Deputy Commissioner of Sitasagar in order to establish the validity of the order, the contravention of which is the subject-matter of the offence, the prosecution have omitted to establish an important ingredient of the offence, (2) that "mens rea" did not exist and (3) that the facts did not disclose an offence as the case was covered by Section 79, Penal Code.

5. It is not necessary for us to decide the last two points as in our view the case can be disposed of on the basis of the view that we take of the first contention.

6. Clause 7 of Section 2 under which the petitioner may be deemed to have been convicted punishes contraventions of any order made u/s 2 other than an order of the nature referred to in Clause (b) of Sub-section (6). u/s 2, Clause (1) the Provincial Government or a District Magistrate if authorised u/s 2(2) may pass an order u/s 2 with respect to any particular person if he is satisfied that it is necessary to make an order in order to prevent him from acting in any manner prejudicial to public safety. Mr. Barua, the learned Counsel for the petitioner points out that even though it is the subjective satisfaction of the authority acting u/s 2 that forms the foundation of the order and even though when such satisfaction has been expressed, where a contravention of any such order is made punishable, before the offence can be said to have been proved, the validity of the order has to be established. He relies on - Emperor Vs. Abdul Majid Abdul Aziz, and - Emperor Vs. Bhiku Ramchandra Shinde, , in support of his contention.

In the former case the order was passed under the Bombay Public Security Measures Act. The accused was charged with the contravention of an order made u/s 2(1) (b). The validity of the order was challenged. It was held that mere tendering of the order by the prosecution was not sufficient. It was necessary for the prosecution to have called in evidence the police Commissioner who passed the order and that he should have made the statement that he was satisfied that the order had to be made to prevent the accused from acting in a prejudicial manner. The learned C. J. who delivered judgment observed as follows:

Although the order to be made is an executive order, the determination that it is a valid order is a judicial determination, and for the purpose of a judicial determination all the principles underlying the Evidence Act and all principles underlying criminal jurisprudence must be complied with.

In his view it was not sufficient for the prosecution where they were charging an accused with the contravention of an order made under the Bombay Public

Security Measures Act (6 of 1947) and where the validity of the order was challenged by the accused merely to tender the order. What would be required of the prosecution in such a case was described in the following terms:

It would be incumbent on the prosecution to call in evidence the authority that made the order, whether he is the Commissioner of Police or any other police officer authorised to make such an order. The Police Commissioner in tendering the order will have to state that materials were placed before him, that he applied his mind to those materials and that on a careful consideration of those materials he was satisfied that the accused was acting in a prejudicial manner, and having been satisfied he made the order which he was producing. If the evidence of the Commissioner of Police is not effectively challenged lay the accused, then on this evidence it would be open to the Court to be satisfied that the order was properly made and the condition precedent laid down by the Legislature was complied with.

But it would be open to the accused, in cross-examination of the Commissioner of Police, to challenge the order on the ground that it was made arbitrarily, capriciously or mala fide, and the Commissioner of Police would have to repel that charge if such a charge was made in cross-examination. It would also be open to counsel for the accused to suggest to the Commissioner of Police that in making the order he had taken into consideration materials and factors which were foreign or extraneous to the scope and ambit of the Public Security Measures Act, or, in other words, that he had permitted his mind to be influenced by considerations which were outside the scope of the statute. If such a suggestion is made and some reasonable grounds are adduced in support of it, it may be that in order to satisfy the Court that he had not taken anything into consideration which was outside the scope and ambit of the Act, it would be necessary for the Police Commissioner to state the general nature of the grounds on which he based his conclusion that the accused was acting in a prejudicial manner.

It is perfectly true that it is not incumbent upon the detaining authority to disclose the; materials to the Court or to state the sources of information on which he came to a particular conclusion. But there is no legislative bar against the Police Commissioner stating the grounds which led him to be satisfied that the accused was acting in a prejudicial manner, and as we have said before it may in a particular case become necessary for the Commissioner of Police under cross-examination to disclose to the Court generally what were the grounds which led him to be satisfied and to make a particular order. It would be necessary to disclose these grounds in order to satisfy the Court that his mind was uninfluenced by any foreign or extraneous matter.

This decision was followed in - Emperor Vs. Bhiku Ramchandra Shinde, The Judges constituting the Division Bench in this case also were the same as in - Emperor Vs. Abdul Majid Abdul Aziz, In this case the Advocate General contended that it was not incumbent upon the detaining authority in every case

to step into the box and prove that it was satisfied that materials existed which led him to make the order. According to him it was only when the order was challenged on a particular ground which would make it necessary for such evidence to be led that it would be incumbent upon the prosecution to call the detaining authority. The Advocate General pointed out that nowhere in his defence had the accused suggested that the detaining authority made the order "mala fide" or that extraneous considerations weighed with the detaining authority in making the order. It was also contended that a presumption should be drawn "ex facie" that the order was validly made. These contentions were repelled & it was held that the burden is upon the prosecution to establish every ingredient which goes to constitute the offence, and one of the most important ingredients is that the detaining authority was satisfied as to the matters set out in Section 2(1) before the order was made, and that it was not sufficient to tender the order which states that the detaining authority was satisfied.

7. The language used in the Bombay Public Security Measures Act is identical with the language used in the relevant provisions of the Assam Maintenance of Public Order Act. The Bombay cases therefore are not distinguishable. The learned Advocate has not made any attempt to distinguish them. He has merely contended that considering that orders u/s 2 have to be made on the subjective satisfaction of the authorities competent to pass the order under the section, the orders are not justiciable and therefore the mere tendering of the order by any official should meet the requirements of the case. This contention conflicts with the view taken in the Bombay cases and is obviously not sound.

It is true that if the authority competent to act u/s 2, Assam Maintenance of Public Order Act, 1947 has material on which it feels satisfied that an order is necessary against any person under that section with a view to preventing him from acting in a manner prejudicial to public order, it would not be open to the Court to hold that the material on which he acted was not adequate or that it was not sufficient for satisfaction or it was not sufficient to form a valid basis of the order. The foundation Of the order is the satisfaction of the authority , competent to pass the order. But it is always open to an accused when he is charged with the contravention of an order u/s 2 to show that the order was made "mala fide" or that it was outside the purview of that Act or even that it was made on extraneous considerations. It cannot be held that the order is wholly unjusticiable and all that the prosecution has to establish is the breach and not the validity of the order when both the validity and the breach of the order are the ingredients which go to constitute the offence.

We are in respectful agreement with that view taken by the Bombay High Court in the above two cases. Even in respect of orders under the Preventive Detention Act it is open to the person detained to show in "habeas corpus" petitions that the orders have been made "mala fide" or on extraneous considerations. In a prosecution where the contravention of an order constitutes the offence, the validity of the order does become ingredient of the offence which the prosecution

has to prove. The validity can be established by examining the officer who made the order. It is only then that the accused can have an opportunity of showing that the order was on extraneous consideration, was made "mala fide" or was outside the ambit or provisions of the Act.

The prosecution therefore would be under a compelling necessity to examine the officer passing the order in order to provide the accused with reasonable opportunity of showing that the order was such that its contravention could not be an offence. Without the examination of the officer passing the order in the manner laid down in - Emperor Vs. Abdul Majid Abdul Aziz, an important ingredient of the offence could not have been established. That officer, in this case the Deputy Commissioner of Sibsagar, has not been examined. The conviction therefore has to be quashed on this technical ground. The petition is allowed and the petitioner acquitted. Fine if paid shall be refunded. The Rule is made absolute.

Deka, J.

8. I agree.