

(1972) 12 KL CK 0015
In the High Court Of Kerala
Case No : O.P. No. 2737 of 1972

Kunnikkal Narayanan

APPELLANT

Vs

The State of Kerala and Another

RESPONDENT

Date of Decision : 14-12-1972

Acts Referred:

Constitution of India, 1950 — Article 19(1), 245
Maintenance of Internal Security Act, 1971 — Section 5

Citation : AIR 1973 Ker 97 : (1972) CriLJ 1637

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J; P. Govindan Nair, J; K. Sadasivan, J

Bench : Full Bench

Advocate : M.P. Menon, for the Appellant; Govt. Pleader, for the Respondent

Judgement

Govindan Nair, J.—The petitioner. Kunnikkal Narayanan, has been detained under the Maintenance of internal Security Act, 1971, for short, the Act. He has prayed in this petition as amended by order on C.M.P. No, 7630 of 1972 and by order on C.M.P. No. 14154 of 1972 for the following reliefs :--

- (1) for a declaration that Section 5(a) of the Act is illegal and unconstitutional,
- (2) for a declaration that part (b) in paragraph 19 (1) of the Kerala Security Prisoners" Order is illegal.
- (3) that the Government Order dated 23-12-1971 marked as Ext. R1 and produced along with the counter-affidavit made on behalf of the State on 19-12-1972 in answer to C.M.P. No. 7630 of 1972 be quashed and
- (4) that a direction be issued that the three books; (1) Four Essays on Philosophy by Mao Tse-Tung, (2) Mao Papers by Jerome Ch'en and (3) Mao Tse-Tung by Stuart Sehram, be delivered to the petitioner.

2. The three books referred to above were sent to the petitioner but he was not permitted to receive them on the ground that the books fell within the term "Mao literature" in Ext. R1, an order passed by the Government under part (b) of Sub-

Clause (1) of Clause 19 of the Kerala Security Prisoners' Order, 1971, hereinafter referred to as the Order. The relevant portion of Ext. RI is in these terms :--

"It is hereby ordered under Clause 19 of the said Order that it will not be permissible for Security Prisoners to receive or purchase Mao literature."

And Clause 19 of the Order provides :

"19. Books, Newspapers and periodicals.-

(1) Security Prisoners may receive such books, newspapers and periodicals as are not (a) prescribed by the Government; or (b) considered by the Government as not permissible.

(2) In addition to books, newspapers and periodicals which may be received through post or otherwise Security Prisoners who receive funds from outside may be allowed to purchase from such funds, books, newspapers and periodicals coming within Sub-clause (1) above."

3. The Order was passed by the State Government u/s 5 of the Act, the relevant part of which may also be read at this stage:

"5. Power to regulate place and conditions of detention.-- Every person in respect of whom a detention order has been made shall be liable-

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special orders, specify; and

(b) ...

4. The petitioner challenged the action of the State in refusing to deliver the books Nos. (1) and (2) mentioned in paragraph 2 above, in O. P. No. 1167 of 1972 on the grounds, that those books were not "Mao literature" and that there was discrimination in not supplying the books to the petitioner. This Court held that the books fell within the expression "Mao literature" and further held that there had been no discrimination and dismissed the petition. There was no challenge in that petition of the validity of the Act or the Order or for that matter Ext. RI.

5. It was contended by counsel on behalf of the petitioner that u/s 5(a) Government can frame any condition to canalise the power of the Government and so the section is bad for excessive and impermissible delegation. It was further urged that even if Section 5 is held to be controlled by the purposes envisaged by the Act as disclosed by the preamble to the Act and the provisions in it and its scheme, part (b) of Sub-clause (1) of Clause 19 of the Order is bad in that it has conferred unlimited power on the Government and that it has gone beyond the Act,

6. The Act, it is clear from the preamble, has been passed to provide for detention in cases where such detention was necessary for the purpose of

maintenance of internal security and matters connected therewith. Section 3 clearly indicates in what circumstances an order directing a person to be detained can be passed. Before such an order could be passed the Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or the security of the State or the maintenance of public order or the maintenance of supplies and services essential to the community, it is necessary to detain that person. The conditions that can be imposed u/s 5 must be for achieving the purposes mentioned in the preamble to the Act and in Section 3 thereof. So read, there is no ambiguity in Section 5 and enough guidelines are furnished by the Act itself. We therefore negative the contention that Section 5(a) of the Act is bad for excessive delegation of legislative power.

7. Sub-Clause (1) of Clause 19 of the Order must also be read as a part of the Act and the power given to the Government under part (b) of Sub-clause (1) of that clause is controlled by the provisions in the Act and the power has to be exercised for the purpose of achieving what is aimed at by the Act. So understood and so read, part (b) of Sub-clause (1) of Clause 19 of the Order has not conferred unlimited power on the Government and the clause is not ultra vires the Act.

8. Incitement to violence with a view to overthrow Governments established by law will be against the security of the State and against the maintenance of public order. So an order passed in purported exercise of the power u/s 5 can contain provisions with a view to prevent actions that may impair security of the State or which may endanger public order. Reading of such literature as is likely to inflame persons may lead to acts of violence or resort to violence for the purpose of overthrowing established Governments or creating public disorder. Refusing permission to read such literature is a legitimate condition that can be imposed u/s 5 of the Act. Prevention of access to such books or literature can therefore be provided by an order u/s 5. And that is what has been done by Clause 19 (1) of the Order.

9. It was next contended that Clause 19 (1) infringed the fundamental rights guaranteed to the petitioner under Article 19(1)(a) of the Constitution. It is said that freedom of speech and expression guaranteed to a citizen by Article 19(1) (a) includes the freedom to acquire knowledge, to peruse books and periodicals and read any type of literature and restrictions relating to such a right which can be said to be reasonable restrictions are only those introduced in the interests of the sovereignty and integrity of India, the security of the State, public order and such other matters as are provided in Article 19(2) of the Constitution. It was urged that the refusal of permission to receive the three books mentioned above is an unreasonable restriction and is beyond the scope of the restrictions envisaged by Article 19(2) of the Constitution. Counsel on behalf of the State invited OUT attention to a passage from the judgment of Das, J. in A.K. Gopalan

Vs. The State of Madras, at page 108 reading as follows;--

"If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can, within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his "own inclination may direct", reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently attached to the person."

On the basis of these observations, it was contended that a detenu who had no freedom of movement during the time he was under detention could not have the fundamental rights of freedom of speech and expression.

The above passage from the judgment in A. K. Gopalan's case was noticed by a later decision of the Supreme Court in The State of Maharashtra v. Prabhakar Pandurang reported in State of Maharashtra Vs. Prabhakar Pandurang Sangzgiri and Another, and it was said that the view expressed by Das, J., "is not the last word on the subject" and was only one of the five views expressed by the Judges in A.K. Gopalan Vs. The State of Madras, .

10. It is therefore not possible to proceed on the basis that the Supreme Court has ruled that a detenu will not have the fundamental rights under Article 19(1) (a) of the Constitution. Detention, no doubt, makes it impossible for the person detained by the very nature of the act of detention, to exercise the freedoms guaranteed by Sub-clauses (b), (c), (d), (e) and (g) of Article 19(1) of the Constitution. This is not a direct curtailment of these freedoms but is a necessary and incidental consequence of the act of detention. However there is no such necessary consequence as far as the freedom under Article 19(1)(a) is concerned. A person under detention can continue to give expression to his views, indulge in writing books, in reading books and in learning subjects and generally in acquiring knowledge. Such freedom of course can also be restricted in the interest of the security of the State and public order envisaged by the Act. Such restriction will also be valid under Article 19(2) of the Constitution as well. So even if the fundamental right under Article 19(1)(a) continued to exist after detention its restriction cannot be said to be against Article 19 of the Constitution.

11. If the books are of such a nature as we have already adverted to, conducive to instigate people to acts of violence to overthrow established Governments and to disturb public order and peace, they can be denied to a detenu. The very purpose of detention will be destroyed by allowing security prisoners to train themselves to a course of action which would overthrow established Governments or result in creating instruments that will disturb peace and public order of the State. So power can be given to Government to prevent access to such books. That is the power conferred by part (b) of Sub-clause (1) of Clause 19 of the Order. That power can be exercised only to prevent access to books to a security prisoner for the purposes of achieving the ends envisaged by the Act,

namely, security of the State and maintenance of public order. We therefore negative the contention that Clause 19 of the Order is violative of Article 19 of the Constitution of India.

12. We are now left with the question as to whether Ext. R1 order passed by the Government in purported exercise of the power under part (b) of Sub-clause (1) of Clause 19 of the Order is valid. We have already read the relevant part of Ext. R1. The order only says that security prisoners are not permitted to receive or purchase "Mao literature". This Court held that two of the three books denied to the petitioner came within the expression "Mao literature."

No passages from these books had been brought to our notice in the course of the arguments to show that a reading of these books would result in endangering security of the State and prejudicially affect public order. We consider that any order passed by the Government preventing access to books must necessarily be for the purpose of achieving the objects envisaged by the Act. There must also be an indication in the order passed by the Government that this was the purpose sought to be achieved. Prevention of access to "Mao literature", we consider is too wide and ambiguous a term for defining the purposes or objects sought to be achieved by such orders. The order Ext. R-1 has resulted in the denial of the three books mentioned above to the petitioner. This however did not prevent three other books; (1) The State and Revolution -- V. I. Lenin, (2) Lenin on War and Peace and (3) National Liberation War in Viet Nam -- By General Vo Nguyen Giap, being made available to the petitioner, to his daughter and his wife respectively. The statement of the petitioner that these books were so made available was not disputed before us by counsel for the State. These three books were produced before us by the petitioner and a number of passages were read from these books. We shall not refer to all of them but it will be appropriate to read a few. In the book The State and Revolution, it is said "Democracy is an organisation for use of violence by one class against another", and that "The State machine must be smashed". Similarly in Lenin on War and Peace, there is the passage "An oppressed class which hesitates to use arms deserves to be treated as slaves" and further that "Even women and children should take up arms, following the example of Paris Commune, to overthrow capitalist society". In the National Liberation War in Viet Nam. there are passages such as "Armed struggle and political action should go together", "To win power, combine military action of the people with mass uprisings".

13. If such literature is conducive to creating a frame of mind which will express itself by resort to violence for the purpose of achieving political ends, or overthrowing established Governments or by disrupting public order, one would have felt that the three books that we have referred to now are better kept out of the reach of security prisoners. Yet they have been made available and the order Ext. R-1 did not prevent the receipt of those books by the security prisoners, Ext. R-1 does not therefore serve the purpose sought to be achieved. The books that do not contain or contain much less inflammatory materials than

those contained in these three books are denied to security prisoners whereas inflammatory materials as pointed out above have been made available to the petitioners and others. This we think, is the result of using such wide and ambiguous words "Mao literature" in Exhibit R-1, and such an order does not achieve as has been shown above the purpose that is sought to be achieved by an order of Government under Clause 19 of the Order and u/s 5 of the Act. We are therefore constrained to set aside Ext. R-I and allow this petition to that extent. We do so.

14. It need hardly be said that it will be open to the Government to pass appropriate fresh orders in this matter in the light of what we have stated in this judgment. In fact, it is essential that the matter is dealt with expeditiously and appropriate orders passed. It is for the Government to consider whether there should be an appropriate authority conferred with power to decide which literature should be allowed and which prohibited by applying the guidelines formulated and principles laid down by the Government. In the meantime, we direct the State Government to consider the question as to whether the petitioner can be permitted to receive the three books that we have mentioned in paragraph 1 above and pass necessary orders. This too must be done expeditiously.

15. This petition is ordered on the above terms. There will be no order as to costs.