
(1990) 01 AHC CK 0049
In the Allahabad High Court
Case No : Writ Petition No. 10804 of 1989

Maharshi Avadhesh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 15-01-1990

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 3, 3(1)
Constitution of India, 1950 — Article 124, 124(4), 14, 226, 227

Citation : AIR 1991 All 52

Hon'ble Judges : V. Kumar, J; S.C. Mathur, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.C. Mathur, J.—The petitioner Maharshi Avadhesh also known as A. B. Shorewala, who has described himself as Founder-President of Rashtriya Party, has filed this petition seeking issuance of certain directions to the Prime Minister of India, the Union Home Minister, the Union of India and "others concerned" in respect of the matters specified in the prayer clause. At the time of hearing the petitioner, who argued the case in person, elaborated the term "others concerned" by submitting that notices of the petition may be issued also to Hon'ble the Chief Justice of India and to a sitting Judge of this Court who till recently was a Judge of the High Court of Jammu and Kashmir. The directions sought by the petitioner run into 19 clauses. In these clauses the petitioner seeks directions to hold inquiry or investigation into certain matters, directions to some holding high public offices to resign from the said offices, and directions to the concerned authorities to dismiss certain public servants and constitutional authorities from the posts or offices they are presently holding. The prayer extends even to directions to amend the Constitution and take back the lost territory of the country from the neighbouring country which is forcibly occupying the same.

2. The immediate provocation for the present petition appears to be the alleged

abduction of Dr. Rubaiya Syed daughter of Sri Mufti Mohammad Syed, Union Home Minister, by terrorists and her subsequent release in exchange of five hard-core terrorists from police custody. The petitioner does not appear to be aggrieved by the release of Dr. Rubaiya Syed as he is by the release of alleged terrorists and the manner in which the former's release has been obtained. The facts stated by the petitioner are based on reports published in newspapers, extracts whereof have been filed as Annexures to the petition. The petitioner claims to have filed the petition in public interest. The public interest which the petition is claimed to serve is preservation of Nation's sovereignty, security, integrity, dignity and honour, credibility of public services and impartiality, independence and credibility of country's judiciary.

3. As is well known the abduction of Dr. Rubaiya took place in the State of Jammu and Kashmir. The petitioner refers to the accession of that State to the Indian Union and the privileged position it was given in the Constitution which according to the petitioner has resulted in chaotic conditions developing in the State over the years and culminated in the abduction of Dr. Rubaiya Syed and release of hard-core terrorists.

4. Before independence the State of Jammu and Kashmir was an independent State with Maharaja Hari Singh as its ruling monarch. The petitioner states that soon after independence the State was invaded by the neighbouring country Pakistan which resulted in Maharaja Hari Singh rushing to Delhi seeking accession of his State to the Indian dominion as the State of the country at that time was. According to the petitioner the accession could have been accepted unconditionally but the then Prime Minister of the country unnecessarily put conditions in the accession and subsequently a privileged status was given to the State by incorporating Art. 370 in the Constitution. The petitioner describes this act as anti-national anti-people and treacherous. According to him our neighbouring country Pakistan has taken advantage of this situation and has smuggled men, arms and ammunition in the State through which terrorism has been created. The Government had arrested five terrorists, namely, Sher Khan, Hamid Sheikh, Noor Mohammed Kalwal, Mohammed Altaf Butt and Javed Ahmad Jargar. While these five terrorists were in custody on 8-12-1989, the daughter of the Union Home Minister was abducted by members of the Kashmir Liberation Front. Thereafter, it is claimed, there were negotiations between the representatives of the Government and the hard-core terrorists who demanded release of the aforesaid five terrorists as a condition for the release of Dr. Rubaiya. In this negotiation a Judge of this Court is also claimed to have participated. According to the petitioner instead of adopting a tough line the authorities surrendered meekly before the forces of terrorism and released the five hard-core terrorists in order to obtain release of Dr. Rubaiya Syed. The petitioner asserts that ever since the release of aforesaid five terrorists subversive activities have increased in the State of Jammu and Kashmir. The petitioner points out to the sacrifices made in the past by great Indians and he decries the manner in which release of Dr. Rubaiya was obtained. In this

connection he refers to Maharana Pratap Singh, Martyr Bhagat Singh and Rani of Jhansi. According to the petitioner the entire episode starting from abduction of Dr. Rubaiya and her release has brought ignominy to the country and to its leadership and also to the judiciary of the country. This is the background for the reliefs claimed by the petitioner.

5. At the very outset we may point out that the matter raised by the petitioner is either political or administrative or of propriety. It hardly falls within the jurisdiction of a court of law.

6. One of the reliefs claimed by the petitioner is that the services of the Judge of this Court who participated in negotiations with the terrorists may be dispensed with. A Judge of the High Court is appointed under Art. 217 of the Constitution by the President. He holds a constitutional office and he can be removed from office only in accordance with the procedure prescribed in the Constitution. The procedure for removal is prescribed in clause (4) of Art. 124 of the Constitution. Under that clause of the Art. 124 the President can pass an order removing a Judge of the High Court or of the Supreme Court by an order passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Even if we assume that the role of the Judge in negotiating with the terrorists amounts to misbehaviour within the meaning of cl. (4) of Art. 124 we cannot issue a direction to the President to dismiss him from service. This Court cannot also issue a mandamus to pass a resolution of the nature referred to in cl. (4). In the circumstances, the relief prayed for by the petitioner in respect of the Judge of this Court cannot be granted.

7. The petitioner strenuously submitted that if members of the judiciary will involve themselves in negotiations with criminals like the terrorists the credibility of the judiciary will be eroded and the faith of the people in the judicial system of the country will be shaken. We can only notice the argument of the petitioner but in view of the constitutional status given to a Judge of the High Court we cannot do anything more. The Constitution deliberately does not prescribe any code of conduct for the Judges of the Supreme Court and the High Court and other constitutional appointees in the hope that these constitutional appointees shall not behave in a manner that will bring down their own stature or the stature of the institution to which they belong. Such constitutional authorities are indeed required to act in a manner which will enhance their own stature and the stature of the institution. It is indeed of paramount importance that the faith of the people in the judiciary should not be shaken. So long as the faith of the people in the judicial system of the country is not shaken people will continue to approach courts for redress of their grievances. Once the credibility of the judiciary is lost and the people lose faith in judiciary they will come on the streets to settle their disputes. This is all that we can observe in respect of the anxiety expressed by

the petitioner.

8. The next prayer of the petitioner is for a direction to remove Shri Mufti Mohammad Syed from the office of Home Minister. A minister is appointed by the President on the advice of the Prime Minister. Under clause (2) of Art. 75 he holds office during the pleasure of the President. There is no constitutional guarantee about the tenure of his office like the one provided for under Art. 124(4) of the Constitution for a Judge of the High Court and the Supreme Court and, therefore, it may be assumed that a Minister can be removed from office by the President. However, the pleasure of dismissing the Minister has to be of the President and not of this Court. The Constitution does not prescribe the conditions under which the President may exercise the pleasure of removing a Minister from office. The power to remove a Minister from office is entirely discretionary and is not regulated by any constitutional or statutory provision. This Court under Art. 226 of the Constitution issue a writ of mandamus to command the executive authority to act in accordance with statutory provisions. This Court does not issue a writ of mandamus or direction of like nature to regulate exercise of mere discretion. Accordingly, writ of the nature prayed for by the petitioner in respect of Sri Mufti Mohammad Syed also cannot be issued.

9. The next constitutional functionary whom the petitioner wants to be ousted from office is the country's Prime Minister Sri Vishwa Nath Pratap Singh. The prayer of the petitioner is that he may be directed to resign from his office. There is no constitutional or statutory provision prescribing the circumstances in which the country's Prime Minister is obliged to resign. To resign or not to resign is again a matter of discretion resting entirely with the holder of the office. Accordingly this Court cannot issue a writ, direction or order in the nature of mandamus requiring the Prime Minister to resign from his office.

10. The petitioner then wants certain public servants who have played dubious role in maintenance of law and order or in the release of terrorists, to be dismissed from services. Public servants have the protection of Article 311 of the Constitution. Under Art. 309 of the Constitution the appropriate legislature is competent to regulate recruitment and conditions of service of persons appointed to public services and posted in connection with the Union or of any State. Under this provision the appropriate legislature is competent to enact laws relating to tenure of office of public servants. Under the proviso to the said Article the President and the Governor are competent to frame rules on the same subject. Thus the services of the public servants are governed by constitutional and statutory provisions. Unless there is a breach of statutory provisions a public servant cannot be dismissed from service. Even when breach has been committed of a statutory provision the procedure prescribed in the Constitution (Art. 311) and in the Statute will have to be followed. It is for the employer of these public servants to decide whether any one of the them has committed any misconduct warranting dismissal or removal from service. Removal or dismissal from service is the prerogative of the employer. Even if an employee has

committed misconduct it is for the employer to decide whether that public servant will be continued in service or he will be removed therefrom. This Court cannot therefore, by issuing a writ of mandamus, or order or direction of like nature command the executive to dismiss any public servant.

11. The next prayer of the petitioner is to command the concerned authorities to hold inquiry or investigation into the lawlessness prevailing in the State of Jammu & Kashmir and to take appropriate action against the persons found responsible for that lawlessness. A statutory provision regarding holding of inquiries is contained in the Commissions of Enquiry Act, 1952 (LX of 1952). Section 3(1) of the Act reads as follows:--

"3. Appointment of Commission --(1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the people or, as the case may be, the legislative Assembly of the State, by notification, in the official Gazette, appoint a commission of inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly;*

12. Under the above provision the right to appoint a Commission of Inquiry vests in the appropriate Government. There are two situations in which a Commission may be appointed. The first is when the Government is of the opinion that it is necessary so to do and the second is when a resolution in that behalf is passed by the House of the people or the Legislative Assembly, as the case may be. In the first case the appointment of a Commission is discretionary and in the second case it is obligatory. Once a resolution is adopted by the Legislature the Government has no option but to appoint a Commission of Inquiry. In other cases the Government is not bound to appoint a Commission of Inquiry. In other words, in the first situation it is entirely discretionary with the Government to appoint a Commission or not to appoint a Commission. This Court cannot control the exercise of discretion by the executive. The opinion of the Government referred to in the above provision is subjective and the petitioner cannot, therefore, ask for a mandamus of compel the Government to appoint a Commission of Inquiry.

13. The next prayer of the petitioner is to command the concerned authorities to abrogate Art. 370 of the Constitution or to extend its benefit to other States also so as to remove the existing discrimination. Discrimination, if any, existing on account of Art. 370 is a constitutional discrimination and no exception can be taken to it. Discrimination is prohibited by Art. 14 of the Constitution but that provision cannot be applied to nullify a discrimination recognised by the Constitution itself. Further, the petitioner's prayer involves amendment of the Constitution. The Constitution provides a procedure for amendment of the Constitution. That amendment can be carried out only by the Parliament exercising constituent power. This court cannot issue a mandamus to a

legislature to frame a particular law. Similarly, this Court cannot command the Parliament to exercise its constituent power of amending the Constitution. For amending the Constitution a Bill will have to be brought before the Parliament and that Bill will have to be passed by the requisite majority prescribed in the Constitution. This Court cannot control the will of the Parliamentarians. If the Parliamentarians do not give the Bill the requisite majority for its passage the Constitution will not be amended. If this Court cannot control the voting pattern of a Bill seeking to amend the Constitution this Court obviously cannot command any authority to abrogate Art. 370 of the Constitution or to extend its benefit to other States also.

14. The petitioner suggests a remedy for bringing about equality between the citizens of India of Kashmiri origin and the rest of the Indian citizens. He suggests that no Kashmiri be allowed to settle down and acquire property in any part of the country outside Kashmir and the properties acquired by such persons outside the State of Jammu and Kashmir be taken over by the State and Kashmiris who have settled in any part of the country outside the State of Jammu and Kashmir be ordered to shift to Kashmir. The petitioner points out that on account of the special constitutional status given to the State of Jammu and Kashmir laws have been enacted by the legislature of that State under which a non-Kashmiri is not entitled to acquire property within that State. Kashmir is an integral part of the country and it is unfortunate that such a discriminatory law has been enacted. But because of the constitutional status given to the State the courts can do nothing in the matter except express regret. However, we do not agree with the drastic remedy suggested by the petitioner for ending discrimination. Article 370 appears in Part XXI of the Constitution which bears the heading "Temporary, Transitional and Special Provisions. "The marginal heading of Art. 370 reads "Temporary provisions with respect to the State of Jammu and Kashmir", From the heading of Part XXI and of the marginal heading of Art. 370 it is apparent that Article 370 is of transitional nature. Obviously this temporary provision has been made as those charged with framing the Constitution felt that complete accession of the people of Jammu and Kashmir with the people of the rest of India will take some time. We can only wish that the time does not prolong unduly as it is of prime importance that a citizen of India living in one corner of the country may have the right to settle down and acquire property in any part of the country. When the time is ripe for doing this is for the political power to decide. As such the issue is not legal but political.

15. It may be pointed out that the State of -Jammu and Kashmir is not the only State in respect of which certain special provisions have been made. Special provisions have been made for certain other States also like the States of Maharashtra, Gujarat, Nagaland, Assam, Manipur, Andhra Pradesh and Sikkim (See Articles 371 : 371A : 371B : 371C : 371D : 371E and 371F) Obviously these special provisions have been made taking into account the peculiar conditions prevailing in those States. The State of Jammu and Kashmir is a border State and has its own peculiarities which obviously compelled the

founding fathers of the Constitution to give that State a special status which is not enjoyed by other States of the country.

16. The petitioner alleges discrimination practised by the State authorities in obtaining release of Dr. Rubaiya Syed from the clutches of the terrorists. The petitioner points out that an Indian Diplomat Sri Raviridra Mahatre had been similarly abducted by the members of the Kashmir Liberation Front who demanded release of terrorists Maqbool as a condition for the release of Sri Mahatre but the Government did not obtain release of Sri Mahatre by releasing Maqbool from custody resulting in the terrorists extinguishing life Sri Mahatre. The petitioner poses the question as to how the administration would have acted if the son, daughter, brother or sister of any other citizen had been similarly abducted for ransom. The petitioner points out that there have been instances when abducted persons were allowed to be murdered without the ransom being paid or the person in detention being released. He goes on to pose the question in respect of the children of the former Prime Minister Sri Rajiv Gandhi. The issue, in our opinion, is entirely administrative and political. It may be that the administration has acted with discrimination but we have no way of bringing about parity in a matter of this nature. One way of bringing about parity is to release other terrorists also who are presently in custody. This will bring about further disaster and accordingly no direction can be issued for releasing the remaining terrorists. In fact, the petitioner too has not, very wisely, made any such prayer. The other way of bringing about parity is to allow the abducted persons to die at the hands of the terrorists. The Courts cannot lend their support in extinguishment of life. We cannot, therefore, command the executive not to rescue any person further from the clutches of the terrorists. The matter is entirely in the discretion of the executive. Accordingly, we are unable to grant any relief to the petitioner on the basis that in obtaining release of Dr. Rubaiya Syed the Administration has practised discrimination.

17. The other directions sought by the petitioner are as follows :--

(i) to direct the authorities to flush out terrorists immediately from the valley of Jammu and Kashmir;

(ii) to direct authorities to ban foreigners from visiting Kashmir valley who go there on various pretences but primarily to establish contact with secessionists forces and to finance them;

(iii) to direct the Union of India and concerned authorities to arrest, prosecute, dismiss and penalise all those connected with the release of five hard-core terrorists in exchange of one individual, namely, Dr. Rubaiya;

(iv) to direct the authorities to ensure that no soft pedalling will be resorted to in obtaining release of any one abducted or kidnapped howsoever high he may be including the Prime Minister himself, and

(v) to direct the authorities to accord equal treatment to daughters of all Indians

and no preferential treatment be given! to daughters of high ups. These are administrative matters and no directions can be issued by this Court. This Court can issue only such directions of which it can supervise compliance. Even we were to issue directions of the nature prayed for by the petitioner it will not be possible for this Court to supervise compliance of the direction. It may also be pointed out that the directions/ reliefs sought by the petitioner are mostly of sweeping nature and are vague and generalised. Accordingly, none of these directions can be issued.

18. A direction is also sought by the petitioner to command the authorities to take back from Pakistan that part of the State of Jammu & Kashmir which that country forcibly occupied. The matter is entirely political and does not fall in the field of law to be entertained by this Court.

19. In view of the above, the petition lacks merit and is hereby dismissed in limine.

20. Petition dismissed.