

(2009) 06 AP CK 0027

In the Andhra Pradesh High Court

Case No : Writ Petition (SR) No. 61225 of 2009

Martinez Montsant Joan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-06-2009

Acts Referred:

Constitution of India, 1950 — Article 10, 21, 226, 25, 5
Foreigners Act, 1946 — Section 14, 16, 3, 3(2)
Registration of Foreigners Act, 1939 — Section 5, 5, 8
Registration of Foreigners Rules, 1992 — Rule 11, 11(2), 12, 12(4), 2

Citation : (2009) 5 ALD 307 : (2009) 5 ALT 120

Hon'ble Judges : Vilas V. Afzulpurkar, J; Ghulam Mohammed, J

Bench : Division Bench

Advocate : Anand Kumar Kapoor, for the Appellant; Penjuri Venugopal, Additional S.C. for C.G. for Respondent No. 1, Public Prosecutor for Respondent No. 2 and G.P. for Home, for the Respondent

Final Decision : Dismissed

Judgement

Ghulam Mohammed, J.—The writ petitioner is Spanish National, holding passport No. X 804029. The petitioner came to India on 19-6-2006 via New Delhi on a student visa valid for a period of five years from 19-6-2006 to 18-6-2011 and got his name registered with Foreign Registration Officer, Gangtok, Sikkim and obtained a residential permit at Sikkim valid till 30-4-2007. The said permit was however, extended up to 30-4-2008. As the petitioner was residing at Sai Kailash Apartments, 7th Floor, Flat No. 701, Puttaparthi, Anantapur District, Andhra Pradesh without informing to the FRO, Anantapur about change of his residence to Puttaparthi from Sikkim and also without extending the residential permit beyond 30-4-2008 and tried to leave India on 1-6-2009 from Bangalore to Bangkok, on the above circumstances, the petitioner was charged with violation of Rules 11 and 12 of the Registration of Foreigners Rules, 1992, and para 7 of the Foreigners Order, 1948 and also u/s 5 of the Registration of Foreigners Act, 1939 and Section 14 of the Foreigners Act, 1946 and thereafter he was arrested

on 4-6-2009 and was sent to judicial custody.

2. Hence, this Writ Petition has been filed seeking direction to the 3rd respondent-Jail Superintendent, Central Prison, Chanchalguda, Hyderabad to release the petitioner by declaring the Rules 11 and 12 of the Registration of Foreigners Rules, 1992 and para 7 of the Foreigners Order, 1949 as illegal, unfair, unjust and without authority of law and unconstitutional being violative of Articles 21, 25 and 51 and also in disregard to International Law and in consequence to quash the Crime No. 58 of 2009 pending before the Puttaparti (U) P.S., Anantapur.

3. Mr. Anand Kumar Kapoor, learned Counsel for the petitioner contended that Rules 11 and 12 of the Registration of Foreigners Rules, 1992 are unconstitutional as they violate Article 21 of the Constitution of India and also they are in derogation of Article 25 of the Constitution of India. Learned Counsel submits that as the petitioner came to India to study and practise "Vajrayana Buddhism" and that he was practising the teachings of "Buddhism" taught by his Gurus, therefore, imposition of the limitation of travel on a Foreigner who is holding valid visa is nothing but an archaic and unreasonable restriction on his freedom to travel within India and abroad, and the same is in clear derogation of "Declaration of Human Rights of Individuals who are not Nationals of the Country in which They Live, 1985, which was adopted by United Nations General Assembly by Resolution 40/144 of 13 December 1985". It is further contended by the learned Counsel for the petitioner that the petitioner who is already charged u/s 5 of the Registration of Foreigners Act, 1939 and the said Act covers the entire gamut and arena with regard to Registration of Foreigners; that by making rule on the same subject of Registration of Foreigner under the Foreigners Act, 1946, the petitioners cannot be double charged for the same alleged offence, as such Section 14 of the Foreigners Act, 1946 cannot be invoked against the petitioner. Learned Counsel for the petitioner further contended that as per the remand report, the petitioner submitted a letter to the FRO, Anantapur and that arrest was caused on his request. When the said request is itself pending, the question of committing of the alleged offences, does not arise as the petitioner's application is stated to be dated 2nd June, 2009, whereas the arrest was effected on 4th June, 2009. That by itself, it is submitted, shows that a crime has been registered even before consideration of the request of the petitioner that such an act by itself reflect that the petitioner's right to liberty is being deprived in an unjust and unfair manner, and the procedure followed for such deprivation is clearly unreasonable in the facts and circumstances of the case. It is also contended by the learned Counsel for the petitioner that with regard to allegation levelled against the petitioner under the provisions of the Foreigners Act, the maximum punishment prescribed is imprisonment for a period of one year and it is a cognizable offence, therefore police has no authority to invoke the impugned proceedings. It is further contended that right to travel abroad is covered under Article 21 of the Constitution of India, as per Ex.P-1 the petitioner was contemplating to leave

India, if that be the case, then not allowing him to leave India by not granting emigration clearance, ipso facto proves that his fundamental right guaranteed under Article 21 of the Constitution of India is brazenly violated and the charges emanating on that count are clearly unconstitutional and as such liable to be quashed and the writ petition deserves to be allowed.

4. On the other hand, learned Public Prosecutor relying on the provisions of the Section 14 of the Foreigners Act, 1946 contended that the petitioner without intimating to the FRO, Anantapur has overstayed in Puttaparthi and tried leave the country without valid immigration clearance and therefore no interference is warranted in this Writ Petition. Learned Government Pleader for Home by drawing our attention to the aims and objects of the Foreigners Act, 1946 and the Registration of Foreigners Act, 1939, submitted that "foreigner" means a person who is not a citizen of India, and that the above Acts which are comprehensive pieces of legislation, confer upon the Government certain powers in respect of the entry of foreigners into India and their departure and that since the petitioner is not having valid permit to move from one part of the India to another and that the petitioner even did not renew his residential permit after expiry of its due date to stay at least in Sikkim and therefore no interference is warranted in this Writ Petition.

5. The issues that fall for consideration in this Writ Petition are as to whether the liberty of the petitioner has been deprived pursuant to the procedure adopted by the authorities and whether the procedure prescribed by the law is fair and just, and not arbitrary?

6. To be precise, in the instant case the petitioner, being foreigner, complains of the deprivation of his personal liberty, pursuant to the detention of the 3rd respondent. According to the respondents, the petitioner, without informing to the FRO, Anantapur about change of his residence to Puttaparthi, Anantapur, Andhra Pradesh from Sikkim and also without extending the residential permit beyond 30-4-2008 is staying at Puttaparthi from November, 2007. It is therefore, expedient to refer to Rule 11 of the Registration of Foreigners Rules, 1992 which reads as follows:

11. Report of absence from address: (1) If at any time a foreigner proposes to be absent from his registered address for a continuous period of eight weeks or more or he is changing his registered address or he is finally departing from India, he shall, before he leaves, inform in person or through an authorized representative or by registered post his Registration Officer of his intention to leave either temporarily or permanently the jurisdiction of the Registration Officer. In case he is returning he should inform the Registration Officer of the date of return and in the case he is moving away, the change of address. Any changes made subsequently should also be intimated to the Registration Officer.

Provided that nothing in this Sub-rule shall apply in the case of any foreigner in respect of whom, in pursuance of the proviso to Sub-rule (3) of Rule 6, the

address of Indian citizen is deemed to be his registered address.

(2) Every foreigner, who stays for a period of more than eight weeks at any place in any district other than the district in which his registered address is situated, shall inform the Registration Officer of that district of his presence.

(3) The information required under Sub-rule (2) may be made in writing and the requirements of the said Sub-rule shall be deemed to have been fulfilled if, prior to his arrival in a district other than that in which his registered address is situated, the foreigner furnishes to the Registration Officer of the said district information of the dates of his proposed arrival in and departure from the said district.

7. Rule 12 of the Registration of Foreigners Rules, 1992 reads as follows:

12. Change in Registered address: A Foreigner shall be deemed to have changed his registered address-

(a) if he departs from India;

(b) if he changes his residence from one place to another place in India;

(c) if having no residence, he leaves his registered address knowing that he is not likely thereafter to return thereto within six months of leaving it; or

(d) in any case to which the first proviso to Sub-rule (3) of Rule 6 applies, if either he or the Indian citizen whose address is deemed to be his registered address applies to the Registration Officer to be absolved from or fails at any time to discharge the obligations laid down upon them by Sub-rule (4) of that rule:

Provided that Clause (c) of this rule shall not apply in any case in which in accordance with the second proviso to Sub-rule (3) of Rule 6 the foreigner's registered address is the office of the Registration Officer of the district in which he first registered upon his arrival in India.

8. According to definition under Rule 2(f) of the Registration of Foreigners Rules, 1992 "registered address" means a foreigner's address in India as reported under Rule 6 and recorded in item 11 of his Certificate of Registration. According to item 11 of the residential permit the petitioner's address was recorded as "Pomra Hotel, East Sikkim, Gangtok". Though the petitioner was staying at Puttaparthi, Anantapur, Andhra Pradesh from November, 2007, change of registered address was not made according to Rule 12 of the above Rules by the petitioner herein, therefore, contention of the petitioner that provisions of Rules 11 and 12 of the Registration of Foreigners Rules, 1992 does not apply merits no consideration.

9. Section 14 of the Foreigners Act, 1946 reads as follows:

Penalty for contravention of provisions of the Act, etc - Whoever-

(a) remains in any area in India for a period exceeding the period for which the visa was issued to him;

(b) does any in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder;

(c) contravenes the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act,

shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of Clause (f) of Sub-section (2) of Section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.

10. Section 16 of the Foreigners Act reads as follows:

Application of other laws not barred: The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Registration of Foreigners Act, 1939 (16 of 1939), the Indian Passport Act, 1920 (34 of 1920), and of any other enactment for the time being in force.

11. Section 14 of the Foreigners Act, 1946, provides inter alia that the foreigners who contravene the provisions of this Act shall be punished with imprisonment for a term which may extend to five years and shall also be liable to pay fine. Section 16 of the Foreigners Act, 1946 also provides that provisions of this Act shall be in addition to, and not in derogation of the provisions of the Registration of Foreigners Act, 1939, the Indian Passport Act, 1920 and of any other enactment for the time being in force. On the other hand, the Registration of Foreigners Act, 1939 provides for the registration of foreigners in India and the aim and object of the said Act is to provide for the registration of foreigners entering, being present in, and departing from India. According to Section 5 of the Registration of Foreigners Act, 1939 any person who contravenes, or attempts to contravene or fails to comply with, any provision of any rule made under the Registration of Foreigners Act, 1939 shall be punished, if a foreigner, with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both, or if not a foreigner, with fine which may extend to five hundred rupees. However, Section 8 of the Registration of Foreigners Act, 1939 clearly mandates that application of other law not barred and that the provisions of this Act shall be in addition to, and not in derogation of the provisions of the Foreigners Act, 1946 and any other law for the time being in force. The provisions of the Registration of Foreigners Act, 1939 and of Foreigners Act, 1946 are comprehensive pieces of legislation and each Act is exhaustive law. Therefore, the contention of the learned Counsel for the petitioner that he was double charged for the same alleged offence also does not merit consideration.

12. Obviously, the petitioner came to India on 11.9.2006 via Delhi on a Student visa valid for a period of five years bearing Visa No. W346616 dated 19-6-2006. The said visa permit expires on 18-6-2011. On 20-10-2006, the petitioner got his name registered with the F.R.O. Gangtok, Sikkim and obtained a Residential Permit valid till 30-4-2007 issued under Para 7 of the Foreigners Order, 1948. Thereafter, the Residential Permit was extended till 30-4-2008. It is apt to extract the relevant portion of the order of residential permit granted by the F.R.O. Gangtok.

Residential Permit (Under Para 7 of the Foreigners Order, 1948)

1. Mr. Joan Martinez Montsant foreigner of Spain Nationality holding Passport No. X804029 dated 31-10-2005 bearing Visa No. (SV) W346616 dated 19-6-2006 for India is permitted to remain in India until 30-4-2007.

2. This permit must be surrendered at the time of departure from India to the Registration Officer of places from which Mr. Joan Martinez Montsant leaves India.

3. In the event of Mr. Joan Mortinez Montsant not departing from India before 30-4-2007 he has obtained the permission of the Central Government to remain for a longer period, be liable to prosecution for contravention of the provision of the Foreigners Act, 1946 punishable with imprisonment for a period of five years and with fine and will also be liable to expulsion from India....

13. It is noteworthy that the above residential permit was granted under Para 7 of the Foreigners Rules (sic. Order), 1948 in favour of the petitioner and it was extended upto 30-4-2008 only. Thereafter, residential permit was not extended or renewed in favour of the petitioner. In the circumstances, it is not within the domain of this Court exercising the power of judicial review under Article 226 of the Constitution of India to grant relief to the petitioner who did not renew the residential permit from concerned authority and overstaying at Putttaparthi unlawfully.

14. As per Section 3 of the Foreigners Act, the Central Government may make an order with respect to any particular foreigner or generally for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefore (sic. therefrom) or their presence or continued presence therein. As per Sub-section (2) of Section 3 such order may provide inter alia that the foreigner shall not remain in India or in any non-permitted area therein. Pursuant to that power conferred by Section 3, Foreigners Order, 1948 was made by the Central Government. Paragraph 7 thereof deals with restriction of sojourn in India by a foreigner. As per Clause (iii) of sub-paragraph (3) of paragraph 7, every foreigner to whom a permi is issued under sub-paragraph (1) or subparagraph (2) of paragraph 7, shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period and before doing so shall surrender the permit to the Registration Officer. Such a thing was not done. Further, Section 14 of the Foreigners Act provides for penalties and if any person contravenes the provisions of the Foreigners Act or

Foreigners Order shall be punished with imprisonment for a term which may extend to five years. Therefore, it cannot be said that the petitioner by staying at Puttaparthi has not committed the offence under Foreigners Act, 1939 (sic. 1946). Further, the petitioner, who is a foreign national, has been staying in India beyond the residential permit, therefore the principles of natural justice also cannot be applied in the instant case.

15. So far as the contention of the learned Counsel for the petitioner, based upon the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, 1985, is concerned, he has placed reliance upon the Article 5(1) and (2), which reads as under,

Article 5

1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:

(a) The right to life and security of persons; no alien shall be subject to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

(d) The right to choose a spouse, to marry, to found a family;

(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

(f) The right to retain their own language, culture and tradition;

(g) The right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations.

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights;

(a) The right to leave the country;

(b) The right to freedom of expression;

(c) The right to peaceful assembly;

(d) The right to own property alien as well as in association with others, subject to domestic law.

16. The learned Counsel submits that in view of the said convention to which India is a signatory, even a foreigner enjoys the rights under Clause (2)(a) to (d) as well as Clause (1)(a) to (g) of Article 5 of the said Declaration on the Human Rights. The learned Counsel would, therefore, submit that the provisions of Rules 11 and 12 of the Registration of Foreigners Rules, 1992 and Para 7 of Foreigners Order, 1948 and Section 5 of the Registration of Foreigners Act, 1930 (sic. 1939) and Section 14 of the Foreigners Act, 1946 must be declared as in conflict with the aforesaid Declaration on the Human Rights. The remand report which is produced along with the writ petition, mentions the violation of the aforesaid provisions, which, according to the learned Counsel, would not stand the test of valid restriction in the light of the Declaration on the Human Rights referred to above.

17. We have considered the aforesaid contention and we pointed out to the learned Counsel that Article 5(1) and (2) of the above said Declaration on the Human Rights have granted certain rights to the foreigners who shall enjoy rights, in accordance with domestic law, subject to the relevant international obligation of the State as well as subject to restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others and which are consistent with the other rights recognized in the relevant international instruments. The freedom of foreigner, therefore, is always subject to domestic laws and restrictions as prescribed by law. Various requirements such as visa, residential permit etc. were made essential and the provisions of the aforesaid statutes and other statutes have been enacted for the purpose of protecting national security, public safety, public order, etc. and in ignorance of the said restrictions, it cannot be said that a foreigner has an unlimited right to move throughout the country of India once visa was granted to him and it also cannot be said that merely because residential permit was not obtained by the petitioner, the same cannot be equated to a serious offence warranting arrest of a foreigner especially in the light of the Declaration on the Human Rights relied upon by the petitioner. The aforesaid contention, to our mind, therefore, is liable to be rejected.

18. Obviously, a foreign national visiting India or residing in India cannot be treated as a citizen as per Articles 5 - 10 of the Constitution of India. A foreigner who holds an Indian Visa and staying in India by virtue of valid residential permit granted by the concerned authorities, then such a person is entitled to enforce fundamental rights guaranteed under Article 21 of the Constitution. If the life and liberty of a foreigner is deprived, except in accordance with the provisions of the

Foreigners Act and the rules made thereunder, this Court can enforce the right of such persons. The action of the authorities depriving a person of his life and liberty must be reasonable and unarbitrary. However, a foreign national who holds an Indian Visa and staying in India without renewal of residential permit granted under the Foreigners Act and the Foreigners Order, is not entitled to enforce Fundamental Rights under Article 21 of the Constitution of India, inasmuch as the foreigner national's residential permit is concerned, the right under Article 21 is limited in comparison with the right of a citizen under Article 21 of the Constitution. The rights granted either to a foreigner or to a citizen of India are subject to compelling State interests and permissible reasonable, restriction which includes security of the nation and the constitutional governance. Even those who are not citizens of this Country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the Constitutional provisions. Though they have the right to live, so long as they are here with human dignity, just as the State is under obligation to protect the life of every citizen of this Country, so also the State is under an obligation to protect the life of the persons who are not citizens of this Country. However, they are subject to reasonable restrictions and therefore in case of non-citizen those rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. In the circumstances it cannot be said that personal liberty of the petitioner has been deprived pursuant to the procedure adopted by the authorities.

19. For the above reasons, we do not see any merit in any of the contentions advanced by the learned Counsel for the petitioner. Accordingly we do not see any ground to entertain the Writ Petition and the same being meritless is dismissed. However, it is open for the petitioner to pursue his remedies as available under appropriate law. No costs.

20. Learned Counsel for the petitioner sought leave of this Court to appeal before the Supreme Court. We do not see any substantial question of general importance which needs to be decided by the Hon'ble Supreme Court. Hence, leave is rejected.