
(1996) 06 AHC CK 0018
In the Allahabad High Court
Case No : Writ Petition No. 9246 of 1990

Moti Sunar alias Moti Lal

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-06-1996

Acts Referred:

Constitution of India, 1950 — Article 19(1), 21
Penal Code, 1860 (IPC) — Section 352, 504, 506
Uttar Pradesh Police Regulations, 1948 — Regulation 236, 853, 856, 857

Citation : (1996) 3 AWC 1389 : (1997) CriLJ 2260

Hon'ble Judges : S.H.A. Raza, J; I.S. Mathur, J

Bench : Division Bench

Advocate : R.N. Shukla, for the Appellant; C.S.C., for the Respondent

Final Decision : Allowed

Judgement

I.S. Mathur, J.—One would have thought that after the decision of Hon'ble Supreme Court in, Kharak Singh Vs. The State of U.P. and Others, ; Malak Singh and Others Vs. State of P and H and Others, and Govind v. State of Madhya Pradesh, AIR 1975 SC 1378, the Police would not have encroached upon the fundamental right of a citizen guaranteed under Article 21 of the Constitution of India by making "domiciliary visits" to the house of the citizen during night hours and insisting the citizen to go to the police station without any reason.

2. Undoubtedly, the police has been vested with the power to make searches, enter into the house of a person to arrest him if any cognizable offence is reported against a person under the provision of the Cr. P.C. in accordance with law, but it cannot make an inroad into the house of a citizen without cognizable offence being reported to it. The English Common Law Maxim says that "every man's house is his castle" or "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose" has been accepted as law by the Courts in India. The said Maxim is imbedded under Article 21 of the Constitution itself.

3. In, *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295, it was observed that "domiciliary visits" is violative of Article 21 of the Constitution and there is no law on which it can be justified. Hon"ble Mr. Justice K. Subba Rao and Hon"ble Mr. Justice J.C. Shah, in their minority judgment declared the entire Regulation 236, consisting of Clauses (a) to (f) pertained to surveillance as unconstitutional on the ground that it infringed, both Article 19(1) and Article 21 of the Constitution. Hon"ble Mr. Justice N. Rajagopal Ayyangar speaking on behalf of majority of the Judges, constituting the Bench indicated that the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect and Article 21 has no relevance in that context. For, the right of privacy is not a guaranteed right under the Constitution, and therefore, the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III. The majority did not favour the view of Hon"ble Mr. Justice K. Subba Rao (as he then was) and his brother Judge Hon"ble Mr. Justice J.C. Shah (as he then was).

4. Hon"ble K. Subba Rao, J. and Hon"ble J.C. Shah, J., while defining the right of the personal liberty in Article 21, observed that it was a right of an individual to be free from restrictions or encroachments of his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

5. Dealing with the Article 19(1)(d) pertaining to the right of a citizen to move freely, it was observed that;

Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinizing gaze of the policeman be described as a free movement. The whole country is his jail. The freedom of movement in cl. (d) therefore must be a movement in a free country, i.e., in a country where he can do he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Article 19(1)(d) of the Constitution.

6. As stated above, although the domiciliary visits by the police men into the

house of the citizen was held to be violative of Article 21 of the Constitution of India but the regulation 236 except clause (b) was held to be constitutional for the reason, that at the relevant time the right of the privacy was not held to be a fundamental right but the march of judicial activism was reflected in *State of Maharashtra v. Madhukar Narayan Mardikar* AIR 1991 SC 2097, wherein the departmental proceeding was started against the delinquent Police Inspector for entering into the house of lady and trying to prosecute her with a view to force her to dance at the tune of the said Inspector. The enquiry conducted against the delinquent proved that his conduct was perverse and on the recommendation of the Enquiry Officer, the delinquent was dismissed from service. The delinquent being aggrieved, invoked the jurisdiction of Bombay High Court which allowed the petition. Thereafter the matter came up before Hon''ble Supreme Court, wherein it was observed;

Since the complainant is an unchaste woman it would be extremely unsafe to allow the fortune and career of a Government Official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence.

7. Mr. R. N. Shukla, learned counsel for the petitioner strenuously contended that as the right of privacy has been held to be a fundamental right by Hon''ble Supreme Court, hence para 228 of U. P. Police Regulation be declared ultra vires to Article 19(1)(d) and Article 21 of the Constitution of India.

8. We are of the view that although the right of privacy has been declared as a fundamental right and a person cannot be deprived of the freedom of movements guaranteed by the Article 19(1)(d) as well as personal liberty guaranteed under Article 21, it cannot be said that such rights are absolute rights. Such rights are subjected to the reasonable restrictions and for that reason in *Gobind Vs. State of Madhya Pradesh and Another*, , it was observed:

The right to privacy will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, it cannot be held that the right is absolute.

9. In *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378 (supra), it was further observed that;

Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it : for, what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by "law". The procedure having regard to the provisions of Regulations 853(c) and 857.

10. The question which deserves consideration before this Court is as to whether the regulation in question gives an unbridled, uncanalised power to the police to use the power under the regulation in such a way to squeeze out the fundamental freedom of the citizen. In that regard, a note of a caution was given in *Malak Singh and Others Vs. State of P and H and Others*, , wherein Hon"ble Mr. Justice Chinnappa Reddy (as he then was) speaking on behalf of bench observed that:

But, surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(1)(d). That cannot be permitted.

11. It was further observed that "History sheets and Surveillance registers" have to be and are confidential documents. Neither the person whose name is entered in the register nor any other member of the public can have access to the surveillance register."

12. It was further indicated :

But all this does not mean that the police have a licence to enter the names of whoever they like (dislike?) in the surveillance register; nor can the surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of freedoms; nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in Rule 23.4 or for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limit prescribed by the rules, will entitle a citizen to the court's protection which the court will not hesitate to give.

13. It was also observed that "Surveillance, therefore, has to be unobtrusive and within bounds."

14. It was further observed that:

Ordinarily the names of persons with previous criminal record alone are entered

in the surveillance register. They must be proclaimed offenders, previous convicts, or persons who have already been placed on security for good behaviour. In addition, names of persons who are reasonably believed to be habitual offenders or receivers of stolen property whether they have been convicted or not may be entered. It is only in the case of this category of persons that there may be occasion for abuse of the power of the police officer to make entries in the surveillance register. But, here, the entry can only be made by the order of Superintendent of Police who is prohibited from delegating his authority under Rule 23.5. Further it is necessary that the Superintendent of Police must entertain a reasonable belief that persons whose names are to be entered in Part II are habitual offenders or receivers of stolen property. While it may not be necessary to supply the grounds of belief to the persons whose names are entered in the surveillance register it may become necessary in some cases to satisfy the court when an entry is challenged that there are grounds to entertain such reasonable belief.

15. In the light of the aforesaid observations of the Hon"ble Supreme Court, now we have to look into the factual matrix as set out in the writ petition. It has been averred that the petitioner is a law-abiding citizen, who has never been challenged in any criminal case and no criminal case was pending against him at the time when the writ petition was filed. The Station Officer, Police Station Kothi, District Barabanki opened the history sheet No. 4-B against the petitioner without any justified reason.

16. It has been averred by the petitioner that since 1981, the Police of Police Station Kothi, district Barabanki had been watching the activities of the petitioner and encroached upon the privacy of the petitioner, as they used to knock the door of the petitioner during mid-night. The history sheet was opened on account of enmity with the police which is being done in order to downgrade the prestige of the petitioner. The surveillance has created hurdle in the free movement of the petitioner and his routine activity and work has been disturbed due to interference of the local police and he could not go any where without informing the local police. Such action on the part of the police is in violation of the fundamental right and freedom of the movement granted by the Article 19(1)(d) of the Constitution of India.

17. It was also averred that on 26-7-1990 at about 11.30 P.M., the Station Officer Incharge along with some policemen came at the house of the petitioner, when he was sleeping inside the house. They called the petitioner and thereafter without showing any reasons they forced the petitioner to go to the Police Station along with them. The Station Officer Incharge demanded money from the petitioner, but when the petitioner refused he was mercilessly beaten by the police and he was to be implicated in some false criminal case. As a result of this coercive method adopted by the police of Police Station Kothi, the petitioner succumbed to illegal desire of the police, and only thereafter he was released.

18. The petitioner approached the Superintendent of Police by submitting an

application in which it was averred that although he had no criminal history but the police of Police Station Kothi had opened his history sheet and threatened him every day for the dire consequences.

19. A counter-affidavit, sworn by Rajendra Prasad Tripathi, Sub-Inspector, Police Station Kothi, district Barabanki, was filed wherein it was stated that the petitioner used to smuggle the opium. It came to the knowledge of the police by various sources that the petitioner used to supply opium, but later on he himself used to purchase the opium and send it to the Gram Pradhan Sri Mahmood of village Dhamtnau. He has also developed contacts with the opium Smugglers of village Tikra, Barabanki. Hence, the history sheet was opened to keep a watch over him and his activities. It was denied that the petitioner was ever harassed by the police. It was further submitted that police personnel used to enquire about the work and conduct of the petitioner whenever the same was required without creating any hurdle.

20. It was admitted that on 26-7-1990 at about 6.00 P.M. the Inspector Narcotics Department along with other police personnel went to the village Ajoba in respect of investigation, in a search of Morphine or opium, after obtaining information from some one and the entry in that regard was made in the General Diary. There appears nothing in the counter-affidavit as to what transpired after such a raid. It was submitted that the petitioner was never misbehaved by the police concerned. An application dated 29-7-1990 alleged to have been preferred by the petitioner was not available in the police record.

21. The petitioner has annexed a copy of the history sheet dated 24-7-1981. The contents of which are similar to what has been produced by the learned Standing Counsel. The English transliteration of which is reproduced below :

Moti Sunar S/o Kalideen Sunar, village Kothi, Police Station Kothi was born in the year 1947. His father Kalideen Sunar had no source of income. His financial position was very bad, as a result of which he could not receive any education. As he grew up, he alongwith his father, started learning the work of Gold-smith. He has four brothers, namely, Om Prakash, Dileep Kumar, Sushil Kumar and Ajit Kumar and as they were unable to meet the expenses, the petitioner came into the contact of some of the Smugglers of village Jwar and he started working as opium carrier. As he earned profit, he started purchasing the opium and transporting it to Sri Mahmood, Pradhan of Village Marmau. Gradually he developed his relation with other Smugglers and started supplying opium to village Tikra. He is very alert and clever person. Fortunately, he escaped the attention of the police and till then he could not be arrested. He is efficient in opium smuggling and is good smuggler. Hence his surveillance is necessary. It was urged that history sheet B Class be opened which was approved by the Superintendent of Police, without indicating any reason.

22. On 30-11-1992, a report was made that at the relevant time he was peaceful and worked in his Gold-smith shop and did not indulge in any other activity

except his profession. But in the year 1993, a report was made that the petitioner is a clever person although there existed no complaint against him even then surveillance is required.

23. Before dealing with the facts of the case, it would be worthwhile to have a look towards para 228 of the U.P. Police Regulation :

Para 228 :- History sheet and surveillance : "Part V, consists of history-sheets. These are the personal records of criminal under surveillance. History sheets should be opened only for persons who are or are likely to become habitual criminals or abettors of such criminals. There will be two classes of history sheets.

01 - Class A, history sheets for dacoits, burglars, cattle-thieves, railway, goods, wagon thieves and abettors thereof.

02 - Class B, history sheets for confirmed and professional criminals who commit crimes other than dacoity, burglary, cattle theft and theft from railway goods, wagons e.g. professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department, Poisoners, cattle poisoners, railway passenger thieves, bicycle thieves, expert pick pocket, forgers, coiners, cocaine and opium smugglers, hired ruffians and goondas telegraph wire-cutters, habitual illicit distillers and abettors thereof.

History sheets of both classes will be maintained in similar form, but those for Class B, will be distinguished by a red bar marked at the top of the first page. No history sheet of class B, may be converted into history sheet A though should the subject of a history of class B, be found to be also addicted to dacoity, burglary, cattle theft or theft from railway goods, wagons, A Class as well as B Class, surveillance may under para 238 be applied to him. In the event of a Class A, history sheet men becoming addicted to miscellaneous crime, his history sheet may be converted into a Class B history sheet with the sanction of the Superintendent.

24. A perusal of para 228, Class B of the regulation indicates that Class B history sheet can be opened only against the confirmed and professional criminals, who commit crimes other than dacoity, burglary, cattle theft or theft from railway goods, wagons, e.g. professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department, poisoners, cattle poisoners, railway passenger thieves, bicycle thieves, expert pick-pocket, forgerers, coiners, cocaine and opium smuggler, hired ruffians and goondas telegraph wire-cutters, habitual illicit distillers and abettors thereof.

25. Admittedly, the petitioner cannot be bracketed as confirmed or professional criminal. Only allegation against him is that he indulged himself into the smuggling of opium, but even an iota of evidence of material exists against him in that regard was never challaned, prosecuted or convicted for such an offence.

26. Although, we directed the learned Standing Counsel to place before this Court the materials on the basis of which the history sheet was opened against

the petitioner but no material has been placed. Para 228 of the U.P. Police Regulation casts the duty on the Police Officer to construe the regulation strictly and open the history sheet only on the basis of certain materials. It also casts the duty on the Police Officer to reasonably believe, that the person against whom history sheet is opened, is a confirmed and professional criminal or habitual offender.

27. In the present case, on the report of some Police Constable or Inspector, the Superintendent of Police only has passed a cryptic order "history sheet B Class". The order does not indicate the "reasonable belief of the Superintendent of Police that the petitioner was a confirmed or professional criminal or habitual offender who indulged into the Smuggling of opium.

28. It was the case of police, itself, that the petitioner had no criminal antecedent but without looking into the report of the police and without caring to look into the contents of para 228 of the Regulation, the Superintendent of Police has approved the report, although much after the opening sheet two criminal cases of petty offences have been registered against the petitioner. The order passed by the Superintendent of Police opening the history sheet against the petitioner suffers from non-application of mind. Even in the life of the criminal or habitual offender, time may come where he starts living a peaceful life. According to police reports, at a later stage the petitioner has confined his activity to his profession of Goldsmith. The report indicated that except that profession he did not take interest in any other activity. The history sheet has to be yearly reviewed but, in the present case, there exists no allegation against him that he used to indulge in opium smuggling again. The case under Sections 352, 504, 506 IPC was undoubtedly registered against him in the year 1994. As far as the other criminal case registered against him is concerned, it is a minor offence, we are not aware about the nature and the facts of the cases but only because he was involved in one or two cases, the petitioner cannot be termed as a confirmed and professional criminal. There existed no justification for continuance of his name being mentioned in the history sheet even after 1992.

29. We are definitely of the view that the police surveillance in the case of the petitioner, has seriously encroached upon the privacy of the petitioner, and his fundamental right of the personal liberty guaranteed under Article 21 of the Constitution of India and the freedom of the movement guaranteed by Article 19(1)(d). The care and caution which the police is required to observe in the matter of surveillance was completely, brushed aside. Knocking the door of the petitioner" during the night hours, and forcing him to go to the Police Station, and asking him to seek police permission before he moves anywhere else, have not been denied in the counter-affidavit.

30. We are satisfied that there were no sufficient grounds for Superintendent of Police to entertain a reasonable belief that the surveillance was required in the case of the petitioner and there existed no evidence to support the fact that the surveillance of the petitioner was necessary. Hence, the order passed by the

Superintendent of Police, Barabanki opening the history sheet no. 4B of the petitioner at Police Station Kothi, District. Barabanki deserves to be quashed.

31. In the result, the writ petition is allowed. The order dated 27/29-7-1991 passed by the Superintendent of Police, District Barabanki opening the history sheet B Class under para 226 of U.P. Police Regulation is hereby quashed. The opposite parties are directed to close the present history sheet of the petitioner and not to keep surveillance on the petitioner, in pursuance of the said history sheet.