
(1972) 02 DEL CK 0012

In the Delhi High Court

Case No : Letter Patent Appeal No. 27 of 1972

Peter Samouel Wallace

APPELLANT

Vs

The Regional Passport Officer and Others

RESPONDENT

Date of Decision : 01-02-1972

Acts Referred:

Citation : (1972) 8 DLT 433 : (1972) 2 ILR Delhi 233

Hon'ble Judges : V.S. Deshpande, J; B.C. Misra, J

Bench : Division Bench

Advocate : R.L. Kohli, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) In *Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others*, the majority of the Constitution Bench of the Supreme Court held that right to travel abroad was a part of "personal liberty" and as such a fundamental right guaranteed by Article 21 of the Constitution. It could, Therefore, be regulated only "according to procedure established by law" there under and not by mere executive discretion and further the exercise of executive discretion was also vocative of Article 14 of the Constitution. Parliament thereupon enacted the Passports Act, 1967 (No. 15 of 1967) (hereinafter called the Act) to establish the procedure under which passports may be granted or refused to applicants by the Central Government. u/s 6(2)(f) of the Act, the passport authority shall refuse to issue a passport on the ground "that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India".

(2) The application of the appellant Peter Samouel Wallace for a passport was rejected on this ground u/s 6(2)(f) of the Act by the Regional passport Officer, Delhi, inasmuch as several criminal cases were pending against him in the law courts. This order was challenged by Wallace in a writ petition which was heard by D. K. Kapur J. The learned Judge dismissed the writ petition by pointing out

that seven criminal cases were pending against Wallace. Out of them three were said to have resulted in the acquittal of Wallace. But the affidavit of Wallace regarding the remaining four cases was vague. It merely stated that he had been acquitted. It did not state when he was acquitted. On the contrary, a further affidavit filed for the Government stated that there were three other cases pending for trial against Wallace. It was further stated that Wallace had made a fresh application for the grant of passport and hence the previous application for passport against the rejection of which the writ petition has been filed had become infructuous. The learned Judge was further of the view that the Passports Act, 1967 could not be said to be ultra virus Article 21 of the Constitution and the restriction imposed by section 6(2)(f) thereof on the grant of passport could not be said to be unreasonable.

(3) In this appeal against the dismissal of the writ petition, Shri R.L. Kohli, learned counsel for the appellant, has urged one main point. He says that the fundamental right to travel abroad could be regulated only by "procedure established by law". He relies on the summary of the observations of Patanjali Sastri J. in *A.K. Gopalan Vs. The State of Madras*, as given in the head-note at pages 90-91 saying that the meaning of "procedure established by law" is not "any procedure which may be prescribed by a competent legislature, but the ordinary well-established criminal procedure, i.e., those settled usages and normal modes of procedure sanctioned by the Criminal Procedure Code, which is the general law of criminal procedure in this country". He contends, Therefore, that the Passports Act, 1967 is merely a new procedure prescribed by the Legislature. It could not be said to be the "procedure established by law" and it cannot, Therefore, deprive the appellant of his fundamental right to travel abroad guaranteed by Article 21.

(4) A proper appreciation of this contention requires an all round consideration of Article 21 of the Constitution. According to the majority decision in *A.K. Gopalan's* case the scope of Article 21 was distinct from that Article 19(1)(d). While Article 19(1)(d) postulates the freedom of a person to move freely throughout the territory of India, Article 21 deals with the total loss of freedom of a person by imprisonment or preventive detention. While the restriction on the right to move freely throughout India guaranteed by Article 19(1)(d) had to be reasonable and in the interest of the general public, the personal liberty guaranteed by Article 21 could be taken away "according to procedure established by law". According to this analysis, the reasonableness of a restriction on the fundamental right guaranteed by Article 19(1)(d) could be scrutinised by the Court on merits. This power was analogous to the due process (both substantive and procedural) contemplated by the Fifth and the Fourteenth Amendments of the U. S. Constitution. But the restriction imposed on personal liberty under Article 21 could be justified by any law which the Legislature may choose to enact. Court would be power less to examine the validity of such enacted law on the ground of its reasonableness (due process) in view of the difference between the language of Article 19(5) and Article 21. The learned

Judges in Gopalan's case did not consider whether the enacted law taking away personal liberty under Article 21 could be tested on the anvil of Article 14 of the Constitution.

(5) Shri Motilal Setalvad, the then Attorney-General who appeared for the Government in Gopalan's case before the Supreme Court referred to the Debates of the Constituent Assembly and pointed out that the expression "due process of law" used in the Fifth and the Fourteenth Amendments of the U. S. Constitution was deliberately omitted from the first draft and the expression "according to procedure established by law" was used in Article 21 to make it clear that the validity of the enacted law depriving a person of his personal liberty under Article 21 was not to be open to challenge at all. He, however, admits in his "My Life-Law and Other Things" (1970) at page 157 that "the sharp intellect of Justice Sastri did not fail to perceive the fallacy underlying the argument which I had advanced on behalf of the Intervener and which as accepted by the Court resulted in the abridgment of the right of personal liberty. If "law" was to mean . law enacted by the Legislature, how was the citizen's personal liberty safeguarded against arbitrary inroads by the Legislature ?" At page 158 the learned author quotes Sastri J. saying at page 202 of the Report as follows:-

" THE main difficulty I feel in accepting the construction suggested by the Attorney-General is that it completely stultifies Art. 13(2) and, indeed, the very conception of a fundamental right. It is of the essence of that conception that it is pro- tested by the fundamental law of the Constitution against infringement by ordinary legislation".

(6) At page 205 of the Report Sastri J. suggested two possible solutions of the problem:-

(1)"In the first place, a satisfactory Via media between the two extreme positions contended for on either side may be found by stressing the word "established" which implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute".

AND(2)"The only alternative to the construction I have indicated above if a constitutional transgression is to be avoided, would be to interpret the reference to "law" as implying a constitutional amendment pro tanto for, it is only a law enacted by the procedure provided for such amendment (Art. 368) that could modify or override a fundamental right without contravening Art, 13(2)."

(7) With the greatest respect, we may venture to point out that some fundamental procedural safeguards implied in the expression "procedure established by law" used in Article 21 would be found to exist in clauses (!) and (2) of Article 22. They secure to the arrested person the right to be informed of the grounds for such arrest and the right to consult a counsel and to defend himself by a legal practitioner of his choice. They also provide that such a person is immediately produced before a Magistrate within a period of 24 hours after the

arrest and that he shall not be detained in custody beyond such a period without the authority of a Magistrate. Of course the law of preventive detention enacted in the subsequent clauses of Article 22 is an exception to this procedure.

(8) Secondly the precise relationship between Article 19 and Article 21 has been the subject of consideration by the Supreme Court (specially by Subba Rao, J./C. J.) from time to time. In *K. K. Kochuni v. States of Madras and Kerala*, (1960) Scr 887 at 914(3) Subba Rao J. observed that the views of the learned Judges in *A. K. Gopalan*'s case may be broadly summarised under three heads, namely:-

(1) To invoke Article 19(1) a law shall be made directly infringing that right, (2) Articles 21 and 22 constitute a self-contained code, (3) The freedoms in Article 19 postulate a freeman.

(9) In *State of Maharashtra v. Prabhakar Pandurang Sangagiri*, (1966) 1 Scr 782 at 707, Subba Rao J. again considered that the interrelation between Articles 19 and 21 in the following words:-

" THERE are five distinct lines of thought in the matter of reconciling Art. 21 with Art. 19, namely, (1) if one loses his freedom by detention, he loses all the other attributes of freedom enshrined in Art. 19(2) personal liberty in Art. 21 is the residue of personal liberty after excluding the attributes of that liberty embodied in Art. 19 the personal liberty included in Art. 21 is wide enough to include some or all of the freedoms mentioned in Art. 19, but they are two distinct fundamental rights-a law to be valid shall not infringe both the rights; (4) the expression "law" in Art. 21 means a valid law and, Therefore, even if a person's liberty is deprived by law of detention, the said law shall not infringe Art. 19; and (5) Art. 21 applies to procedural law, whereas Art. 19 to substantive law relating to personal liberty."

(10) In *Kharak Singh Vs. The State of U.P. and Others*, . in the majority judgment by Ayyangar J., the following observations were made:-

"IT is true that in Art. 21 as contrasted with the 5th and 14th Amendments in the U. S., the word "Liberty" is qualified by the word "personal" and Therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those elements or incidents of "liberty" like freedom of speech or freedom of movement etc., already dealt within Art. 19(1) and the "liberty" guaranteed by Art. 21... We....consider that ""personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Art. 19(1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Art. 21 takes in and comprises the residue."

(11) The view expressed therein that Article 19(1) deals with particular species or attributes of freedom while the rest of "personal liberty" is embodied in Article 21 was adopted by the majority speaking through Subba Rao. C. J., in *Satwant*

Singh Sawhney's case. The result of the development of these views culminating in Satwant Singli Sawhney's case. Therefore, is thus summarised in the headnote of Satwant Singh Sawhney's case at page 526 in the following. words:-

""Liberty" in our Constitution bears the same comprehensive meaning as is given to the expression "liberty" by the 5th and 14th Amendments to the U. S. Constitution and the expression "personal liberty" in Art. 21 only excludes the ingredients of liberty enshrined in Art. 19 of the Constitution. In other words, the expression "personal liberty" in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art. 19."

(12) In the majority judgment in Rustom Cavasjee Cooper Vs. Union of India (UOI), , the inter-relation between Article 19(1)(f) and Article 31 was considered at length from page 568 onwards. The decision in Gopalan's case also came up for consideration because it formed "the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom. and as a corollary thereto, that the freedoms under Arts. 19, 21, 22 and 31 are exclusive-each article enacting a code relating to protection of distinct rights". (Page 571 of the report). Shah, J. speaking for the majority in R. C. Coopers' case went on to observe at page 574 that the principle underlying the judgment of the majority in Gopalan's case was extended to the protection of the freedom in respect of the property. The majority judgment in R. C. Cooper's case was thereafter concerned to show that this extension of the principle in Gopalan's case to the right of property was wrong. In that context, the following observation was made at page 576:-

" WE have carefully considered the wighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important gaurantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individual's rights."

(13) The requirement that the law taking away property under Article 31(1) of the Constitution should also satisfy the test of reasonableness under Article 19(5) of the Constitution laid down by the Supreme Court in R. C. Cooper's case was based on their holding that both Articles 19(1)(f) and Article 31 dealt with

the same right of property. They had, Therefore, to be read together. But the principle of this holding would not be applicable to the relationship between Article 19 and Article 21 insofar as Article 21 is said to comprise only those liberties which are not already comprised in Article 19. If the liberty to travel abroad, for instance, is not comprised in Article 19 at all, then a law regulating such liberty would have to satisfy the requirements of Article 21 only and not of Article 19(5). This seems to be the reason why no reference to the decision in *Satwant Singh Sawhney*'s case was made by Shah J. in *R. C. Cooper*'s case. Regarding the question "Has a person living in India a fundamental right to travel abroad" ? posed in *Satwant Singh Sawhney*'s case by the majority, which according to a learned author (H. M. Seervai-Constitutional Law of India, 1968, Suppl. page S-121) should have been "Can a person living in India be prevented from leaving or entering India" ". the law is still as stated by the majority in *Satwant Singh Sawhney*'s case.

(14) The law derived from the majority decision in *Satwant Singh Sawhney*'s case may be stated as follows:-- Article 21 comprises of all the personal liberties which are not included in Article 19. These personal liberties may further be classified into two groups. In the first group would fall the right to be free from wrongful confinement or imprisonment or preventive detention or in other words from a total restraint of movement. This was dealt with in *Gopalan* 's case. The observations of Sastri J. that the procedure established by law which can deprive a person of this right should be the ordinary well-established criminal procedure and not any procedure which may be enacted by the Legislature were made in relation to this right. The basic procedural safeguards laid down in clauses (1) and (2) of Article 22 as also in the Code of Criminal Procedure are applicable when this right of personal liberty or freedom from total restraint is in question. In the second group would fall the numerous other personal liberties which are not expressly enumerated in Article 21 but which have been implied therein on the analogy of the 5th and the 14th Amendments of the U. S. Constitution by the majority decisions in the *Kharak Singh* and *Satwan Singh Sawhney* cases. The right of a person to travel abroad and the power of the Legislature and of the Government to restrict that right fall in this second group. This right is excluded from Article 19(1)(d). The law restricting this right need not. Therefore, satisfy the test of reasonableness embodied in Article 19(5). This right is contained only in Article 21. The law restricting this.

"right has, Therefore, to satisfy only the requirement of "procedure established by law" within the meaning of Article 21. There can be no doubt that the right to travel abroad is not comparable in importance to the right to be free from wrongful confinement. The observations of Sastri J. in *Gopalan*'s case relied on by the learned counsel for the appellant in relation to the right to be free from total confinement cannot, Therefore, be applied to the right to travel abroad. Only a little reflection will show that the first two clauses of Article 22 and the Criminal Procedure Code would be totally irrelevant in regard to the right to travel abroad. We are, Therefore, driven to the conclusion that the Passports Act, 1967 would

be valid if it is "procedure established by law" within the meaning of Article 21. It is well known that the doctrine of "due process" as developed in the American Constitutional law was originally intended to protect "liberty" in the Indian Constitution. But Justice Frankfurter of the U.S. Supreme Court advised the late Shri B. N. Rau that in his opinion the power of review implied in the "due process" of vetoing legislation enacted by the representatives of the nation was not only undemocratic, but also threw an unfair burden on the Judiciary. This view was communicated by B. N. Rau to the Drafting Committee of the Constituent Assembly which introduced a far-reaching change in the clause, which is now Article 21 of the Constitution, by replacing the expression "without due process of law" by the expression "except according to procedure established by law". [3 Framing of the Indian Constitution (1968) 218].

(15) The expression "procedure established by law" does not necessarily have ethical overtones. It is true that such procedure must be "established by law". So long, however, as such procedure is not contrary to clauses (1) and (2) of Article 22, it cannot be said that any procedure enacted by a new law as distinguished from a long standing old law would not be procedure "established by law". The word "established" cannot necessarily refer to old standing law. As recognised by Sastri J. himself in Gopalan's case an amendment of old standing law would still be "established" procedure. In that of this right should be the ordinary well-established criminal procedure and not any procedure which may be enacted by the Legislature were made in relation to this right. The basic procedural safeguards laid down in clauses (1) and (2) of Article 22 as also in the Code of Criminal Procedure are applicable when this right of personal liberty or freedom from total restraint is in question. In the second group would fall the numerous other personal liberties which are not expressly enumerated in Article 21 but which have been implied therein on the analogy of the 5th and the 14th Amendments of the U.S. Constitution by the majority decisions in the Kharak Singh and Satwan Singh Sahwney cases. The right of a person to travel abroad and the power of the Legislature and of the Government to restrict that right fall in this second group. This right is excluded from Article 19(1)(d). The law restricting this right need not. Therefore, satisfy the test of reasonableness embodied in Article 19(5). This right is contained only in Article 21. The law restricting this right has, Therefore, to satisfy only the requirement of "procedure established by law" within the meaning of Article 21. There can be no doubt that the right to travel abroad is not comparable in importance to the right to be free from wrongful confinement. The observations of Sastri J. in Gopalan's case relied on by the learned counsel for the appellant in relation to the right to be free from total confinement cannot, Therefore, be applied to the right to travel abroad. Only a little reflection will show that the first two clauses of Article 22 and the Criminal Procedure Code would be totally irrelevant in regard to the right to travel abroad. We are, Therefore, driven to the conclusion that the Passports Act, 1967 would be valid if it is "procedure established by law" within the meaning of Article 21.

(16) It is well known that the doctrine of "due process" as developed in the American Constitutional law was originally intended to protect "liberty" in the Indian Constitution. But Justice Frankfurter of the L.J. S. Supreme Court advised the late Shri B. N. Rau that in his opinion the power of review implied in the "due process" of vetoing legislation enacted by the representatives of the nation was not only undemocratic, but also threw an unfair burden on the Judiciary. This view was communicated by B. N. Rau to the Drafting Committee of the Constituent Assembly which introduced a far-reaching change in the clause, which is now Article 21 of the Constitution, by replacing the expression "without due process of law" by the expression "except according to procedure established by law". [3 Framing of the Indian Constitution (1968) 218].

(17) The expression "procedure established by law" does not necessarily have ethical overtones. It is true that such procedure must be "established by law". So long, however, as such procedure is not contrary to clauses (1) and (2) of Article 22, it cannot be said that any procedure enacted by a new law as distinguished from a long standing old law would not be procedure "established by law". The word "established" cannot necessarily refer to old standing law. As recognised by Sastri J. himself in Gopalan 's case an amendment of old standing law would still be "established" procedure. In that sense, the Passports Act, 1967 may also be said to be "established" procedure. For long before its enactment, the requirements of the procedure regulating the grant and refusal of passports were the same. It is only because such procedure was executive and was not embodied in a statute that it could not satisfy the requirement of Article 21. The same procedure was. Therefore, "put into the form of a statute". But there is no material change in the procedure. An application for a passport was liable to be rejected if a criminal case was pending against the applicant both before and after the enactment of the Passports Act, 1967. We are of the view, Therefore, that the Passports Act, 1967 is "procedure established by law" within the meaning of Article 21. It is not, Therefore, ultra virus Art. 21.

(18) The appeal is, Therefore, dismissed in limine.