

(2012) 11 PAT CK 0052

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 569 of 1997

Radhey Shyam Pandey

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 20, 21, 22, 226

Citation : (2013) 2 PLJR 451

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Siya Ram Shahi and Mr. Ram Ganesh, for the Appellant; Shatrughna Pandey, A.C. to S.C. 23, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Chakradhari Sharan Singh

1. Heard Mr. Siya Ram Shahi, learned Counsel for the petitioner, Mr. Shatrughna Pandey learned Assistant Counsel to Standing Counsel-23 on behalf of State of Bihar and other official Respondents and learned Counsel appearing for Respondent No. 6, the Union of India. While posted as Assistant Engineer in Tubewell Division, Siwan, under the Water Resources Department, Government of Bihar, the petitioner was detained on 22.08.1976 under Maintenance of Internal Security Act, 1971, (hereinafter referred to as "MISA") on the allegation of his association with Chhatra Sangharsh Samiti and Rashtriya Swayam Sewak Sangh. He represented before the Central Government against his detention. It is stated in the writ petition that the Joint Secretary, Ministry of Home Affairs, Government of India sent a communication dated 23.11.1976 to the Chief Secretary, Government of Bihar, to the following effect:-

Radhey Shyam Pandey was detained under "MISA" on 22.08.1976 as the D.M. Siwan found his activities prejudicial to the security of the state and maintenance of public order. After his appointment as an assistant engineer in the Tubewell

Division, Siwan, Radhey Shyam Pandey developed some differences with the senior colleagues, namely, Bharat Singh, Executive Engineer, Tubewell Division, Siwan and D.K. Yadava, S.D.O. of the same Division over the issue of passing a bill of a contractor, who had allegedly bribed the above mentioned Executive Engineer. The Departmental colleagues pressed upon Radhey Shyam Pandey not to take this issue, but the latter did not budge under their pressure. Radhey Shyam Pandey is an out-spoken man in the habit of sending complaints to VIPs regarding the bunglings of his own departmental officers. He took up the issue of alleged bungling of Rs. 40 lakhs by officials of his department. He sent information alleging misappropriation to the concerned high officials of the State Govt. and demanded an enquiry into the affairs of the Tubewell Division, Siwan. This brought him to the adverse notice of his department and he was suspended for some time. Pandey, therefore, went to Delhi and sat on Dharna in front of the Rashtrapati Bhavan demanding justice. It is reported that the senior officers at Delhi assured him to look into the matter and he was thereafter reinstated. His reinstatement created anxiety among the corrupt officials of his department, who considered him a trouble maker. They started pulling strings and finally succeeded in winning over the D.M., who issued orders for a detention of Shri Pandey. It would, therefore, appear that the detention of Shri Radhe Shyam Pandey was not bonafide.

2. The allegation of the petitioner is that in spite of such communication he was not released and he thus remained detained up to March, 21, 1977 and only after "Emergency" was lifted he was released on March 22, 1977. His further plea is that "Shah Commission" was constituted to enquire into the excesses committed during the period of Emergency. The Shah commission also took into account the fact that petitioner continued in detention up to March 21, 1977 despite the communication dated 23.11.1976 of the Joint Secretary, Ministry of Home Affairs, Government of India.

3. In the year 1978, the petitioner approached the Commissioner, Irrigation Department, Government of Bihar for adequate compensation on the ground that his detention was illegal and mala fide.

4. The plea is that Irrigation Department had agreed for payment of compensation to the tune of Rs. 50, 000/- (rupees fifty thousand) for such illegal detention subject to concurrence of the Home Affairs Department. The Home Affairs Department also, is said to have given its concurrence but subject to concurrence by the Finance Department. The file, according to the petitioner, kept on moving from 1978 to 1992 when finally the Additional Commissioner, Finance Department passed an order on 14.12.1992 (Annexure-3) that if the petitioner felt that any compensation was due, he might approach the competent Court, if so advised. The Additional Commissioner, Finance Department, in the said order dated 14.12.1992 (Annexure-3) recorded that it was not possible for the Government to adjudicate as to the agony, if any, reason thereof and the compensation amount. On 24.09.1993, the petitioner filed a representation to

the Additional Commissioner, Water Resources Department, Government of Bihar, requesting him to serve a copy of the order about which he had learnt unofficially. Thereafter, vide letter dated 03.12.1993 (Annexure-4), the Additional Secretary, Water Resources Department, Government of Bihar communicated that his claim for compensation had been rejected.

5. The further plea of the petitioner is that he sought permission vide his letter dated 25.04.1995 (Annexure-5) from the Special Secretary, Water Resources Department, Government of Bihar, for moving competent Court in this regard in terms of Rule 21 of the Bihar Public Service Code Rules. Vide letter dated 01.03.1996 (Annexure-6) the Department, however, rejected the said application dated 25.04.1995.

6. The petitioner in the background of above noted facts approached this Court by filing the present writ petition under Article 226 of the Constitution of India for a direction commanding the Respondents to pay adequate compensation to him against his illegal detention under "MISA" during the period of Emergency.

7. This writ petition could have been dismissed on the sole ground of inordinate delay in approaching this Court in writ jurisdiction for the reason that the cause of action, if any, arose immediately after his release on 22.03.1977 whereas the petitioner filed the present writ petition in 1997. In my opinion, the plea that the matter remained pending with the State Government Department for adjudication could not be a valid explanation for such delay in approaching the Court after more than a decade.

However, in view of issue raised and the question involved in the present writ application, I proceed to adjudicate upon merits of the case.

8. "MISA", which came into force with effect from July 2, 1971 conferred power on the State Government, Central Government and competent authority to detain a person, if it was satisfied with regard to such person that it was necessary with a view to prevent him from acting in any manner prejudicial to defence of India, the relations of India with foreign powers or the security of India; or the security of the State or the maintenance of public order, the maintenance of supplies and services essential to the communities etc.

9. On December 3, 1971 the President of India had issued a proclamation in exercise of power conferred by Clause (1) of Article 352 of the Constitution of India declaring that a grave emergency existed whereby the security of India was threatened by external aggression. Subsequently, while the proclamation dated December 3, 1971 was still in force, in exercise of power conferred by Clause-1 of Article 359 of the Constitution of India, the President of India by a proclamation dated 16.11.1974 declared as follows:-

a) the right to move any court with respect to orders of detention which have already been made or which may hereafter be made u/s 3(1)(c) of the Maintenance of Internal Security Act, 1971 as amended by Ordinance 11 of

1974, for the enforcement of the rights conferred by Article 14, Article 21 and clauses (4), (5), (6) and (7) of Article 22 of the Constitution, and

b) all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect of orders of detention made under the said Section 3(1)(c), shall remain suspended for a period of six months from the date of issue of this Order or the period during which the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 is in force, whichever period expires earlier.

10. The above Presidential Order was subsequently amended by substituting "twelve months" for "six months." On June 25, 1975 another proclamation of emergency was issued by the President of India which reads as follows:-

In exercise of the powers conferred by clause (1) of Article 352 of the Constitution of India, I, Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

11. On June 26, 1975, the President of India, in exercise of powers conferred by Clause-1 of Article 359 of the Constitution of India made the following order:-

In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the proclamation of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

This Order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This Order shall be in addition to and not in derogation of any Order made before the date of this order under clause (1) of Article 359 of the Constitution.

12. Certain amendments were introduced in "MISA" with effect from June 29, 1975 incorporating Section 16-A. Evidently this amendment came into force after declaration of Emergency. By Constitution (38th Amendment) Act, 1975, Article 1(A) was inserted in Article 359 which is relevant for the purpose of the present adjudication which is as follows:-

[(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the

order of aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.]

(emphasis added)

13. "MISA" came to be further amended by Act No. 14 of 1976 by adding Section- 16A(9) which received the Presidential ascent on January 25, 1976.

14. In the background of above, the question which needs to be decided in the present writ application is whether the petitioner can, through present writ application, question the validity/legality of the order of detention passed during the period when proclamation of Emergency was in operation and during which the right to move any Court for enforcement of such of the fundamental rights conferred by Part III of the Constitution of India was under suspension; on the ground that such exercise of power detaining him under "MISA" was mala fide and on extraneous considerations. Further, whether he can claim compensation as of right for such detention.

15. "MISA", which was basically a pre-emergency enactment was amended during the proclamation of emergency was in operation by Act 39 of 1975 with effect from June 29, 1975 by introducing Section 16A with specific recital to the effect that the provisions of this Section shall have effect during the period of operation of proclamation of emergency, notwithstanding anything contained in the Act or any rules of natural justice. Subsequently, Sub-section (9) to Section 16A of MISA was added by introducing amendment in Act 39 of 1975, which reads as follows:-

(9) Notwithstanding anything contained in any other law or any rule having the force of law,-

(a) the grounds on which an order of detention is made under sub-section (1) of Section 3 against any person in respect of whom a declaration is made under sub-section (2) or sub-section (3) and any information or materials on which such grounds or declaration under sub-section (2) or a declaration or confirmation under sub-section (3) or the non-revocation under sub-section (4) of a declaration are based, shall be treated as confidential and shall be deemed to refer to matters of State and to be against the public interest to disclose and save as otherwise provided in this act, no one shall communicate or disclose any such ground, information or material or any document containing such ground, information or material;

(b) no person against whom an order of detention is made under sub-section (1) of Section 3 shall be entitled to the communication of disclosure of any such ground, information or material as is referred to in clause (k) or the production to him of any document containing such ground, information or material.

16. Whether the question of mala fide can be gone into while exercising power of judicial review of an order of detention passed under "MISA" during the period when proclamation of Emergency was in operation came to be considered by

Constitutional Bench of the Supreme Court in case of A.D.M., Jabalpur v. Shivakant Shukla (1976) 2 SCC 52. By its majority judgment, the Supreme Court held that in view of the Presidential Order dated 27.06.1975, challenge to the legality of order of detention on the ground that it was vitiated by mala fide, factual or legal or was passed on extraneous consideration was not permissible in a proceeding under Article 226 of the Constitution of India.

17. The entire claim of the petitioner in the present case is based on the plea that the order of detention passed against him was a mala fide exercise of power and he was detained during the emergency period on extraneous considerations. However, following the majority judgments of Constitution Bench of Supreme Court in case of A.D.M., Jabalpur v. Shivakant Shukla (Supra), I am of the view that such plea is not sustainable. The petitioner's claim for compensation on the ground that his detention was based on mala fide exercise of power or on extraneous considerations is fit to be rejected accordingly.

18. I am not unmindful of the fact that the majority judgment of Supreme Court in case of A.D.M., Jabalpur v. Shivakant Shukla (Supra) came under severe criticism so much so that the Apex Court in case of Remdeo Chauhan @ Rajnath Chauhan Vs. Bani Kant Das and Others, made the following observation:-

54. There is no doubt that the majority judgment of this Court in A.D.M., Jabalpur case violated the fundamental rights of a large number of people in this country. Commenting on the majority judgment, Chief Justice Venkatachaliah in the Khanna Memorial Lecture delivered on 25.02.2009, observed that the same be "confined to the dustbin of history". The learned Chief Justice equated Khanna, J.'s dissent with the celebrated dissent of Lord Atkin in *Liversidge v. Anderson*. In fact the dissent of Khanna, J. became the law of the land when, by virtue of the Forty-Fourth Constitutional Amendment, Articles 20 and 21 were excluded from the purview of suspension during Emergency.

However, the fact remains that the said judgment, to the extent it deals with the provisions of Section 16A of "MISA" with reference to the proclamation of Emergency and the Presidential order dated June 26, 1975 is still a binding precedent having not been overruled expressly or impliedly.

19. I am of the further opinion that Clause (1-A) of Article 359 of the Constitution also puts a bar on challenge to an order of detention passed during the emergency period. The clause, which has been quoted hereinabove, saves the "things done or omitted to be done"; under a law made by State (within the meaning of Part III of the Constitution) while an order made under Clause (1) of Article 359 is in operation, in exercise of the power conferred under Clause (1-A); though such law would cease to have effect to the extent of incompetency of the State to make such law being in conflict with the rights conferred by Part III of the Constitution, as soon as order under Article 359(1) ceases to operate. This is to be noted that Clause (1-A) was introduced in Article 359 with retrospective effect from the date of the Constitution. Section 16A of MISA is thus covered by

Clause (1-A) of Article 359 of the Constitution and, therefore, things done under such law can't be questioned even after the Emergency came to be lifted.

20. Reference may be made in this regard to the Constitution Bench judgment of nine Judges of Supreme Court in case of Attorney General for India and Others Vs. Amratlal Prajivandas and Others, which considered the effect of amendment in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) made with effect from 01.07.1975 after the proclamation of emergency on 25.06.1975 and action taken thereunder during the period when proclamation of emergency was in operation. The orders of detention in that case were made after the proclamation of emergency to which Section 12A of COFEPOSA was applicable. In view of provisions u/s 12A of COFEPOSA, the detainees were not supplied the grounds of detention nor were given any opportunity to make representation against their detention nor the cases were referred to the Advisory Board. They were, however, released on or within a day or two of the date on which the Emergency was lifted. However, the order of detention was being made basis for taking action against such detainees under Smugglers And Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (SAFEMA). The detainees questioned the order of detention passed under COFEPOSA after their release, on the ground that such order of detention was made a basis for action under SAFEMA against them and they were thus entitled to challenge the validity of the order of detention. They contended that they might not have been able to question the validity of the detention during their detention because of the operation of the proclamation of Emergency but after lifting of Emergency, they were entitled to challenge the order of detention, such order being used for action under SAFEMA. The Supreme Court negated the plea holding that Clause (1-A), was introduced in Article 359 by Constitution (38th Amendment) Act, 1974, with a view to bring the effect of Presidential Order under Article 359(1) on par with Article 358(1) of the Constitution. The Apex Court, dealing with the words "except as respects things done or omitted to be done before the law so ceases to have effect" as occurring in Clause (1-A) of Article 359 of the Constitution held that effect of these words was evidently the same as that obtaining under Article 358(1) of the Constitution of India.

21. The Apex Court in case of Attorney General for India v. Amritlal Prajivandas (Supra) held in paragraph 32 as follows:-

32. Now coming to Clauses (1) and (1-A) of Article 359 the position is this: While clause (1) empowers the President to suspend the enforcement of the fundamental rights named in such notification (and any and all proceedings in that behalf in any court), it does not empower the President to suspend the fundamental rights. Evidently, the Founding Fathers did not think it necessary to clothe the President with such a power. The words in clause (1) are clear and unambiguous. They only speak of suspending the enforcement of the rights in Part III and not suspending the rights themselves. We see no warrant, no justification and no basis for holding that the suspension of enforcement of the

rights means in effect the suspension of the rights themselves. If that were the intention of the Founding Fathers, they would have said so expressly. Indeed, they have stated what they meant in explicit language. In view of the fact that the fundamental rights in Part III are allowed to be affected by a Presidential Order, we think, we ought not to read anything more than what the clause expressly says-and its language leaves no room for any doubt. This is the view taken in *Makhan Singh* [as well as by Bhagwati, J. in *A.D.M. Jabalpur v. Shivakant Shukla*] and we agree with them respectfully. Then came clause (1-A), introduced by the 38th Amendment Act with retrospective effect from the date of Constitution. It says that while a Presidential Order suspending particular fundamental rights is in operation, the State shall be entitled to make any law or to take any executive action which it would not have been entitled to make or to take but for the suspension of the enforcement of the said rights. At the same time, the clause says that any law so made shall, to the extent of incompetency, cease to have effect as soon as the Presidential Order ceases to operate "except as respects things done or omitted to be done before the law so ceases to have effect". The effect of these words ("except as respects....effect") is evidently the same as that obtaining under Article 358 (which too employs identical words) which we have explained hereinbefore at some length. It is true that clause (1) of Article 359 does not provide for the suspension of any of the fundamental rights but only their enforcement and it equally true that those fundamental rights (whose enforcement is suspended) continue in theory to be alive, yet we must also give effect to clause (1-A), which is equally a part of Article 359 now-and must be deemed to be such a part at all points of time commencing from 26-1-1950. The conclusion is, therefore, inescapable that during the period the Presidential Order under Article 359(1) suspending enforcement of certain rights conferred by Part III is in operation, the State is empowered to make any law or to take any executive action inconsistent with such rights. All this is so because the emergency proclaimed to meet the threat to the security of India has to be effectively implemented. The requirements of emergency constitute both the foundation as well as an implied limitation upon the power. What is warranted is what is necessary for effective implementation of emergency.

22. In the present case, as was the situation in case of *Attorney General for India v. Amritlal Prajivandas* (Supra), the petitioner was detained under MISA after proclamation of Emergency dated 25.06.1975. Section 12A introduced in COFEPOSA by Act 19 of 1976 is almost identical to the amendment made in MISA by introducing Section 16A to the Act. The petitioner in the present case was released immediately after the Emergency was lifted. In my opinion, following the ratio laid down for *Attorney General for India v. Amritlal Prajivandas* (Supra), the petitioner cannot question the legality of order of detention and claim compensation. In view of Clause (1-A) of Article 359 of the Constitution, the orders passed during the period of Emergency are saved by giving effect to the words "except or respects things done or omitted to be done before the law so ceases to have effect" occurring in Clause 359(1-A) of the Constitution.

23. In view of the provisions of Clause (1-A) of Article 359, the petitioner cannot sue the State for damages or other reliefs nor can he take any other proceedings against the State for detaining him during the period of Emergency because the validity of the things done or omitted to be done cannot be questioned either during or after Emergency by virtue of Article 359(1-A) of the Constitution of India.

24. Learned Counsel for the petitioner has placed reliance on the judgments of Apex Court reported in Kharak Singh Vs. The State of U.P. and Others, and Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others, in order to claim compensation. None of these cases would apply in the facts and circumstances of the present case as none of them deal with detention of a person during proclamation of emergency, under law covered by Article 359(1-A) of the Constitution. This writ application is, accordingly, dismissed but without cost.