

(1965) 02 GUJ CK 0001

In the Gujarat High Court

Case No : Spl. Civil Application No. 152 of 1961

Ratilal Bhogilal Shah

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 12-02-1965

Acts Referred:

Arms Act, 1959 — Section 18
Arms Rules, 1951 — Rule 41A, 41B
Constitution of India, 1950 — Article 226, 227
Penal Code, 1860 (IPC) — Section 143, 342, 352, 457

Citation : AIR 1966 Guj 244 : (1965) GLR 522

Hon'ble Judges : J.M. Shelat, C.J;J.B. Mehta, J

Bench : Division Bench

Advocate : B.H. Shah, for the Appellant; B.R. Shah, Asstt. Govt. Pleader and K.L. Talsania, Addl. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Mehta, J.—This petition Is directed against the order, dated November 28, 1989, suspending the petitioner's arms licence and the order dated November 22. 1960. cancelling the same

2. The petitioner is an Indian citizen residing at Hatholi in Kaira District and is carrying on extensive cultivation in vast areas. He was granted a fire-arm licence No. POL. MD. 120 enabling him to own, possess and hold a Bridge-Load gun for self protection and the said licence was to expire on December 31, 1960 During the pendency of one criminal complaint filed against the petitioner by one Chhotabhai Jivabhai under Sections 143, 467, 342 and 352 of the Indian Penal Code on or about March 14, 1958, the respondent No. 8, the District Magistrate of Kaira. by the order, dated November 23, 1959, suspended the petitioner's licence on the ground of security of public peace. The material part of the said order at Annexure "A" it as under:

"Fire arms licence in form XVI bearing No. MD 120 for a B. L. gum for self

protection issued in the name of Shri Ratilal Bhogilal Shah of Hathnoli Taluka Mehmabad is suspended u/s 18(a) of the Indian Arms Act for the security of the public peace."

It is the case of the petitioner that he was acquitted in the pending criminal case on February 29, 1960, as the complainant's case was found to be cooked up story. He, therefore, applied for restoration of licence on March 23, 1960, but his request was rejected by the 3rd respondent by his order, dated August 26, 1960, and by the letter, dated October 18, 1960, the petitioner was informed that he would not be given reasons as the said order not to return the arm was not in the form of an order. The petitioner thereafter appealed against the order suspending his licence on October 28, 1960, and the said appeal was finally-rejected on January 16, 1961 as being time barred by respondent No 2. the Commissioner of Revenue, Baroda. The petitioner, therefore, challenged the said suspension order in this petition under Articles 226 and 227 of the Constitution of India. In the affidavit filed by respondent No. 3, it was the case of respondent No. 3 that the order of suspension was made after calling for reports From the police, after considering the general security of public peace and after a proper application of mind to this question. In para 12 he stated that the said order did mention the reasons that it was for the security of the public peace that the order was passed. He further stated that the second order dated August 25. 1960, was also a proper order inasmuch as it was made after considering reports from the police, the judgment of the Court, the facts and circumstances of the case, the general security of public peace and after a proper application of mind to this question. It was also stated that the said order was in continuation of the order of suspension and the reasons mentioned in the said order had not changed and they were the same viz. for the general security of public peace and those reasons were sufficient to warrant making of the said order. Finally in para 18 he had stated that the authorities had to look to the general security of public peace as a whole and therefore. the said order suspending and cancelling the arms licence of the petitioner was a proper and valid order. When the matter came up for hearing, the under-secretary to the respondent No. 1. the State of Gujarat, filed an affidavit stating that the order cancelling the licence of the petitioner was finally passed by the Additional District Magistrate on November 52. 1960, and the said order was served on the petitioner and so the petition had become infructuous. The said order had been annexed to the said affidavit at Ex. 1 and the material part thereof is as under:

"Fire arms licence in form XVI bearing No. MD 120 for a B. L. Gun for self protection issued in the name of Shri Batilal Bhogilal Shah of Hathnoli Taluka Mehmabad suspended under this office order No. P. O. L. M. Section 120 dated 23-11-1959 is hereby cancelled u/s 18(a) of the Indian Arms Act for the security of public peace."

The petitioner's case is that no copy of the said final order was served on him and that while his appeal was pending, a police officer had come to him and had

informed him that he would not be given a licence and in token thereof he was asked to sign some papers and he was not aware of the alleged order. In view of the said cancellation order the petitioner also sought permission to amend the petition by joining the Additional District Magistrate as the 4th respondent and by challenging the said cancellation order as well. As the State Government had produced the order of cancellation only on the day of hearing, the learned Assistant Government Pleader did not raise any objection against the proposed amendment and even waived the service of notice. The said amendment having been allowed, the petitioner had carried out the said amendment and, therefore, both these orders are now challenged in this petition.

3. Mr. B. H. Shah for the petitioner challenged the said orders on the following grounds:

(1) That both the orders of suspension and cancellation of the licence were null and void as no reasons were recorded as required u/s 18 of the Act before they were passed by the authority concerned

(2) That the Additional District Magistrate had no jurisdiction to cancel the licence, and

(3) that the impugned orders were made without giving any reasonable opportunity whatsoever to the petitioner to give his explanation and so they were in contravention of the principles of natural justice. As the first contention of Mr. B. H. Shah goes to the root of the matter and as we accept the same, it is not necessary for us to go into the other two contentions raised by Mr. Shah for the petitioner.

4. Section 18 of the Indian Arms Act, 1878, hereinafter referred to as "the Act", in so far as it is material for our purpose, runs as under:

"18. Any licence may be cancelled or suspended-

(a) by the officer by whom the same was granted, or by any authority to which he may be subordinate, or by any Magistrate of a District or Commissioner of Police in a presidency town, within the local limits of whose jurisdiction the holder of such licence may be, when, for reasons to be recorded in writing, such officer, authority, Magistrate or Commissioner deems it necessary for the security of the public peace to cancel or suspend such licence:"

5. Rule 41-A of the Indian Arms Rules, 1951, hereinafter referred to as the "rules" provides in Sub-clause (1) that where a licence has been cancelled or suspended under Clause (a) of Section 18 of the Act, the person aggrieved by the order of cancellation or suspension may within thirty days of the date of the passing of the said order, prefer an appeal against it. Rule 41-B provides in Sub-clause (1) (b) that an authority cancelling or suspending a licence under Clause (a) of Section 18 of the Act, shall record in writing his reasons for such refusal or cancellation or suspension. Sub clause (2) provides that a copy of the reasons so recorded shall be furnished on request to the person affected unless the said

authority considers the disclosure of such reasons prejudicial to public Interest, In the latter case the reasons recorded shall be communicated to the appellate authority on demand, if the person affected has preferred an appeal against the order. Mr. Shah for the petitioner contends that under Clause (a) of Section 18. two conditions precedent for the exercise of this power of suspension or cancellation of the licence for a fire-arm are: (i) that the authority passing such orders must himself record such reasons why the order had been passed and (ii) that it should appear from the order that it was passed because it was deemed necessary for the security of the public peace to cancel or suspend such licence. He relied on a decision of the Division Bench of the Allahabad High Court consisting of Agarwala and Mukerji JJ in Beni Chand Vs. The District Magistrate, Banda and Another, , where in a case of an order of suspension of the arm licence these two conditions were held to be essential conditions u/s 18 of the Act and the order passed in breach thereof was held to be one without jurisdiction and was quashed in a writ petition. This view of the Allahabad High Court has been followed by Sinha. J. in Haji Md. Vakil Vs. Commr. of Police and Another, . where it was held that the following things were essential to make an order u/s 18 valid:

"(1) The officer, authority Magistrate or commissioner, cancelling or suspending the licence, must have reasons for which he deems it necessary for the security of the public peace to cancel or suspend such licence

(2) The person cancelling or suspending the licence must himself record the reasons in writing.

(3) The order on the face of it should show

(a) that it was passed because it was necessary for the security of the public peace to cancel or suspend such licence

(b) that the reasons for thinking so have been recorded in writing by the person making the order "

The learned Judge further observed:

"I would not go to the extent of saying that the reasons must necessarily be communicated, but I think that the licence-holder whose licence has been cancelled or suspended has a right to know the reasons and if the order is challenged the Court has a right to look into it. Otherwise, I do not see the point in making it essential that reasons should be recorded in writing".

As against this, the learned Assistant Government Pleader for the respondent strongly relied on a decision of the Madhya Pradesh High Court in Moti Miyan Vs. Commissioner, Indore Division and Others, where the learned Judge took the view that the reasons for refusal to renew the licence u/s 17 had to be recorded to enable the person aggrieved to state effectively his objections to the order in the petition or memorandum of appeal which he may prefer. The giving of reasons was, therefore, necessary for an effective exercise of the right of appeal,

but the omission to do so would not make the order of the competent authority as without jurisdiction. According to the learned Judges the remedy would be by way of appeal or for a writ of mandamus directing the authority to state his reasons so that the person concerned may be in a position to exercise his right of appeal, but the order passed without recording the reasons could not be interfered with by the High Court on the ground that it was without jurisdiction. The learned Assistant Government Pleader also relied on the fact that the ground of public security itself was a reason for passing the impugned order and the said reason was in terms mentioned in the order itself and, therefore, there was due compliance with the requirements of Section 18 of the Act

6. Now the learned Assistant Government Pleader's argument proceeds on a clear misconception of Section 18 of the Act. What Section 18 requires is not only the subjective satisfaction of the authority concerned that it deems necessary to pass the order of suspension or cancellation for security of public peace but also that reasons on which such subjective satisfaction has been reached must be recorded In writing by the authority itself What the learned Assistant Government Pleader does is to confuse the recording of the conclusion of the authority with the reasons for which it arrives at that conclusion.

7. As for the next contention of the learned Assistant Government Pleader, we must examine the purpose for which these two safeguards were enacted by the Legislature to find out the true intention of the legislature. It is well settled that the employment of the auxiliary verb "shall" which is prima facie mandatory is inclusive and whether the statute is mandatory or directory has to be found out in each case by finding out the true intention of the Legislature by ascertaining the same from the nature and design of the statute and the consequences which would follow from construing it one way or the other, and above all, from the fact whether the object of the Legislature would be defeated or furthered As pointed out by Maxwell on The Interpretation of Statutes, Eleventh Edition. 1962, at p. 364: "A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor Inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority concerned, and it is therefore probable that such was the intention of the Legislature". At page 363, it is also observed as under: "The position is the same where compliance is made, in terms, a condition precedent to the validity or legality of what is done. The neglect of the statutory requisites in such cases would obviously be fatal." In the present case, It is clear that the two requirements are conditions which related to the exercise of the power vested in the concerned authority. These two conditions must be fulfilled before the power of suspension or cancellation of a licence is exercised by such authority. Such prescriptions of the nature of conditions precedent for exercise of any power and which would constitute limitations on the exercise of the power itself, should be considered to be

absolute In nature as unless these requirements were strictly fulfilled, the power itself would not be acquired. It must be kept in mind that these provisions are in the nature of reasonable restrictions imposed on the right of a citizen to hold property in the Interest of general public. For the security of public peace the authority is empowered to suspend or cancel the fire-arm licence and thus deprive the citizen of his fire-arm. It constitutes, therefore, the first requirement of the section that this wide power should be exercised when the authority deems it necessary for the security of the public peace. Naturally, in what cases such wide power must be exercised must be left to the subjective satisfaction of the authority concerned and the Court could not go into the subjective satisfaction on the ground that the materials were inadequate or insufficient or that they were true or false Whether the necessity for such action exists or not is entirely for the authority to decide in his discretion and that is why it seems that in this context the other requirement of the recording of reasons by the authority himself is the only protection which is afforded to the person concerned to ensure that the reasons which impelled the authority to suspend or cancel the licence were those which had a rational nexus or close proximity with the object sought to be achieved of securing public peace and were, therefore, germane to the context and scope of the power vested in him. If these reasons which were recorded were totally Irrelevant as a justification for the conclusion reached by him viz., the necessity to secure public peace, the exercise of the power would be obviously void as being not justified by the terms of the statute conferring the power. Even though as provided in Rule 41-B a copy of the reasons may not be furnished unless the person affected requests for the same and the authority considers the disclosure of such reasons not to be prejudicial to public Interest, the said rule in terms requires that the reasons must be recorded in writing and even if the authority considers disclosure of such reasons prejudicial to public interest, those recorded reasons have got to be communicated to the appellate authority on demand if the person affected had preferred an appeal against the order. These reasons would, therefore, be always placed for scrutiny before the appellate authority. The provision of appeal under Rule 41-A and of disclosure of reasons at least before the appellate authority under Rule 41-B would show that the recording of these reasons is provided by way of salutary safeguard as a fetter on the exercise of this wide power so that the same may not be arbitrarily or capriciously exercised. If this necessary safeguard is ignored, the very object for which this provision is inserted would be wholly defeated. The only protection afforded to the subject would therefore be nullified, if it were held that the requirement was anything but mandatory. That is why the Allahabad and the Calcutta High Courts have, as stated above, taken the view that an order in breach of these two essential conditions would be one without jurisdiction. With great respect, we cannot agree with the view of the Madhya Pradesh High Court that an order passed without recording the reasons would not be one without jurisdiction, as the same view seems to have been arrived at without examining the question whether this requirement of recording reasons in writing was mandatory or directory, especially in the context of such provisions which are in

the nature of reasonable restrictions of the fundamental right of the citizen to hold property. If the prescription was imperative or absolute in its terms, being in the nature of a condition precedent to the acquisition of the power itself, it is clear that nullification for disobedience of this prescription is implicit. We, therefore, hold that if the authority before passing the order has not recorded the reasons in writing for arriving at the subjective satisfaction as to the necessity of such order for securing public peace, the same must be quashed as null and void.

8. The learned Assistant Government Pleader fairly conceded that apart from the grounds stated in the order itself, viz., for security of public peace, no reasons were recorded before passing any of these orders for reaching the said conclusion. The suspension order was produced right from the beginning and even in the affidavit of respondent No. 3 it is stated that the reason stated in the order itself is the only reason and it is not the case of respondent No. 3 that any other reason was recorded. What he considered to be the reason was really a conclusion or subjective satisfaction which he had arrived at viz the necessity of securing public peace. But he has not recorded the reasons for arriving at the said conclusion. Even for the cancellation order the learned Assistant Government Pleader stated before us that he had gone through the entire file and as the matter was adjourned to-day even after instructions he informs us that no reasons whatever have been recorded for the cancellation order except what is stated in the order itself. That order also suffers from the same defect as the suspension order. There also what is stated is the bare conclusion viz the necessity of securing public peace and no reasons for reaching the said conclusion have been recorded either in the order or in any record by the concerned authority. Therefore, both these orders are in clear contravention of Section 18 and must be quashed.

9. The learned Assistant Government Pleader faintly argued that the licence having expired on December 31, 1960, the relief would be in-fructuous. But as pointed out by Sinha, J. in AIR 1964 Cal 157, at p 159, the relief would not be infructuous. . If the order of cancellation stands, the petitioner is prejudiced in two ways. Firstly, there is ignominy of the charge that the petitioner is guilty of something which is prejudicial to the security of public peace and secondly, his chances of procuring a fresh licence are greatly prejudiced if the cancellation of his licence is allowed to remain Whether he will in fact be able to procure one is not for this Court to consider. It depends entirely "Upon the discretion of the respondent, exercised properly within the limits imposed by the provisions of the Indian Arms Act. It is, therefore, clear that the relief would not be infructuous.

10. In the result, we allow this petition and quash the impugned orders of suspension and cancellation of the petitioner's licence and the rule is accordingly made absolute with costs