
(2016) 10 CAL CK 0013
In the Calcutta High Court
Case No : W.P. No. 24471 (W) of 2016

Sandeep Bera

APPELLANT

Vs

Chief Secretary, Government of West Bengal

RESPONDENT

Date of Decision : 06-10-2016

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 25

Citation : (2016) 10 CAL CK 0013

Hon'ble Judges : Dipankar Datta, J.

Bench : Single Bench

Advocate : Gaurab Kumar Basu, Advocate, for the Petitioner in WP 24471 (W)/16; Lokenath Chatterjee, Ms. Debamitra Bharadwaj, Ms. Sumitra Ds, Ms. Kasturi Tarafdar, Advocates, for the Petitioner in WP 24488 (W)/16 & WP 24153 (W)/16; Anirban Ray, Ms. Amrita Pandey, Ms.

Final Decision : Allowed

Judgement

Dipankar Datta, J.—Today is the last working day of this Court prior to the annual vacation. Having regard to time constraints, delivery of an order after making extensive research may not be appropriate; the order has to be short and precise so that some time is left for the party aggrieved to work out his/its remedy before the appellate Court.

2. Since a very important and sensitive common issue is involved in this bunch of writ petitions, the same have been heard one after the other and this common order shall govern the same.

3. W.P. 24471 (W) of 2016 is at the instance of a petitioner who is a resident of Vidyasagarpur, within the jurisdiction of Kharagpur Town Police Station. It is claimed by him that he is also residing at Bibekananda Park within the jurisdiction of Bansdroni Police Station where he has been organizing Durga Puja for the last couple of years in his flat. It is further claimed that the petitioner's neighbours also join him in celebration of Durga Puja and that as per Hindu customs and practices, the idol is immersed on Bijoya Dashami. It is also claimed

by the petitioner that he came to learn from the local police station that this year Durga idols are required to be immersed by 4.00 p.m. of 11th October, 2016 which incidentally is Bijoya Dashami. Seized of such information, he had been to Bansdroni Police Station 24th September, 2016 and was verbally told that the information that he had received earlier was correct. An instruction issued by the respondent no. 8 is part of the writ petition, which is to the effect that immersion of Durga idol on 11th October, 2016 is allowed only till 4.00 p.m.

4. The petitioner has referred to Article 25 of the Constitution of India as well as Articles 14 and 21 thereof to contend that the decision, if any, taken to restrict immersion of Durga idol by 4.00 p.m. is arbitrary, without jurisdiction and discriminatory.

5. It has been prayed that the respondents be directed to extend the time limit for immersion of Durga idol till sunrise of 12th October, 2016 as per Hindu customs and practices as well as devise a route to be taken by the petitioner on the way to immerse the idol.

6. W.P. 24488 (W) of 2016 is at the instance of a practicing advocate of this Court. It is claimed by him that along with his family members, the petitioner has been observing Durga Puja at his ancestral residence at 8/2A, Rupchand Roy Street within Burrabazar Police Station, Kolkata - 700 007 for about last 200 years. The petitioner has vividly described in his writ petition what the festival is all about. In short, Durga Puja epitomizes the victory of good over evil. It is further claimed that the family of the petitioner follows the time schedule as provided in the 'Gupta Press Panjika' and in terms thereof, the important custom of 'Debibaran' followed by 'Sindur Khela' is performed only after sunset which can commence after 5.13 p.m. of 11th October, 2016, and that upon completion of customary rites and ceremonies, the immersion procession would commence around 7.00 p.m. The route that the petitioner has been following has also been mentioned in paragraph-10 of the writ petition. He has also referred to information derived from the media that immersion of Durga idols would not be permitted by the administration after 4.00 p.m. of 11th October, 2016 and the entire day of 12th October, 2016, on account of celebration of Muharram.

7. In paragraph-14 of the writ petition, it has been pleaded as follows :-

"It is further stated that, after independence, in the years 1952, 1982 and 1983, Muharram was celebrated on the day of Ekadashi, i.e., the day immediately following Mahadashami, as is the instance this year. However, to the best of the knowledge of the petitioner, no such restrictions on immersion proceedings were ordered at any point of time. Further, in the years 1950, 1951 and 1984, Muharram had been celebrated on Dwadashi, i.e., the day following Ekadashi. Even in such years, there were no restrictions imposed upon immersion processions of the deity of Goddess Durga. It is stated that immersion processions had continued even on the days of Muharram and there were no law and order or other problems. A table showing the dates of observation of Durga

Puja and Muharram/Ashura in independent India is annexed and marked "P-3".

8. Referring to the fact that the Central Government and the State Government have declared a holiday on the occasion of Dusshera/Mahadashami on 11th October, 2016 so that people can observe the said occasion, prohibiting immersion after 4.00 p.m. of 11th October, 2016 has been cited as an impediment for completion of rites and ceremonies on the day of Mahadashami which have been observed since the last very many years and cannot be completed before 7.00 p.m. The petitioner himself appears to have despatched a notice demanding justice addressed to the Officers-in- Charge, Burrabazar and North Port Police Stations as well as the Officer-in-Charge, Howrah Bridge Traffic Guard to allow commencement of the immersion procession from his residence at about 7.30 p.m. on 11th October, 2016 which would be completed by 8.30 p.m. Receiving no response, the petitioner has also prayed for similar relief as claimed in the other writ petition.

9. W.P. 24153 (W) of 2016 is at the instance of the petitioners who claim to observe Durga Puja at their ancestral residence at 'Bholanath Dham', 33/2, Beadon Street, Kolkata - 700 006 since several generations. Portions of the contents of the writ petition bear resemblance to the case pleaded in W. P. 24488 (W) of 2016 except that the petitioners follow the 'astronomic almanac' of 'Beni Madhab Sil'. Prayers in this writ petition are similar to the prayers in the other writ petitions, meaning thereby that permission to immerse Durga idol after 7.00 p.m. has been prayed for on Bijaya Dashami.

10. W.P. 24712 (W) of 2016 is at the instance of a organizer of a community puja. He has claimed similar relief as claimed by the other petitioners.

11. Mr. Majumder, learned Government Pleader representing the State initially sought to resist the writ petitions by raising the points of locus standi, incomplete pleadings and failure to annex relevant documents in support of the assertion that the petitioners have been performing Durga Puja in their residences, failure to issue notice demanding justice, etc.

12. It would be appropriate to record that, at this stage, the statements in the writ petition are to be deemed as correct unless, of course, absurd and improbable pleadings are noticed which are unworthy of credence. No absurd and improbable pleading is found in any of the writ petitions and, therefore, the point of locus standi as well as failure to annex documents in support of the assertion that the petitioners have been organizing Durga Puja in the yesteryears, has not impressed this Bench. The objection stands overruled.

13. Insofar as the objection that notice demanding justice has not been served on the respondents, the same is equally without merit. Apart from the fact that some of the petitioners have despatched notices demanding justice and proof of such despatch is also available in W. P. 24471 (W) of 2016 and W. P. 24152 (W) of 2016, the substantive prayer in these writ petitions is for setting aside the decision that has been taken prohibiting immersion of Durga idols not beyond

4.00 p.m. of 11th October, 2016. A writ court sets aside a decision or order by issuing a writ of or direction/order in the nature of Certiorari; and it is settled law that for issuance of a Certiorari, prior notice demanding justice is not imperative. This objection too fails.

14. Mr. Majumder having been called upon to argue the merits of the writ petitions has submitted that a web portal 'Aasan' had been launched by Kolkata Police on 30th August, 2016 which would provide a single window for all clearances, for the Durga Puja festival in West Bengal. While inaugurating the portal, the Chief Minister had, inter alia, informed "...puja organisers and Kolkata Police that the government had decided that idol immersion will take place till 4pm on October 11 - the Bijoya Dasami day." The above observation of the Chief Minister was widely published in four newspapers and, therefore, all Puja organizers were adequately put on notice in advance that immersion beyond 4.00 p.m. of 11th October, 2016 would not be permitted by the administration.

15. When called upon by the Bench to produce the decision, Mr. Majumder submitted that no minutes of the meeting had been prepared and, therefore, there was no written decision signed by the Chief Minister or any other competent officer.

16. On a further query as to whether such a course of action was permissible or not, Mr. Majumder answered in the affirmative and cited the decision reported in (2004) 6 SCC 465 (State of Punjab v. Nestle India Limited). He also placed reliance on the Division Bench decision of this Court reported in (2000) 2 ICC 256 (Cal) (Sri Mrinmay Kumar Rath v. Sub-Divisional Officer, Contai Sub-Division) in support of his contention that immersion processions can be regulated by the administration and since there is no complete or total bar to the taking out of immersion processions on 11th October, 2016, the plea of the petitioners has no substance.

17. Mr. Majumder also placed for consideration of this Bench a message emanating from Mr. D. Guhathakurta, IAS, Commissioner, Internal Security Cell, Home Department addressed to all divisional commissioners, district magistrates, superintendents of police, commissioners of police, etc. Mr. Majumder wished that the message should not be handed over to the petitioners because of its confidential nature.

18. This Bench proposes to deal with the message at a later part of this order.

In course of hearing, two steps of the State Government have emerged which are perhaps unprecedented in the history of Bengal. First, immersion of Durga idols on Bijoya Dashami (11th October, 2016) has been restricted and no immersion will be allowed beyond 4.00 p.m. Secondly, there is no decision in black & white taken either by the civil administration or by the police administration indicating any reason for imposing the impugned restriction.

19. Upon hearing the parties, this Bench is of the considered view that the writ

petitions deserve to be heard on merits after the parties exchange their affidavits. However, the important point that has to be considered first is whether at all any interim relief should be granted, for, such relief, if granted, would result in granting substantially the principal relief claimed in the writ petitions.

20. Ordinarily, an interim relief which grants the principal relief claimed in the writ petition should not be granted. However, in a case where withholding the interim relief would amount to rendering the writ petition itself infructuous by the time the same comes up for final hearing, a writ court may, having regard to strong prima facie case, balance of convenience and irreparable injury, issue an interim writ even though it would amount to granting the final relief. However, such relief should be granted in rare cases and under compelling circumstances. This is the law laid down in the decision reported in (2004) 4 SCC 697 (Deoraj v. State of Maharashtra).

21. In view of the facts and circumstances under consideration, there cannot be any doubt that the petitioners in W. P. 24471 (W) of 2016, W. P. 24488 (W) of 2016 and W. P. 24153 (W) of 2016 have been successful in presenting an exceptional case warranting interim relief, which might be seen as granting final relief claimed in the writ petition, but based on the factors of a strong prima facie case, balance of convenience and irreparable injury.

22. This Bench is taken aback to find that no decision has been taken by the State Government in accordance with its rules of business or any other law for the time being in force, on paper, prohibiting immersion of Durga idols beyond 4.00 p.m. on Bijoya Dashami.

23. This is plainly not permissible. A decision not on paper cannot be enforced in any manner whatsoever. Some one has to take responsibility for such decision. Even if a high constitutional functionary duly empowered proposes to take a decision affecting rights of subjects, he cannot escape the rigours of reducing such decision in writing and signing it. If such constitutional functionary perceives that he is not bound to follow such procedure, that would amount to subverting the rule of law and indeed a very sad day for the State. Should a constitutional functionary take a decision and seek to enforce it without putting it on paper, there is no existence of a decision at all. Question of enforcement of such non-existent decision does not arise at all.

24. It appears from the newspaper report relied on by Mr. Majumder that the so-called meeting on August 30, 2016 was attended by puja organizers and Kolkata Police. The puja organizers are unidentified but having regard to the announcement of launching of web portal for single window clearances, it would stand to reason that those puja organizers who are required to obtain clearances for organising Durga Puja must have attended such meeting. No document has been produced by Mr. Majumder to satisfy this Bench that individuals/family groups/neighbours, who organise Durga Puja in their respective households or apartment complexes were put on notice to attend such meeting. The petitioners

as well as non-participating Puja organizers, who were not invited to attend such meeting, cannot be bound by any disclosure of a so-called decision made at such meeting.

25. What is more surprising is that no reason is forthcoming for prohibiting immersion of Durga idols after 4.00 p.m. on Bijoya Dashami.

26. In course of hearing, Mr. Majumder submitted that immersion beyond 4.00 p.m. had been prohibited on the ground that processions (tazia) are taken out by members of the Muslim community and that to check law and order problem that might arise because of processions being taken out both by the Hindu and the Muslim communities, it was considered necessary by the Government to impose such prohibition. This Bench regrets to record that no such reason is available even in the press report. No reason is also available in the message that was forwarded to the members of the civil and police administration by Mr. D. Guhathakurtha.

27. Reliance placed by Mr. Majumder on the decision on Nestle India Limited (supra) is thoroughly misplaced. It would appear therefrom that the Finance Minister of the State Government in his budget speech for 1996-97 had made a representation for abolition of purchase tax on milk for which manufacturers of milk products did not pay purchase tax on milk for AY 1996-97 and mentioned such fact in their returns. After the returns submitted by the tax payers were entertained and manufacturers had passed on the benefit of exemption to dairy farmers and milk producers, the Government with the expiry of the said assessment year, took a decision not to abolish purchase tax on milk and the taxing authority raised a demand for AY- 1996-97. The challenge thrown by the assesseees was sought to be resisted by the State Government by submitting that no exemption notification as required by the relevant statute had been issued. Repelling such objection, the Supreme Court proceeded to hold that the State Government could not resile from its decision to exempt milk purchasers and demand purchase tax with effect from April 01, 1996; hence, claim of the assesseees of promissory estoppel against the demand of tax for the period preceding the subsequent decision of the Government deserved to be upheld.

28. This Bench is at a loss to comprehend as to how such decision can come to the rescue of the State Government in these cases. In Nestle India Limited (supra) the Finance Minister by his announcement intended to confer exemption benefit which was acted upon; later on the State Government resiled which operated to the detriment of the assesseees leading to presentation of the challenge to the action of the State Government and it was such challenge that succeeded.

29. The decision in Mrinmay Kumar Rath (supra) also does not aid the State Government. It would appear on perusal of the decision that the petitioner prayed for permission to use a particular route for immersion, which was declined by the Bench. The sensitive issue that has emerged for decision in this

bunch of writ petitions did not arise there and, therefore, the decision is clearly distinguishable.

30. On facts and circumstances, there being no decision in black and white taken by the Government prohibiting immersion processions beyond 4.00 p.m. of October 11, 2016, worshippers of Maa Durga who wish to immerse idols on Bijoya Dashami in the evening would stand deprived without the authority of law. The so-called decision of the Government, which was conveyed to the participants of the meeting held on August 30, 2016, as observed earlier, is not binding on the petitioners in the absence of any material being placed before this Bench to demonstrate that such petitioners were invited to attend the meeting of August 30, 2016. Indeed no such invitation may have been sent to household puja organizers because they are not required to obtain any clearance from the police for organizing puja in their respective residences.

31. Apart from the above, the most fundamental aspect of the matter cannot be overlooked. The power that the State Government has to regulate processions cannot be doubted but such power has to be exercised reasonably, rationally and without any discrimination. Durga Puja happens to be the most important festival of Bengali speaking people residing in West Bengal or in any other state. Never has there been a restriction on immersion of Durga idols on Bijoya Dashami at any earlier point of time. It has been brought to the notice of this Bench that in the years 1982 and 1983, Muharram was observed on the day following Bijoya Dashami but no restriction of the nature impugned herein was imposed.

32. It has been ascertained from Mr. Majumder that number of processions (tajia) taken out on the roads, streets and thoroughfares in the State of West Bengal on the eve of Muharram is not known to the administration. No effort worth the name has been made to satisfy this Bench that processions (tajia) on the eve of Muharram are an inseparable part of the mourning that is associated with Muharram. There has never been a holiday declared either by the Central Government or the State Government, on the eve of Muharram to facilitate processions (tajia). There has been a clear endeavour on the part of the State Government to pamper and appease the minority section of the public at the cost of the majority section without there being any plausible justification. The reason therefor is, however, not far to seek.

33. It also does not appear that there has been any study undertaken by the police administration of the State for identification of routes to be followed by those associated with immersion of Durga idols and those associated with processions (tajia). The administration has failed to take note of the fact that Muharram is also not the most important festival of people having faith in Islam. To put it curtly, the State Government has been irresponsibly brazen in its conduct of being partial to one community, thereby infringing upon the fundamental rights of people worshipping Maa Durga.

34. Article 25 of the Constitution guarantees to all persons freedom to profess

and propagate religion, subject to public order. That, allowing the processions beyond 4.00 p.m. on Bijoya Dashami would affect public order, is conspicuous by its absence either in the press release or the message issued by Mr. D. Guha Thakurata. Immersion on Bijoya Dashami is such a ritual for puritan Hindus that the same cannot be postponed to a day beyond Bijoya Dashami or preponed at the whims and caprices of the State Government. The almanacs prescribe a time schedule which has to be followed in letter and spirit by every Hindu to perform puja and worship Maa Durga with a pure and clean mind. The community puja organizers, who indulge in performing puja to compete with one another for the purpose of winning prizes on offer at the instance of the State Government (clear from the press report relied on by Mr. Majumder) can afford to keep the Durga idols beyond Bijoya Dashami but not the household Puja organizers. On each day, the idol has to be worshipped. These factors have also not been considered.

35. The State Government must realize that it would be dangerous to mix politics with religion. We, the people of India boast of being a secular nation but actions of some State Governments are in deviation of the constitutional norms and principles. No decision ought to be taken that would have the potential of pitting one community against another. We are living in difficult times. Intolerance would rise in the event of such arbitrary decision of the State Government being put in place and enforced.

36. Mr. Majumder was once heard to say in course of hearing that some of the questions that the Bench posed to him do not relate to the pleaded case. Such submission overlooks the fact that the State Government has clearly acted in a hush hush manner by not putting the relevant decision on paper, not putting the contents of the press report relied on by Mr. Majumder and the message of Mr. D. Guhathakurata on the official website as well as not publishing any order imposing restriction in the Official Gazette. In the absence of an informed decision, it is too much to expect that the petitioners would be in a position to urge all possible grounds to attack the impugned restriction.

Prima facie, this Bench is satisfied that the petitioners in W. P. 24471 (W) of 2016, W. P. 24488 (W) of 2016 and W. P. 24153 (W) of 2016 have established customary rights to perform their religious ceremonies and functions which includes immersion on Bijoya Dashami and illegal deprivation or encroachment thereof by the administration, deserves to be interdicted for protecting their rights.

37. For the reasons aforesaid, those petitioners are entitled to interim relief. They shall be entitled to immerse the respective Durga idols worshipped by them in the evening of Bijoya Dashami and such immersion must be completed by 8.30 p.m. Each of such petitioners shall follow the routes that they have been following in the earlier years with an intimation to the police authority in charge of overseeing immersion. There being no valid decision of the State Government prohibiting immersion beyond 4.00 p.m. on Bijoya Dashami, such prohibition shall also not apply to other household pujas and pujas organized by apartment

owners in their respective complexes.

38. The police administration in coordination with the civil administration shall sit together in the next couple of days and identify the routes which are to be followed by immersion processions and processions (tazia) taken out by the Muslim community. Care must be taken to ensure that the routes do not overlap. The civil administration and the police administration shall, however, ensure law and order which is their primary duty and allow the season of festivity to be enjoyed by the people of the State.

39. Insofar as W. P. 24712 (W) of 2016 is concerned, relief is denied because of belated approach and further that any order on this writ petition at this late stage might result in a chaotic condition which would be difficult for the civil and police administration to handle.

40. Affidavit-in-opposition be filed by the respondents within four weeks after vacation; reply thereto, if any, be filed within two weeks thereafter.

41. The writ petition shall be treated as ready for hearing on expiry of the period fixed above for exchange of affidavits and thereafter the parties shall be at liberty to mention it for consideration before the appropriate bench.