
(2009) 05 AHC CK 0843
In the Allahabad High Court

Shekhar Tiwari

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 04-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 135A
Constitution of India, 1950 — Article 100, 102, 105, 14, 190
Criminal Law (Amendment) Act, 1932 — Section 7
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 323, 342
Representation of the People Act, 1951 — Section 62, 7, 8

Citation : (2009) 4 AWC 3181

Hon'ble Judges : Ashok Bhushan, J;Arun Tandon, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—This writ petition has been filed by a sitting member of Uttar Pradesh Legislative Assembly who is detained in prison facing criminal charge under Sections 323, 342, 457, 364, 302, 201, 120B, I.P.C. and 7, Criminal Law Amendment Act, praying for a writ of mandamus commanding the respondents to permit the petitioner to participate in the session of Uttar Pradesh Legislative Assembly.

2. Brief facts of the case necessary for deciding the controversy raised in the writ petition are : The petitioner contested the general election of Legislative Assembly from the State of U.P. in the year 2007 as a ruling party candidate from Auraiya Sadar Constituency No. 285 and was declared elected. On 24.12.2008, an F.I.R. was lodged by one Smt. Shashi Gupta wife of Manoj Kumar Gupta an Engineer working with the State Government under Sections 323, 342, 457 and 364, I.P.C. with the allegation that in the intervening night three persons came at their residence and had beaten the husband of the petitioner and had abducted him. Police after investigation submitted a charge-sheet against several other persons for charges of murder and criminal conspiracy. Petitioner was arrested by Police Station Akbarpur and was lodged in jail on

25.12.2008, since then the petitioner is detained in District Jail, Etawah. The case was committed on 16.2.2009 to the Court of Sessions Judge, Auraiya and the trial of the petitioner is pending. Apart from criminal charges as mentioned above, petitioner has also been detained under the National Security Act, 1980, U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986. The petitioner claims that he is still a Member of Legislative Assembly of U.P. from Constituency No. 285 and his seat is not vacant under Article 190 of the Constitution of India. Petitioner further claims that he is not subject to any disqualification for being member of State Assembly of U.P. as mentioned under Article 191 of the Constitution of India. The membership of the petitioner as M.L.A. has not been suspended till date. A notification dated 14.1.2009 was issued by the Secretariat, Vidhan Sabha, U.P., Lucknow for holding proceedings of Legislative Assembly for discussion and passing of demands for Second Supplementary grants for the financial year 2008-2009 which was informed to all the members of the Legislative Assembly of State of U.P. The petitioner moved an application dated 7.2.2009 in the Court of Chief Judicial Magistrate with a prayer to grant permission for his participation in the proceedings of the Legislative Assembly of the State of U.P. The application was rejected by the Chief Judicial Magistrate vide order dated 9.2.2009.

3. This writ petition has been filed thereafter seeking a writ of mandamus commanding the respondents to ensure participation of the petitioner in the sessions of the Legislative Assembly of State of U.P.

4. Shri R.A. Verma, learned Counsel for the petitioner in support of the writ petition contended that petitioner having been elected as M.L.A. from Auraiya Sadar Constituency No. 285, it is his right to represent the people of the constituency in Assembly and in event he is denied the participation in the assembly, the right of people to be represented in the assembly shall be denied. He submits that petitioner is not a convict nor suffers from any of the disqualification for being a Member of Legislative Assembly of State of U.P. He submits that detention is only with the object of stopping a detenu from intermixing with the society and the petitioner in this case is not claiming permission for intermixing with the society, rather he is seeking permission to participate in the assembly.

5. Learned Counsel for the petitioner has referred to the judgment of the Madras High Court in re K. Ananda Nambiar AIR 1952 Mad 117.

6. Shri Neeraj Upadhyay, Additional Chief Standing Counsel on behalf of the State submits that a M.L.A. detained in prison has no right to claim participation in the sessions of the Legislative Assembly of the State. He submits that the privileges of a M.L.A. confines him from arrest and detention from civil process as per Section 135A, C.P.C. A M.L.A. has no privilege from being arrested on criminal charges. Referring to Rules of Procedure and Conduct of Business of the Uttar Pradesh Legislative Assembly, 1958, learned standing counsel submits that Rule 80 requires only intimation be given to the Speaker by a Judge, Magistrate

or by Executive Authority that a member is arrested on criminal charge or for a criminal offence or is sentenced to imprisonment and also the place of detention. Rule 81 provides for intimation to Speaker for release of a Member and Rule 82 provides for treatment of communications received from Magistrate. Rule 83 further prohibits arrest of a Member within the precincts of the House without obtaining permission of the Speaker.

7. Reliance has been placed on the judgment of *Pillalamarri Venkateswarlu v. District Magistrate, Guntur* AIR 1951 Mad 269; *Ansumali Majumdar and Ors. v. State of West Bengal and Anr.* AIR 1952 Cat 632 ; *V.K.A. Ranganatha Konar Vs. The Tiruchirappalli Municipal Council, by its Commissioner and Another, and Promode Das Gupta and Others Vs. Deputy Secretary to the Government of West Bengal and Others*,

8. We have considered the submissions of the learned Counsel for the parties and have perused the record.

9. The issue which has cropped up in the writ petition is as to whether a M.L.A. who is detained in prison has a right to claim participation in the session of the assembly and whether the petitioner has made out any case for issuing a writ of mandamus directing the respondents to permit the petitioner to participate in the assembly session. What are the rights of a detenu and whether a M.L.A. detained in prison has any fundamental right or constitutional right to claim participation in the session of assembly are the questions which are to be answered in this writ petition. It is true that petitioner is not a convict, but only facing a criminal charge of murder and does not suffer from any disqualification for membership of the Legislative Assembly of State of U.P.

10. Article 191 of the Constitution of India provides for disqualifications for membership. Article 191 Sub-clause (e) refers to disqualification by or under any law made by Parliament. Section 8 of the Representation of the People Act, 1951 provides for disqualification on conviction for certain offences (hereinafter called the "Act, 1951"). Section 8 of the Act, 1951 is not attracted in the present case since the petitioner has not yet been convicted. Thus, it is true that petitioner is not suffering from any disqualification for being member of Legislative Assembly, but still the question is as to whether the petitioner has a right to participate in the sessions of assembly. Whether a M.L.A. detained in prison has some kind of Parliamentary privilege with regard to participation in the proceeding of the assembly has to be first considered. Privileges of M.L.A. have been provided under Article 194 of the Constitution which is quoted below:

194. Powers, privileges, etc., of the House of Legislatures and of the members and committees thereof.--(1) Subject to the provisions of this Constitution and to the Rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in respect of the

publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities

of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution (Forty-fourth Amendment) Act, 1978.

(4) The provisions of Clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

11. Article 194(1) of the Constitution provides that subject to the provisions of this Constitution and to the rules and the standing orders, there shall be freedom of speech in the Legislature of every State. Sub-article (2) of the Constitution provides that no member of the Legislature of the State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature.

12. Sub-article (3) of the Constitution provides that in other respect the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution (44th Amendment Act, 1978).

13. The question of privileges of Member of Parliament with regard to arrest was considered by the Apex Court in *K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others*, *K. Ananda Namblar* was a Member of Parliament and he was detained by Government of Madras by an order dated 29.12.1964, passed under Defence of India Rules, 1962. Writ Petition under Article 32 was filed challenging the order of detention as well as Rule 30(1)(b). A submission was made that since Rule permits a Member of Parliament to be detained, it contravenes the constitutional right of a M.P. to function as elected member and to participate in the business of the house to which he belongs. It is useful to notice the contentions raised which has been noted in paragraph 8 of the said judgment.

8. That takes us to the merits of Mr. Setalvad's contention that Rule 30(1)(b) of the Defence of India Rules is invalid. The Rule in question has been framed u/s 3(2)(15) of the Defence of India Act and in that sense it can be said, *prima facie*, to be justified by the said provision. But Mr. Setalvad argues that in so far as it permits a Member of Parliament to be detained, it contravenes that

Constitutional rights of Members of Parliament. According to Mr. Setalvad, a Member of Parliament, like a Member of any of the State Legislatures, has constitutional rights to function as such Member and to participate in the business of the House of which he belongs. He is entitled to attend every Session of Parliament, to take part in the debate, and to record his vote. So long as a Member of Parliament is qualified to be such Member, no law can validly take away his right to function as such Member. The right to participate in the business of the legislative chamber to which he belongs, is described by Mr. Setalvad as his constitutional right, and he urges that this constitutional right of a legislator can be regarded as his fundamental right; and inasmuch as the relevant Rule authorises the detention of a legislator preventing him from exercising such right, the Rule is invalid. In the alternative, Mr. Setalvad contends that the Rule should be treated as valid in regard to persons other than those who are Members of Legislatures, and in that sense, the part of it which touches the Members of Legislatures, should be severed from the part which affects other citizens and the invalid part should be struck down. This argument again proceeds on the same basis that a legislator cannot be validly detained so as to prevent him from exercising his rights as such legislator while the legislative chamber to which he belongs is in session. On the same basis, Mr. Setalvad has urged another argument and suggested that we should so construe the Rule as not to apply to legislators. It would be noticed that the common basis of all these alternative arguments is the assumption that legislators have certain constitutional rights which cannot be validly taken away by any statute or statutory Rule.

14. The Supreme Court laid down in the said judgment that privilege of freedom from arrest is limited to the civil cases. After considering the constitutional provisions including Articles 100 and 105, the Apex Court laid down that there is no privilege with regard to attending sessions of Parliament when a valid order of detention has been passed against a member. Repelling the arguments that Member of Parliament has constitutional and fundamental right, to participate in the proceedings of the Parliament following was laid down in paragraphs 19 and 20.

19. There is another aspect of this problem to which we would like to refer at this stage. Mr. Setalvad has urged that a Member of Parliament is entitled to exercise all his constitutional rights as such Member, unless he is disqualified and for the relevant disqualifications, he has referred to the provisions of Article 102 of the Constitution and Section 7 of the Representation of the People Act. Let us take a case falling u/s 7(b) of this Act. It will be recalled that Section 7(b) provides that if a person is convicted of any offence and sentenced to imprisonment for not less than two years, he would be disqualified for membership, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. If a person is convicted of an offence and sentenced to less than two years, clearly such conviction and sentence would not entail disqualification. Can it be said that a person who has

been convicted of an offence and sentenced to suffer imprisonment for less than two years, is entitled to claim that notwithstanding the said order or conviction and sentence, he should be permitted to exercise his right as legislator, because his conviction and sentence do not involve disqualification? It is true that the conviction of a person at the end of a trial is different from the detention of a person without a trial, but so far as their impact on the alleged constitutional rights of the Members of Parliament is concerned there can be no distinction. If a person who is convicted and sentenced has necessarily to forgo his right of participating in the business of the Legislature to which he belongs, because he is convicted and sentenced, it would follow that a person who is detained must likewise forgo his right to participate in the business of the Legislature. Therefore, the argument that so long as the Member of Parliament has not incurred any disqualification, he is entitled to exercise his rights as such Member cannot be accepted.

20. Besides, if the right on which the whole argument is based is not a fundamental right, it would be difficult to see how the validity of the Rule can be challenged on the ground that it permits an order of detention in respect of a Member of Parliament and as a result of the said order the Member of Parliament cannot participate in the business of Parliament. It appears that a similar question had arisen before the Madras and the Calcutta High Courts, and the decisions of these High Courts are in accord with the view which we are inclined to take in the present proceedings. In *Venkateswarlu v. District Magistrate, Guntur* ILR (1951) Mad 135 : AIR 1951 Mad 269, it was held by a Division Bench of the Madras High Court that a Member of the State Legislature cannot have immunity from arrest in the case of a preventive detention order. Similarly, in the case of *In re Ananda Nambiar* ILR (1953) Mad 93 : AIR 1952 Mad 117, it was held by the Madras High Court that once a Member of a Legislative Assembly is arrested and lawfully detained, though without actual trial, under any Preventive Detention Act, there can be no doubt that under the law as it stands, he cannot be permitted to attend the sittings of the House. The true constitutional position, therefore, is that so far as a valid order of detention is concerned, a Member of Parliament can claim no special status higher than that of an ordinary citizen and is as much liable to be arrested and detained under it as any other citizen.

15. Section 135A of C.P.C. exempts a member of legislative body from arrest and detention under civil process. There is no such statutory provision in the Cr.P.C. or any other statute exempting arrest of a M.L.A. from a criminal proceeding.

16. Learned Additional Chief Standing Counsel has referred to "Rules of Procedure and Conduct of Business of the Uttar Pradesh Legislative Assembly, 1958" which contains Rules 80, 81, 82 and 83 and the same are quoted below:

80. Intimation to Speaker by Magistrate of arrest, detention etc., of member.-- When a member is arrested on a criminal charge or for a criminal offence or is sentenced to imprisonment by a Court or is detained under an executive order, the Judge, Magistrate or Executive Authority, as the case may be, shall

immediately intimate such fact to the Speaker indicating the reason for the arrest, detention or conviction, as the case may be and also the place of detention or imprisonment of the member, in the appropriate form set out in the First Schedule.

81. Intimation to Speaker on release of a member.--When a member is arrested and after conviction released on bail pending an appeal or is otherwise released, such fact shall also be intimated to the Speaker by the Authority concerned in the appropriate form set out in the First Schedule.

82. Treatment of communications received from Magistrate. --As soon as may be the Speaker shall, after he has received a communication referred to in Rule 80 or Rule 81 which may also be sent by wireless message, teleprinter or telegram read it out in the House if it is sitting or if the House is not sitting direct that the members be informed of the same:

Provided that if the intimation of the release of a member either on bail or otherwise is received before the House has been informed of the original imprisonment the fact of his arrest or imprisonment and his subsequent release may in the discretion of the Speaker not be intimated to the House by him.

83. Arrest within the precincts of the House.--No arrest shall be made within the precincts of the House without obtaining the permission of the Speaker.

17. Rule 80 of the aforesaid 1958 Rules provide for Intimation to Speaker by Magistrate of arrest, detention etc., of member clearly contemplate arrest of a member on a criminal charge or for a criminal offence. This rule itself indicates that there is no exemption from arrest on a criminal charge.

18. In view of the above discussions, it is clear that there is no privilege of an M.L.A. from not being arrested on a criminal charge. When there is no exemption of an M.L.A. from arrest on a criminal charge, whether after such arrest and detention in prison, he has a right to participate in the sessions of assembly is the issue under consideration.

19. A person lawfully detained in prison does not lose all his fundamental rights which he otherwise possesses. However, there are several natural consequences which flow from his detention. Right to live guaranteed under Article 21 of the Constitution is available to detenu also, but right to practice ones profession stands stripped when a person is detained in prison.

20. The Apex Court in D. Bhuvan Mohan Patnaik and Others Vs. State of Andhra Pradesh and Others, laid down following in paragraph 6 of the said judgment which is quoted below:

6. Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move

freely throughout the territory of India or the right to "practice" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law.

21. Another Division Bench judgment of the Punjab and Haryana High Court in Daljit Singh Rajput Vs. Chandigarh Administration and another, relates to a case of a practising advocate who was in judicial custody made a prayer for being released on the ground that unless he comes out from the jail and conducts the cases of his clients he faces threat from his clients of action under Consumer Protection Act.

22. Repelling the contention of the petitioner following was laid down in paragraph 3 of the said judgment:

3. Be that as it may, the question that needs adjudication is as to whether, to avoid threats of his clients and the consequences of such threats, if taken to logical ends, petitioner can invoke any of the fundamental rights granted to him under the Constitution of India, to secure freedom from judicial custody enabling him to plead the cause of his clients. In our considered view, petitioner has no such right. Right of personal liberty, as enshrined in Article 21 of the Constitution of India, has an exception embedded to it in the very article dealing with personal liberty. No person shall be deprived of his life or personal liberty except according to the procedure established by law. The arrest and judicial custody of the petitioner is because of established criminal law of the country. Insofar as, therefore, right of petitioner to liberty is concerned, the same cannot be pressed into service in this case.

23. Sub-clause (5) to Section 62 of the Representation of the People Act, 1951 lays down that a person detained in prison has no right to vote.

24. Sub-clause (5) to Section 62 of the Representation of the People Act, 1951 is quoted below:

62. Right to vote.-

1. ...

2. ...

3. ...

4. ...

5. No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the

lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force

25. In *Anukul Chandra Pradhan, Advocate, Supreme Court Vs. Union of India and others*, a petition under Article 32 was filed challenging the constitutional validity of Sub-section (5) of Section 62 of the Act, 1951 on the ground that it violates the rights under Articles 14 and 21 of the Constitution. While upholding the constitutional validity of Section 62(5), the Apex Court laid down that a person who is in prison is a result of his own conduct and he cannot claim equal freedom of movement of speech and expression with the others who are not in prison.

26. Following was laid down in paragraphs 5 and 8:

5. There are provisions made in the election law which exclude persons with criminal background of the kind specified therein, from the election scene as candidates and voters. The object is to prevent criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcomed and upheld as subserving the constitutional purpose. The elbow room available to the Legislature in classification depends on the context and the object for enactment of the provision. The existing conditions in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation. Criminalisation of politics is the bane of society and negation of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the Legislature for classification has to be available to achieve the professed object.

8. There are other reasons justifying this classification. It is well known that for the conduct of free, fair and orderly elections, there is need to deploy, considerable police force. Permitting every person in prison also to vote would require the deployment of a much larger police force and much greater security arrangements in the conduct of elections. Apart from the resource crunch, the other constraints relating to availability of more police forces and infrastructure facilities are additional factors to justify the restrictions imposed by Sub-section (5) of Section 62. A person who is in prison as a result of his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with the others who are not in prison. The classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison results automatically from his confinement as a logical consequence of imprisonment. A person not subjected to such a restriction is free to vote or not to vote depending on whether he wants to go to vote or not; even he may choose not to go and cast his vote. In view of the restriction on movement of a prisoner, he cannot claim

that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable.

27. The Apex Court in the above case in context of right to vote under the Act, 1951 has laid down that movement of a prisoner is restricted and he cannot claim entitlement to get the facility to go and vote. An ordinary person who is detained in prison is denied his right to vote. The M.L.A. who is detained in prison on criminal charges cannot claim any superior right to participate in the sessions of Assembly and to cast his vote. The judgment of the Madras High Court in K. Nambiar (supra) referred to by the learned Counsel for the petitioner also lays down that a M.L.A. who is detained under the Madras. Maintenance of Public Order Act has no right to claim participation in the proceedings of the assembly.

28. Division Bench of our Court had the occasion to consider a similar writ petition praying for same relief in Writ Petition No. 1107 (MB) of 2003, Raghu Raj Pratap Singh alias Raja Bhaiya v. State of U.P. and Ors. decided on 13.3.2003 : 2003 (3) AWC 3413 (LB). The petitioner, Raghu Raj Pratap Singh was also detained in prison facing charges under Prevention of Terrorism Act, 2002. He being a sitting M.L.A. filed the writ petition for a direction to permit him to participate in the proceedings of the assembly. This Court relying on the judgment of Nambiar's case (supra) held that a M.L.A. detained in prison has no right to claim participation in the proceedings of the assembly. It was further held that there are no Parliamentary privileges. Following was laid down in paragraph 35 of the said judgment:

35. We are of the view that so long as the two Legislators are detained under valid detention order, they have no right or privilege to participate In the session of the House. We do not agree with Dr. Mishra on the point that this Court is bound to permit any such legislator to participate in the session. Power under Article 226 of the Constitution is discretionary one and no one can say that this Court will have no option but to act in a particular manner.

29. The judgments in the cases of Pillalamarri Venkateswarlu and Ansumali Majumdar (supra) lays down a similar proposition and fully supports the view that a M.L.A. detained in a prison has no right or privilege to claim participation in the proceedings of the assembly. The submission of the counsel for the petitioner that in case the petitioner is not permitted to participate in the proceedings of the assembly then his constituency shall remain unrepresented also has no substance.

30. Non-participation in the proceedings of the assembly by the petitioner is a natural consequence of his detention in prison on criminal charges. Right of participation in the proceedings of the assembly by a member and the privileges in the assembly given to members are rights and privileges of those members

who are participating in the proceedings. When the petitioner is detained in prison by lawful order, he cannot claim a writ of mandamus permitting him to participate in the proceedings of the Assembly. The judgment of the Apex Court in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and Anr. 2005 (3) SCC 311 : 2005 (1) ACR 1002 (SC), also deserves to be noted in which case the petitioner was detained in Tihar Jail an elected M. P. was permitted by the Apex Court to take oath in the House as a Member of Parliament. The said case was with a different prayer and has no bearing on the right of a M.L.A. or M.P. to participate in the proceedings of the Parliament or Assembly. The Apex Court in the said judgment in the facts of that case permitted the petitioner to take oath and it does not help the petitioner in the present case.

31. In view of the foregoing discussions, the petitioner is not entitled for the relief claimed in the writ petition. The writ petition is dismissed.