
(1991) 10 MAD CK 0062

In the Madras High Court

Case No : Writ Petition No's. 2397 and 6072 of 1991

Vela @ Velangani and Johny

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 11-10-1991

Acts Referred:

Constitution of India, 1950 — Article 226
National Security Act, 1980 — Section 3(2)
Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders,
Goondas, Immoral Traffic Offenders and Slum-Grabbers, Act, 1982 — Section 3(1)

Citation : (1991) LW(Cri) 596

Hon'ble Judges : Somasundaram, J; K.M. Natarajan, J

Bench : Division Bench

Advocate : P. Venkatasubramaniam, for the Appellant; R.M. Kanappa Rajendran and A.G., for the Respondent

Judgement

Somasundaram, J.—These writ petitions are filed by the detenus themselves under Article 226 of the Constitution of India for the issue of a writ of habeas corpus for quashing the orders of detention passed against them and to set them at liberty.

2. The order of detention challenged in W.P. No. 2397 of 1991 was passed by the second Respondent on 21-11-1990. The orders of detention challenged in W.P. Nos. 6072 and 7091 of 1991 were passed by the second Respondent on 4-1-1991. The three orders challenged in these writ petitions were passed by the second Respondent in exercise of powers conferred u/s 3(1) of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act (Act XIV of 1982), hereinafter called the Act with a view to prevent the Petitioner from acting in any manner prejudicial to the maintenance of public order and Health. As the point raised by the learned Counsel for the Petitioner in all the three writ petitions is one and the same the writ petitions are disposed of by a common order.

3. The detenus came to adverse notice of the second Respondent in view of the case referred to in the preamble portion of the grounds of detention and they were detained as goondas on the basis of the ground case in the respective cases.

4. Though in the affidavit filed in support of the writ petitions the impugned orders are challenged on various grounds, the learned Counsel for the Petitioner in the course of his arguments confined his submission only to the following ground viz., there was no valid conferment of power on the second Respondent by G.O.Ms. No. 939, Home, Prohibition and Excise Departments dated 15-10-1990 to make the orders of detention under 3(1) of the Act; the Government issued the said G.O. No. 939 without applying its mind and, therefore, is not valid and there is no valid conferment of power on the second Respondent by the said G.O. to pass the impugned orders u/s 3(1) of the Act. Consequently according to the learned Counsel for the Petitioners, the orders of detention passed by the second Respondent pursuant to G.O.Ms. No. 939 dated 15-10-1990 are invalid and are liable to be set aside. This point is taken in part(e) of the grounds in the affidavit filed in support of W.P. No. 2397 of 1991 in the following terms:

I state that the second Respondent herein has no power to pass the order of detention and the delegation given to him in G.O.Ms. No. 939, Home. Prohibition and Excise XII Department, dated 15-10-90, is general delegation of power and it does not confer any right to the second Respondent herein to pass the detention order is not mentioned. So the order passed by him is unconstitutional and 1 cannot be detained by an order passed under such a delegation.

5. The case of the Respondents with regard to the point raised in ground (e) of the affidavit is stated in para 11 of the counter-affidavit of the second Respondent as follows:

Regarding the contention in ground (e) of paragraph 5 of the affidavit, it is submitted that it is not correct to state that this Respondent has no power to pass the orders of detention and delegation given is general delegation of power and it does not confer my right to pass the order. The power is delegated to this Respondent as per the provisions of the said Act.

6. As the question relates to the validity of G.O.Ms. No. 939 dated 15-10-1990 on the basis of which the second Respondent passed the orders of detention challenged in these writ petitions, it is necessary to set out the G.O. No. 939 dated 15-10-1990 which reads thus:

HOME PROHIBITION AND EXCISE (XII) DEPARTMENT

G.O.Ms. No. 939.

Dated: 15.10.1990

Purattasi 29, Promodhutha, Thiruvalluvar Aandu 2021 Read:

1. G.O.Ms. No. 25, Prohibition, and Excise Department dated 18.01.1982.
2. G.O.Ms. No. 803, Home and Prohibition and Excise (XII) Department, dated 17.7.90.

ORDER:

WHEREAS orders have been issued in G.O. first read above, directing that the power to make orders detaining Bootleggers, Drug-offenders, Forest-Offenders, Goondas, Immoral Traffic Offenders and Slum-grabbers under Sub-section (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum-grabbers Act, 1982 (Tamil Nadu Act 14 of 1982) may also be exercised by the Commissioner of Police, Madras for a period of three months on and from the 18th January, 1982:

AND WHEREAS orders have been issued subsequently amending the G.O. first read above and extending the above period, from time to time, by three months at time;

AND WHEREAS the said period, last extended for three months from the 18th July, 1990 in G.O. second read above, expires on the 17th October, 1990;

AND WHEREAS the Government are satisfied that having regard to the circumstances prevailing in the City of Madras, it is still necessary to direct that the power to make orders detaining Bootleggers, Drug-offenders, Forest-offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers under Sub-section (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest-offenders, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1982 (Tamil Nadu Act 14 of 1982) also be exercised by the Commissioner of Police, Madras for further period of three months from the 18th October, 1990;

NOW, THEREFORE, in exercise of the powers conferred by the Proviso to Sub-section (2) of Section 3 of the Tamil Nadu Prevention Of Dangerous Activities of Bootleggers, Drug-offenders, Forest offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act 1982 (Tamil Nadu

Act 14 of 1982), the Governor of Tamil Nadu hereby makes the following amendment to the G.O.Ms. No. 25, Prohibition and Excise, dated 18th January, 1982, as subsequently amended.

AMENDMENT

In the said order, for the words "one hundred and five months" the words "one hundred and eight months" shall be substituted.

M.M. Rajendran, Chief Secretary To Govt.

7. Further, in order to appreciate the contentions of the counsel for the parties, it is also necessary to refer to Section 3 of the Act, which reads as follows:

Power To Make Orders Detaining Certain Persons:

(1) The State Government may, if satisfied with respect to any bootlegger or drug-offender or goonda or immoral traffic offender or slum-grabber that with a view to prevent him from acting in any manner pre-judicial to the maintenance of public order, it is necessary so to do, make an order directing that such person be detained.

(2) If, having regard to the circumstances prevailing, or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government are satisfied that it is necessary so to do, they may, by order in writing, direct that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in Sub-section (1), exercise the powers conferred by the said Sub-section:

Provided that the period specified in the order made by the State Government under this Sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

x x x

8. Mr. P. Venkatasubramanian, learned Counsel for the Petitioner contended that G.O.Ms. No. 939, Home Prohibition and Excise Department is dated 15.10.1990 Para 4 of the said G.O. shows that it came into force with effect from 18-10-1990; the said G.O. merely states that the Government are satisfied that having regard to the circumstances prevailing in the city of Madras, it is still necessary to direct that the power to make order detaining bootleggers, drug-offenders, Forest-offenders, Goondas, immoral traffic offenders and slum-grabbers under Sub-section(1) of Section 3 of the Act, also be exercised by the Commissioner of Police, Madras for a further period of three months from 18-10-1990; G.O.Ms. No. 939 dated 15-10-1990 came into force only with effect from 18-10-1990 and the Government while issuing the said G.O., have taken into account only the circumstance prevailed as on 15-10-1990, the date on which the G.O. was made and while making the said G.O. No. 939 the Government have not taken into account the circumstances likely to prevail in the city of Madras on the future date viz., 18-10-1990 from which date alone, G.O.Ms. No. 939 comes into force; this shows that the Government issued the G.O. without applying its mind and in a mechanical, manner and therefore G.O.Ms. No. 939 is invalid and will not confer valid power on the second Respondent to pass the order of detention challenged in these writ petitions. Consequently according to the learned Counsel for Petitioner the orders of detention passed by the second Respondent are invalid and liable to be set aside. In support of his contention learned Counsel for the Petitioner relied on the decision in 1991 I SCC 500) . There is substance in the contention of the learned

Counsel for the Petitioner. A perusal of Section 3 of the Act shows that the power to make order of detention primarily rests with the State Government. However, Section 3(2) of the Act provides that the State Government being satisfied on certain circumstances may order that the District Magistrate or the Commissioner of Police may also make an order of detention u/s 3(1) of the Act. Section 3(2) of the Act refers to independent circumstances; viz., (1) the prevailing circumstances and (2) the circumstances that are likely to prevail. The prevailing circumstances means circumstances prevalent on the date of the order by which the power is conferred on the District Magistrate or the Commissioner of Police u/s 3(2) of the Act., to pass orders of detention u/s 3(1) of the Act. The circumstances likely to prevail means anticipated circumstances in future. The period during which the District Magistrate or the Commissioner of Police is to exercise the power provided u/s 3(1) of the Act is to be specified in the G.O. which would depend on the existence of circumstances prevalent on the date conferring power or the circumstances likely to prevail on a future date. If the subjective satisfaction is based on circumstances prevailing on the date of the order, the choice of the period which must not exceed three months, would have to be determined from the date of the order. If the conferment of power is considered necessary because of the circumstances likely to prevail during the future period, the duration for the exercise of power must be relatable to the apprehended circumstances in future. The power can be exercised for a future period by taking into consideration the circumstances prevailing on the date of order as well as the circumstances likely to prevail in future period. In the present case, by G.O.Ms. No. 939 dated 15-10-1990 the power was conferred on the Commissioner of Police, Madras u/s 3(2) of the Act to be exercised for a future period by taking into consideration only the circumstances prevailing on the date of the order and without taking into consideration the circumstances likely to prevail in future. As already pointed out, G.O.Ms. No. 939 is dated 15-10-1990 and it was passed by the Government conferring power on the second Respondent to pass orders of detention u/s 3(1) of the Act during the future period commencing from 18-10-1990. In such a case the Government ought to have taken into consideration the circumstances which are likely to prevail during the future period commencing from 18-10-1990. However, there is nothing in G.O.Ms. No. 939 to show that the Government have taken into consideration the circumstances likely to prevail on a future date. On the other hand, the Government took into consideration only the circumstances prevailed on the date of issue of G.O. i.e., 15-10-1990. In G.O.Ms. No. 939 there is absolutely no indication that circumstances likely to prevail from 18-10-1990 were taken into account for directing the conferment of power u/s 3(2) of the Act on the second Respondent to make orders detaining bootleggers, drug-offenders, goondas etc., u/s 3(1) of the Act. This clearly indicates that there is non-application of mind on the part of the Government when they passed G.O.Ms. No. 939 and that it was passed the Government order in a mechanical manner borrowing the words of the earlier G.O.Ms. No. 803, Home, Prohibition and Excise Department dated 17-7-1990. In these circumstances, it has to be held

that G.O.Ms. No. 939 dated 15-10-1990 is invalid and does not confer valid power on the second Respondent to pass the orders of detention u/s 3(1) of the Act.

9. In this context it is useful to refer the decision in Abhay Shridhar Ambulkar Vs. S.V. Bhawe, Commissioner of Police and Others, . In that case the Supreme Court considered the validity of the G.O. dated 6-1-1990 passed by the Government of Maharashtra, pursuant to which, the Commissioner of Police made the detention order dated 12-2-1990 u/s 3(2) of the National Security Act, 1980. The Government order dated 6-1-1990 referred to above reads thus:

ORDER

6th January 1990

59. National Security Act, 1980 No. NSA-2390/1/SPL-3(B) - Whereas the Government of Maharashtra is satisfied that having regard to the circumstances prevailing or likely to prevail in the Greater Bombay Police Commissionerate, it is necessary that during the period commencing on January 30, 1990 and ending on April 29, 1990, the Commissioner of Police and the said Commissioner should also exercise the powers conferred by Sub-section (2) of Section 3 of the National Security Act, 1980 (65 of 1980) (hereinafter referred to as "the said Act").

Now therefore, in exercise of the powers conferred by Sub-section (3) of Section 3 of the said Act, the Government of Maharashtra hereby directs that for the period commencing on January 30, 1990 and ending on April 20, 1990 the Commissioner of Police, Greater Bombay may also if satisfied as provided in Sub-section (2) of Section 3 of the said Act exercise the powers conferred on the State Government by Sub-section (2) of Section 3 of the said Act.

By order and in the name of Governor of Maharashtra.

The language of Section 3(3) of the National Security Act, 1980 and Section 3(2) of the Act 14/82 is identical. The order of detention as well as the G.O. dated 6-1-1990 were challenged in that case on the ground that the Government issued the order dated 6-1-1990 referred above without applying its mind and it simply reproduced the wordings of Section 3(3) of the National Security Act, 1980 in a mechanical manner. The Supreme Court while quashing the G.O. dated 6-1-1990 and the order of detention passed by the Commissioner of Police held as follows:

The subjective satisfaction for the exercise of power under Sub-section (3) of Section 3 must be based on circumstances prevailing at the date of the order or likely to prevail at a future date. The period during which the District Magistrate or the Commissioner of Police, as the case may be, is to exercise the power provided by Sub-section (2) of Section 3 is to be specified in the order which would depend on the existence of circumstances in present or at a future date. If the subjective satisfaction is based on circumstances prevailing at the date of the order, the choice of period, which must not exceed three months, would have to

be determined from the date of the order. If the conferment of power is considered necessary because of circumstances likely to prevail during the future period, the duration for the exercise of power must be relatable to the apprehended circumstances. Therefore, the specification of the period during which the District Magistrate or Commissioner of Police is to exercise power under Sub-section (2) of Section 3 would depend on the subjective satisfaction as to the existence of the circumstances in present or future. Since very drastic powers of detention without trial are to be conferred on subordinate officers, the State Government is expected to apply its mind and make a careful choice regarding the period during which such power shall be exercised by the subordinate officers, which would solely depend on the circumstances prevailing or likely to prevail. The subjective satisfaction cannot be lightly recorded by reproducing both the alternative clauses of the statute. The subjective satisfaction on the prevailing circumstances, or circumstances that are likely to prevail at a future date is the sine qua non for the exercise of power. The use of the word "or" signifies either of the two situations for different periods. That, however, is not to say that the power cannot be exercised for a future period by taking into consideration circumstances prevailing on the date of the order as well as circumstances likely to prevail in future. The latter may stem from the former. For example, there may be disturbances on the date of the order and the same situation may be visualised at a future date also in which case the power may be conferred on the subordinate officers keeping both the factors in mind; but in that case the two circumstances would have to be joined by the conjunctive word "and" not the disjunctive word "or". The use of the disjunctive word "or" in the impugned government order only indicates non-application of mind and obscurity in thought. The obscurity in thought inexorably leads to obscurity in language. Apparently, the Government seems to be uncertain as to the relevant circumstances to be taken into consideration, and that appears to be the reason why they have used the disjunctive word "or" in the impugned order.

10. The learned Advocate-General appearing for the Respondents contended that the Supreme Court in *Abhay Shridhar Ambulkar v. S.V. Bhave* 1991 I SCC 500 has not laid down any ratio; it contains only certain observations which are in the nature of obiter dictum. Such observations of the Supreme Court must be confined to the facts of the case decided by the Supreme Court and, therefore, the decision of the Supreme Court in *Abhay Shridhar Ambulkar v. S.V. Bhave* 1991 I SCC 500 is not helpful to the Petitioner. In support of his contention the learned Advocate-General relied on the decisions reported in *Additional District Magistrate, Jabalpur Vs. Shivakant Shukla*, ; *Rajput Ruda Meha and Others Vs. State of Gujarat*, ; *Raval and Co. Vs. K.G. Ramachandran and Others*, ; *Krishena Kumar and Others Vs. Union of India and others*, ; *Kuli Singh and Others Vs. The State of Bihar and Others*, ; *The State Vs. Vali Mohammad*, ; *Wasudeo Madhaorao Assarkar and Another Vs. The State of Maharashtra*, and AIR 1970 Del 70 . We are unable to accept the contention of the learned Advocate-General. The Supreme Court in *Abhay Shridhar Ambulkar v. S.V. Bhave* 1991 I SCC 500

considered the validity of the order passed by the Government of Maharashtra in exercise of the powers conferred by Section 3(3) of the National Security Act, 1980. As already pointed out, the language of Section 3(3) of the National Security Act and Section 3(2) of Act 14/82 is identical.

In paras 8 and 9 in *Abhay Shridhar Ambulkar v. S.V. Bhavé* 1991 I SCC 500 the apex Court gives reasons for holding that the G.O. dated 6-1-1990 challenged in the writ petition filed under Article 32 of the Constitution is invalid. The reasons given by the apex Court in paras 8 and 9 of the decision are necessary for deciding the issue involved in that case and for disposing of the writ petition filed before the Supreme Court under Article 32 of the Constitution. By no stretch of imagination they can be considered as mere obiter. The principles laid down by the Supreme Court with reference to the order dated 6-1-1990 passed by the Government of Maharashtra u/s 3(3) of the National Security Act, 1980 are clearly applicable to the facts of present case where we are concerned with the validity of G.O.Ms. No. 939 dated 15-10-1990 passed by the first Respondent in exercise of the power u/s 3(2) of the Act. It is not necessary to deal with the various decisions relied on by the learned Advocate-General and referred to above in detail as we have come to the conclusion that the apex Court in *Abhay Shridhar Ambulkar v. S.V. Bhavé* 1991 I SCC 500 has laid down a ratio which is clearly applicable to the facts of the present case.

11. Applying the ratio of the decision in *Abhay Shridhar Ambulkar v. S.V. Bhavé* 1991 I SCC 500 it has to be held that G.O.Ms. No. 939 dated 15-10-1990 is invalid because when under the said G.O. dated 15-10-1990 power was conferred on the Commissioner of Police to be exercised for a future period commencing from 18-10-1990, the Government has not taken into consideration the circumstances likely to prevail in future. As pointed out by the Supreme Court there may be disturbances on the date of the order and that the same situation may be visualised at a future date also in which case the powers may be conferred on the Commissioner keeping both the factors in mind and in such case there must be reference in the G.O. to both the circumstances viz., the circumstances prevailing on the date of the order and the circumstance likely to prevail on the future date. Admittedly in G.O.Ms. No. 939 dated 15-10-1990 there is no reference to the circumstances likely to prevail in future and this only indicates the non-application of mind and that the said G.O. was issued in a mechanical manner borrowing the words in the earlier G.O.Ms. No. 803 Home, Prohibition and Excise Department dated 17-7-1990. Since we have held that G.O.Ms. No. 939 dated 15-10-1990 is invalid, it follows that the second Respondent passed the orders of detention against the Petitioners, which are challenged in these writ petitions without valid conferment of power u/s 3(2) of the Act and the impugned orders of detention are liable to be set aside. Consequently the writ petitions are allowed, the orders of detention passed against the Petitioners are set aside and we direct the detinue to be set at liberty forthwith unless they are required in connection with any other case.