
(1983) 04 MP CK 0030

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 14 of 1983

Vijay Singh Thakur Kunwar Singh

APPELLANT

Vs

State of M P. and another

RESPONDENT

Date of Decision : 22-04-1983

Acts Referred:

Madhya Pradesh Rajya Suraksha Tatha Lok Vyavastha Adhiniyam, 1980 — Section 15(1)

Penal Code, 1860 (IPC) — Section 506

Citation : (1983) JLJ 514 : (1983) MPLJ 621

Hon'ble Judges : U.N. Bhachawat, J; R.C. Shrivastava, J

Bench : Division Bench

Advocate : A.B. Mishru, for the Appellant; M.L. Modi, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Bhachawat, J.

This is a petition under Article 226 of the Constitution of India by which the petitioner seeks a writ for quashing the order of the District Magistrate dated 7th September, 1982, Annexure P-I.

The short facts leading to the present petition are these: The petitioner is a resident of Gwalior. He is alleged to have committed various offences which shall be detailed hereinafter at an appropriate stage, falling under Chapters XVI, XVII and u/s 506 of the Indian Penal Code. The District Magistrate, respondent No. 2 herein, on initiating proceedings against the petitioner under the Madhya Pradesh Rajya Suraksha Tatha Lok Vyavastha Adhiniyam, 1980 (No. XXX of 1981) (for short, hereinafter referred to as the "Adhiniyam") issued a notice dated 29-5-1982 (Annexure-P-2) to the petitioner Annexure-P-3 to the return u/s 15 (1) of the Adhiniyam to the petitioner that he should appear before him on 7-6-1982 and show cause, why he (petitioner) should not be externed for a period of one year from District Gwalior as also from its neighbouring districts, Bhind, Morena,

Shivpuri and Datia. This notice was served on the petitioner on 31st May 1982, while the petitioner was in custody in Central Jail, Gwaiior as is evident by Annexure P-4.

The record of the District Magistrate has been produced for our perusal from which the following facts are obtainable :

01 On 7-8-1982 the petitioner who was in jail on that date conveyed his request to the District Magistrate through the Town Inspector, Police to appear in person after being released on bail from the jail custody, whereupon the District Magistrate adjourned the case to 30-6-1982. On this date also since the petitioner did not appear, the case was adjourned to 7-7-1982 directing for calling an information from the Superintendent, Central Jail, Gwaiior to report whether the petitioner was in custody or released on bail on this date; as the report from the Superintendent, Central Jail, Gwaiior was not received the case was adjourned to 17-7-1982, then to 10-8-1982 and then to 11-8-1982 to await the report. On 11-8-1982 on the report of the Superintendent, Central Jail, Gwaiior th?t the petitioner was in the Jail, the case was adjourned to 16-8-1982 and the Superintendent, Central Jail, Gwaiior was directed to produce the petitioner before the District Magistrate at 3 P. M. on 16-8-1982. On this date the petitioner appeared before the District Magistrate and prayed for time to file reply to the show-cause notice and to produce evidence. This prayer was allowed and the case was posted for that purpose, on 20-8-1982. On 20-8-1982 neither the petitioner nor any one else on his behalf appeared. The District Magistrate therefore posted the case for consideration on 23-8-1982 "PRAKARAN VICHARARTH RAKHA JAWE 23-8-1982" and then the order impugned which is Annexure PI to the petition and Annexue P-I to the return, was passed on 7-9-1982. The relevant part of the order is set out below :

01 The petitioner had raised the following grounds in the petition to challenge the validity of the impugned order :

(a) That Shri Sandeep Khanna, who issued the impugned order as the District Magistrate, Gwalior was not a validly appointed District Magistrate under the provisions of Code of Criminal Procedure, 1973 (Act No. 2 of 1974) and was therefore not competent to pass the impugned order;

(b) That the petitioner was confined in judicial lock-up in Central Jail having been arrested by the police on 6-9-1982. "The non-petitioner No. 2 had no power or authority under said Act to pass the impugned order on 7-9-1982";

(c) That the impugned order is passed mechanically without application of mind on non-existent ground. No such orde.- could be passed when the cases mentioned against the petitioners are pending before the Judicial Magistrate, Gwalior.

(d) That the order is bad as it has been passed without affording a reasonable opportunity to the petitioner u/s 15oftheAdhi-niyam inasmuch as after the

service of show-cause notice dated 29-5-1982 (Annexure P-2/R-3) the petitioner was arrested by police and thus restrained from making representation against the proposed externment before the District Magistrate, Respondent No. 2 and also from preferring an appeal against the impugned order u/s 16 of the Adhiniyam.

02 Though in the petition the petitioner had raised various grounds as detailed in the preceding paragraph, the learned counsel for the petitioner in course of his argument did not touch grounds (a) and (b) at all and varied some of the grounds inasmuch as he planned down his arguments to the following proposition: -

(i) That in the impugned order the time within which and the route by which the petitioner should remove himself from the area he has been directed to be externed is not specified and as such the order is vitiated;

(ii) that the petitioner is deprived of an opportunity to defend or of an opportunity of making an effective representation against the impugned order inasmuch as the documents and materials relied upon in the impugned order, are not supplied alongwith the impugned order;

(iii) that for the offences alleged to have been committed by the petitioner, the petitioner is already facing trial which militates against the allegation that witnesses are not coming forward to give evidence before the Court against the petitioner by reason of apprehension on their part as regards the safety of their person or property;

(iv) that there is no material to support the opinion of the District Magistrate that witnesses are not willing to come forward to give evidence in public against the petitioner. We shall hereinafter deal with the aforesaid contentions ad seriatim in the light of the rival arguments of the learned counsel for the parties.

Proposition No. (/) -It was argued by the learned counsel for the petitioner that since the Adhiniyam restricts the fundamental right of the petitioner to move freely throughout the territory of the country and to reside and to settle in any part of the country, its provision has to be construed strictly and every order passed thereunder, has strictly to be in conformity with its provision. He argued that for an order of externment to be in conformity with the provisions of section 12 (c)(b) of the Adhiniyam it is imperative for the District Magistrate to specify the route by which and the time within which the person against whom the order is made should remove himself from the area wherefrom he is externed. He submitted that in the impugned order there is no such specification and therefore it has been vitiated. The learned Deputy Government Advocate for the State in his arguments in counter submitted that the omission in question is a minor one and it does not invalidate the impugned order.

5.01. Section 12 (c) (b) of the Adhiniyam, so far relevant reads thus: "direct such person *** to remove himself **** by such route and within such time as

the District Magistrate may specify.

(Emphasis supplied by us.)

It is true that the route and time have not been specified in the impugned order, but in our opinion for reasons to follow this omission will not vitiate the order.

2. It is significant to note that the expression used in the forequoted provision is "may specify" which goes to show that such specification is not imperative. Ordinarily the word "May" is not a word of compulsion. It is enabling word and only confers capacity, power or authority and implies a discretion, but it is also capable of being construed as referring to a compellable duty depending upon the context, the object of the legislation and /or the provision or the status of the authority on whom the power and obligation are intended to be conferred. In the instant case the object of the power for specification of route and time in the order of externment is not to effectuate any legal right of the person against whom the order is made. The obvious object behind it appears to be to enable the District Magistrate, depending on the peculiar features of individual case, to lay down the reasonable route by which and with reference to that the reasonable time within which the person against whom the order of externment is made should remove himself from the area wherefrom his externment has been ordered. Thus in absence of such specification the person concerned will leave the area by a reasonable route and within a reasonable time. The upshot of this discussion is that for want of specification as to route and time, the impugned order cannot be held to be invalid. In this respect, though not exactly on the point at hand, but very near to the point is the authority of the Supreme Court in *Suresh Bhojraj Chelani Vs. State of Maharashtra*, , in which the validity of the detention order was challenged on the ground of non-mention of period of detention in order of confirmation u/s 8 (f) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (52 of 1974), wherein their Lordships rejected the contention holding:

It has nowhere been mentioned that the period lesser than one year shall have to be mentioned in the order of confirmation. The submission of the petitioner on this point has no substance. The maximum period (in this case) is one year. When no period is mentioned in an order, the implication is that the detention is for the maximum period of one year (or two years as the case may be). Detention beyond the maximum period will be illegal.

In the result, the arguments of the learned counsel for the petitioner under proposition No. (i) are rejected as devoid of substance.

Proposition No. (ii) - The learned counsel for the petitioner in support of his contention relying on the decision of the Supreme Court in *Kamla Kanyalal Khushalani Vs. State of Maharashtra* and another, , *Sunil Dutt Vs. Union of India (UOI) and Others*, and *State of Bihar Vs. Dr. Yogendra Singh Col (Retired) and Others*, had submitted in his argument that it was incumbent upon respondent No. 2, the District Magistrate, to supply to the petitioner, the copies of all the

material and documents which were relied upon by him for passing the impugned order alongwith the order while serving the order on the petitioner. He submitted that since this was not done, the petitioner has been deprived of a reasonable opportunity to defend and on that ground alone the impugned order deserves to be set aside. He further submitted that in absence of these materials, the petitioner could not know the evidence against him so as to enable himself to make an effective representation against the impugned order. He also submitted that because of this default on the part of the District Magistrate there is a violation of section 15 of the Adhiniyam and Article 21 of the Constitution of India. The argument in counter of the learned counsel for the State, was that the authorities relied on by the learned counsel for the petitioner do not relate to a case under the Adhiniyam. The Adhiniyam has in section 12 laid down the grounds on which an externment can be ordered and section 15 of the Adhiniyam prescribes the procedure for passing an order u/s 12, which has been followed in the instant case. It is only section 15 of the Adhiniyam which lays down the procedure in the matter of giving a reasonable opportunity, that has to be followed and nothing else beyond that.

1. At this stage we would like to set out hereinbelow Article 21 of the Constitution of India. It reads thus :

No person shall be deprived of his life or personal liberty except according to procedure established by law." The significant expression in the above Article relevant for the purpose is "except according to procedure established by law." This expression refers to the substantive as well as the procedural law. In other words, this expression goes to show that this Article is an example of the fusion of substantive and procedural law. The word "law" in its ken would also include the provisions of the Constitution. Thus, the procedure under Article 21 of the Constitution is covered by this expression. At the outset we may say that so far as Article 22 of the Constitution is concerned, it has no application in the instant case, as the present case is not a case of detention. For the purpose of the instant case, section 12 and section 15 of the Adhiniyam are relevant; section 12 is a substantive law and section 15 is procedural law. At the moment we are concerned with the procedural matter i. e., section 15 of the Adhiniyam. It would, therefore, be relevant to set out hereinbelow the relevant provisions of this Adhiniyam. Section 15 of the Adhiniyam reads thus : -

Hearing to be given before order u/s II, 12 or 13 is passed. -

(1) Before an order u/s 11, 12 or 13 is passed against any person, the District Magistrate shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them.

(2) If such person makes an application for the examination of any witness produced by him, the District Magistrate shall grant such application and examine such witnesses unless for reason to be recorded in writing, the District

Magistrate is of opinion that such application is made for the purpose of vexation or delay.

(3) Any written statement put in by such person shall be filed with the record of the case and such person shall be entitled to appear before the District Magistrate by any legal practitioner for the purpose of tendering his explanation and examining the witnesses produced by him.

(5) * * * *"

2. Bearing in mind the forequoted extract, we proceed to examine whether there is any violation of the procedure. The procedure laid down in section 15 of the Adhiniyam, extracted hereinabove, has to be followed for an order u/s 12 of the Adhiniyam. This section nowhere says regarding the supply of copies of the material or documents alongwith the show cause notice. Its sub-section (1) only provides, "Shall inform in writing of the general nature of the material allegations against him." In the instant case, a bare look at Annexure P 2/P-3, relevant part whereof is extracted hereinbelow, go to show that a detailed information mentioning all the material particulars in full, was given to the petitioner:

3. We have hereinabove in paragraph 3 of this order referred to the relevant order sheets of the record of the District Magistrate, respondent No. 2 herein, which unequivocally go to show that umpteen opportunities were afforded to the petitioner to give his explanation but he chose not to avail of. In the above setting of the facts, it cannot be held that section 15 of the Adhiniyam was observed in violation and no opportunity was afforded to the petitioner to defend.

4. It would be pertinent at this stage to set out hereinbelow section 12 (c) of the Adhiniyam so far relevant. It reads thus:

***** the District Magistrate may, by an order in writing, duly served on him
***** *; direct such person *****

The purpose in reproducing this part of section 12 (c) of the Adhiniyam is to indicate that after the order is passed by the District Magistrate, only the copy of that order is to be served on the person against whom the order is passed and not that along with that order the copies of the material and documents relied upon by the District Magistrate for passing that order have also to be supplied. The authorities relied upon by the learned counsel for the petitioner cannot be pressed into service in the instant case. Admittedly, those authorities do not relate to the interpretation of a provision like section 15 of the Adhiniyam. According to the provisions contained in section 8 of the National Security Act, 1980 and section 3 (3) of the COFEPOSA Act the grounds of detention are to be communicated after detention order is passed so as to afford him an opportunity to make his representation against detention, whereas under the Adhiniyam the opportunity is afforded to show cause against the proposed action. It cannot be gainsaid that reasonableness of an opportunity differs according to the circumstances. It is obviously for this reason that there is a difference in the

provisions of the two sets of legislation; one, the National Security Act and COFEPOSA Act and the other the Adhiniyam in the matter of affording an opportunity to the aggrieved person. The relevant provisions are set out hereinbelow in juxtaposition to have a clear view of the marked distinction.

Relevant portions

National Security Act COFEPOSA Act Adhiniyam Sec. 15 (1).

Sec. 8. Sec. 3.

Communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order." "Communicate **** the grounds on which the order has been made, shall be made." "Before an order ***** is passed ***** the District Magistrate shall inform the person in writing of the general nature of the material allegation against him and give him a reasonable opportunity of tendering an explanation regarding them.

The aforesaid two sets of legislation are of differing scopes; there is a qualitative difference between the two, one provides for detention and opportunity thereafter, whereas another provides for externment and not detention, and that too after hearing on the proposed action and, as such, it cannot be said that they are in pari materia. In this view of the matter also, the provisions of the National Security Act and COFEPOSA Act cannot be utilised for construing the provisions of the Adhiniyam especially in the matter of manner of affording an opportunity of making representation. It will also be of significant relevance to point out that on 16-8-1982 when the petitioner appeared before the District Magistrate he did not demand copy of any of the materials or documents on the basis whereof show cause notice (Annexure P-2/P-3) was issued to him, he only prayed for time to file his reply and produce evidence. If the petitioner felt that unless they or any one of them was supplied he was not in a position to submit his reply, he would have naturally made that demand instead of making a prayer for time to file reply and lead evidence. In this setting of the facts, the ground raised about the non-supply of copies is raised for the sake of raising it.

5. In the light of what we have discussed hereinabove in paragraphs 6 to 6.04 the arguments, advanced under the second proposition, of the learned counsel for the petitioner, cannot be accepted. Propositions No. (Hi) & (iv).

We propose to deal with the arguments under these propositions together.

1. We consider it advisable here to extract section 12 of the Adhiniyam so far relevant for deciding the points at hand. It reads thus :

Whenever it appears to the District Magistrate :

(a) *** **

(b) that there are reasonable grounds for believing that such person is engaged

or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or u/s 506 or 509 of the Indian Penal Code, 1860 (45 of 1860) or in the abetment of any such offence and when in the opinion of the District Magistrate witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property;

*** **

This clearly indicates that it is a matter of subjective satisfaction of the District Magistrate. In view of the settled legal position in the matter of such satisfaction, Court cannot substitute its satisfaction; it would be vitiated if the authority concerned has acted in a ruthless or arbitrary fashion or has taken into account irrelevant matter or excluded relevant matter, or that there was no material at all.

2. The learned counsel for the petitioner had submitted that the petitioner has in ground (c) averred that "The cases mentioned against the petitioner were already pending before the Judicial Magistrate, Gwalior," which has not been denied in the return and, therefore, it is established that the petitioner is facing trial. This is true, but we fail to understand, nor any law was brought to our notice that mere pendency of the cases, without anything more, as a matter of law, would vitiate the ground about the unwillingness of the witnesses to come forward and depose against the petitioner. Had it been established that in those cases witnesses have very willingly appeared and/or are willing to appear to depose without any apprehension as regards the safety of their person or property, the position would have been different. In paragraph 4 of the impugned order, the District Magistrate has mentioned the material on which he has been satisfied. The material has been referred to in detail in the show cause notice (Annexure P-2). From the record supplied for our perusal we find that apart from the documents referred to therein the District Magistrate had recorded the statement on 28-5-1982 of the Town Inspector of Police, and the reference "MERE DWARA LIPIBADDHA SAKSHI KE KATHAN SE" in Annexure P-2 is to the statement of that witness. The argument of the learned counsel, that there was no material to form the opinion that witnesses were not willing to come forward to give evidence in public against the petitioner by reason of apprehension on their part as regards the safety of their person or property, is not justified. The material is available, which, inter alia, other documents, is in the evidence of the Town Inspector of Police, mentioned in Annexure P-2.

3. In the light of the foregoing discussion, the arguments of the learned counsel for the petitioner under propositions Nos. (iii) and (iv) have to be rejected and are, accordingly, rejected.

In the result, the petition is dismissed. No order as to costs.