In Re: S.V. Ghate

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Court : Mumbai

Decided On : Jul-11-1950

Reported in : AIR1951Bom161; (1950)52BOMLR711; ILR1950Bom736

Judge : Chagla, C.J. and ;Gajendragadkar, J.

Acts : Preventive Detention Act, 1950 - Sections 3(1) and 3(2)

Appeal No. : Cri. Appln. Nos. 250, 251 and 255 of 1950

Appellant : In Re: S.V. Ghate

Advocate for Pet/Ap. : A.S.R. Chari, Adv. in person and ;K.T. Sule, Adv. in person;L.M. Zaveria and ;H.S. Bhat, Advs. in Petn. No 250 of '50;C.K. Daphtary, Adv. General and ;H.M. Choksi, Govt. Pleader

Disposition : Petition allowed

Judgement :

Chagla, C.J.

1. These three petitions presented under Section 491, Criminal P. C., challenge the orders passed by the Commissioner of Police on 26th February 1950 These three petitions are based on practically identical grounds and therefore it would be sufficient to deal with the facts in Petn. No. 250 of 1950.

2. Ghate, who is the petitioner in this petition, was detained by an order passed by theCommissioner of Police in 1948. He was detained at the Yeravda prison. Act IV [4] of 1950, which is a Central Act, came into force on 26th February 1950 and on that day the Com-missioner of Police passed the following order :

'Whereas the Commissioner of Police, Greater Bombay, is satisfied with respect to the person known as S. V. Ghate of Greater Bombay that, with a view to preventing him from acting in a manner prejudicial to the security of the State of Bombay and the maintenance of public order, it is necessary to make the following order : Now, therefore, in exercise of the powers conferred by the Preventive Detention Act, 1950, the Commissioner of Police, Greater Bombay, directs that the said Section V. Ghate be detained.'

It may be noticed in passing that Ghate is described as 'of Greater Bombay.' That may have been his correct address before he was detained in Yeravda jail. But ever since 1948--aud chat should have been patent to the Commissioner of Police--he was a resident of Poona, being detained in the Yeravda jail. The order is challenged on various grounds. But we will first deal with the ground which according to us must prevail and which appears to be fatal to the making of the order. The ground urged is that the Commissioner of Police, Greater Bombay, had no jurisdiction to pass an order of detention with regard to Ghate who was not within his jurisdiction, but was residing in Poona. It is urged that the only authority that could have made such an order was either the Union Government or the State Government or the District Magistrate of Poona. In order to decide this point it is necessary to look at the scheme of the Central Act, IV [4] of 1950.

3. Section 3, which is the material section, confers power upon various authorities to make orders detaining certain persons, and Sub-clause (1) (a) provides that the Central Government or the State Government may, if satisfied that; it is necessary to detain a person with a view to prevent him from acting in a prejudicial manner, make an order of detention. Sub-clause (1) (b) it is unnecessary to consider because it deals with the case of a person who is a foreigner within the meaning of the Foreigners Act, and power is also given to the Central Government and the State Government to deal with foreigners who fall under that category. Then Sub-

clause (2) provides that any District Magistrate or Sub-Divisional Magistrate, or, in a presidency-town, the Commissioner of Police may, if satisfied as provided in Sub-clauses (ii) and (iii) of Clause (a) of Sub-section (1), exercise the power conferred by the said sub-section. Therefore, the authorities mentioned in this sub-section are invested with the same power as has been conferred upon the Central Government and the State Government under Sub-section (1). The contention of the petitioner is that the District Magistrate or the Sub-Divisional Magistrate or the Commissioner of Police may exercise the same power as the Union Government or the State Government can exercise under Sub-section (1), but there is a territorial limitation to their jurisdiction, and the power that they can exercise must be limited to the persons who reside within their jurisdiction. It would not be open to a District Magistrate or the Commissioner of Police to pass an order with regard to a person who was not resident within the district of which the District Magistrate was the District Magistrate or who was residing outside Greater Bombay with regard to the Commissioner of Police. On the other hand, it is contended by the Advocate-General that the jurisdiction conferred upon the District Magistrate, the Sub-Divisional Magistrate and the Commissioner of Police is co-extensive with the jurisdiction conferred upon the Central Government and the 8tate Government. In our opinion on a plain reading of the language of the statute it is clear that the contention put forward by the Advocate General is not tenable. It cannot be seriously disputed that as far as the Central Government and the State Government are concerned the jurisdiction is not and cannot be co-extenaive. If the jurisdiction was co-extensive it would mean that the State Government could make an order with regard to a person residing outside the territories of the State Government. Such position would be totally opposed to the fundamental principles on which our Constitution is based, namely, Federation and territorial limits of the executive power of the State Government. If therefore in Sub-section (1) it is necessary to read a limitation upon the jurisdiction of the State Government, namely, that it can only act within its own territories, in our opinion it is equally necessary to read a limitation upon the powers of the District Magistrate, the Sub-divisional Magistrate and the Commissioner of Police in Sub-section (a), and that limitation is that although those officers may exercise all the powers which are conferred upon the Union Government or the State Government, as far as the

exercise of these powers is concerned, they cannot exercise them beyond their own jurisdiction.

4. There is a further reason why we must come to this conclusion on the interpretation of Section 3(2). The Act nowhere provides that the person passing the order of detention has the power to detain the person against whom suchan order is passed. Therefore the power of detention must be implicit in the order of detention that is passed by the proper authority. Therefore a District Magistrate or a Sub-Divi-sional Magistrate or a Commissioner of Police who passes the order of detention is also given the power by necessary implication to detain the person against whom be has passed that order. It is, therefore, impossible to contend that a District Magistrate or a Sub-Divisional Magistrate or a Commissioner of Police can detain a person against whom he has passed the order in a place over which he has no jurisdiction. If the Advocate General's contention were sound, it would mean that the Commissioner of Police cannot only pass an order of detention against a person resident in Poona, but he can in fact detain him as part of his powers as Commissioner of Police. The statute nowhere confers such power upon the Commissioner of Police, and it is clear that the Criminal Procedure Code does not invest him with any such power. Therefore in, our opinion the jurisdiction that is conferred upon the officers mentioned in Sub-section (2) with regard to the making of the order of detention is identical with the jurisdiction that these officers possess with regard to the detaining of persons against whom the order is made. These two jurisdictions are co-extensive, and necessarily they must be co-extensive.

6. When we turn to some of the other sections of the Act, the position is made clearer still. Section 4 deals with the power to regulate place and conditions of detention, and under this section a detenu is liable to be re-moved to and detained in such place and under such conditions, including conditions as to maintenance, discipline, and punishment for breaches of discipline, as the Central Government or, as the case may be, the State Government, may from time to time by general or special order specify. Therefore, it is only the State Government of the Central Government that can order the removal of a detenu from one place to another. If, therefore, a District Magistrate were to detain a person in Poona of which he was the District Magistrate, it is only the State Government or the Central Government

that can direct his removal from Poona to any other place. This again emphasises the strict territorial nature of the jurisdiction conferred upon the officers mentioned in Sub-section (2) of Section 8.

6. Then, turning to Section 5, that provides that no detention order made by an officer mentioned in Sub-section (2) of Section 3 shall be deemed to be invalid merely by reason that the place of detention specified in the order is situate out-side the limits of the territorial jurisdiction of such officer This section again underlines the policy of the Act that ordinarily the person detained should be within the territorial jurisdiction of the officer who makes the order. But if by inadvertence or by mistake the place of detention mentioned in the order is outside the jurisdiction, that by itself would not invalidate the order.

7. Then Section 6 deals with powers in relation to absconding persons, and that provides that a report in writing has got to be made to a Presidency Magistrate or a Magistrate of the First Class having jurisdiction in the place where the person ordinarily resides, and it further provides that the provision of Section 87, 88 and 89, Criminal P. C., are to apply in respect of the said person and his property.

8. The Advocate-General has relied on two decisions of this Court in support of his argument. The first is, Emperor v Balkrishna Phansalkar 34 Bom. L. R. 1523 : 34 Cri. L. J. 199 . A Special Bench consisting of Sir John Beaumont C. J., BroomfielA. I. R. 1933 Bom. 1and Nanavati JJ. considered the provisions of the Emergency Powers Ordinance (II [2] of 1933). By Section 67 of that Ordinance the Local Government was given the power to invest the District Magistrate with the powers of the Local Government under different sections of the Ordinance, and practically the same question came to be considered by the Special Bench as we have to consider as to what was the jurisdiction of the District Magistrate who was invested with the power to make orders by the Local Government. And Sir John Beaumont C. J. says (p. 1534):

'But, when one has regard to the nature of the office of District Magistrate, and Commissioner of Police, Bombay, one cannot, I think, construe the order as meaning that, and I am disposed to think that what the order really means, and should be construed as meaning, is that the Government invests each District

Magistrate with the powers of the Local Government in his particular District.'

In this particular case the District Magistrate of Sholapur purported to make an order and served it upon a person who was imprisoned in Bijapur. The case was ultimately decided on a point of waiver as the person against whom the order was served came to Sholapur and did not challenge the jurisdiction of the Magistrate to make the order. Broomfield J took a contrary view of the interpretation of this section. With very great respect to the learned Judge, his view was based upon a misapprehension of the realposition that prevailed in law. The learned Judge took the view that looking to the provisions of the Criminal Procedure Code a case could be tried where the offence was committed, and as in this particular case the act complained of had taken place in Sholapur and if a case had been filed with regard to that act it could have been tried by the Sholaour Court, therefore the District Magistrate of Sholapur had jurisdiction to make the order though the person concerned was outside his jurisdiction. Now, we are not dealing with the question as to where a particular case can be tried with regard to a particular offence. I dare say that these petitioners, if they were charged in a criminal Court, they could have been tried by a criminal Court in Bombay. But that hag nothing whatever to do with the jurisdiction that the Commissioner of Police has got to make an order with regard to a person who is outside his jurisdiction. Under the Criminal Procedure Code he has not even the power to apprehend a person who is outside his jurisdiction. Even for the purpose of apprehension he has got to rely upon the officers of the other district. It is only when the offender is apprehended and brought to his own district that he can be tried for an offence which was committed in his district. Again with respect to the learned Judge jurisdiction must be found in the words of the statute itself. Jurisdiction cannot be conferred upon an authority merely by analogy and really Broomfield J. in this judgment was going more by analogy than on a construction of the plain words of the section. . Turning to the third Judge, Nanavati J., he takes the same view as the learned Chief Justice and he says at p. 1561:

'It seems from this quite clear that the District Magistrate is such only with reference to his district, and that has powers as a District Magistrate are also limited to his district. He can give orders only to persons wit bin hia district,

became only they are subject to his jurisdiction.'

With respect we entirely agree with that view.

9. The same Ordinance came to be considered in a subsequent case reported in Emperor v. Gulabchand 95 Bom. L. R. 185: A.I.R. 1933 Bom 148 : 34 Cri. L. J. 771, and the Ordinance was being considered by a Bench of this Court consisting of Sir John Beaumont C. J. and Murphy J. and at p. 195 the learned Chief Justice makes it clear that he adhered to the view which he had expressed in the earlier case to which I have already referred. In this particular case the order that was made by the District Magistrate of Sholapur was preventing someone from outside his jurisdiction to come within hisown jurisdiction, and the learned Chief Justice emphasises the fact that as the order had to be carried out within the District of Sholapur, there was no objection to the order having been served on the accused outside the district. In this case it is not suggested that the order made by the Commissioner of Police is one which is to be carried out within his own district. Murphy J. concurred with the view taken by the learned Chief Justice and was at pains to point out that the view taken by Broom field J in the earlier case went too far. Therefore both these decisions to which I have just referred far from assisting the Advocate-General support the contention put forward by the petitioners. Therefore, in our opinion, the objection taken by the petitioners to this order must prevail and we hold that the Commissioner of Police had no jurisdiction to make an order against the petitioners who were not resident in Bombay and who were not within his jurisdiction.

10. This would have been sufficient to dispose of this petition. But there is another point urged by the petitioners and the petitioners have requested us to give our decisions on that point as it concerns rather vitally the liberty of the subject; and as the matter has been argued elaborately and at some length, we think it necessary to express our opinion on that point also.

11. There is one rather particular feature of this case which it is necessary to emphasise. The petitioners before us were incarcerated and were deprived of their freedom for a period of two years; from 1948 to 1960 they were behind prison bars. There is no suggestion in any affidavits made in these proceedings that

during these two years the petitioners indulged or could indulge in any prejudicial activity. What has been urged by the petitioners in the forefront of their petitions is that the detaining authority merely proceeded on the materials which were before the detaining authority in 1948, that there were not and could not be any fresh materials on which the order of 26-2-1950, could have been made and, therefore, the charge levelled against the detaining authority is that it never arrived at that satisfaction which the law requires before the petitioners could be deprived of their liberty. It is necessary to consider what is the nature of satisfaction that is required under Act IV [4] of 1950, because the language used in this Act is different from the language used in the parallel Bombay Act. The Bombay Act, after it was amended, provided that the Provincial Government may, if it is satisfied that any person including a person arrested under Sub-section (A1)was acting, is acting or is likely to act in a prejudicial manner, make an order for his detention. Therefore, it will be noticed that it was sufficient if the parson against whom the order was made had acted in the past, or was acting in the present, or was likely to act in the future in a prejudicial manner to enable the detaining authority to pass the order of detention. Now, when he turn to the Central Act what is required is that the proper authority has to be satisfied that it is necessary to detain a person with a view to preventing him from acting in any prejudicial manner. Therefore, the satisfaction must be related to the person, against whom the order is made, acting in a prejudicial manner It has been urged by the Advocate-General that the language of Section 3 is wider than the language of the corresponding section in the Bombay Act, and the Advocate-General has almost gone to the length of suggesting that as the language stood it would be open to the detaining authority to act without any materials at all, and to act on mere suspicion or on re-mote possibility of a person to be detained acting in a prejudicial manner. The matter is of considerable importance because as I said before it vitally affects the liberty of the subject. Wide and vast powers are given to the executive under this act to deprive a subject of his Liberty and, therefore, we must, as far as possible, of course within the law, try and circumscribe that power so that it should be used in a manner which would interfere as little as possible with the liberty of the subject. Now, in our opinion, the satisfaction that the law requires is that there must be at least a reasonable probability of the person against whom an order is sought to be

made acting in a prejudicial manner. It may not be necessary to go to the length of saying that the detaining authority must feel absolute certainty that if the person to be detained was not detained he would act in a prejudicial manner. But from the materials placed before the detaining authority he must be in a position to say that there was a reasonable probability of his acting in a prejudicial manner. In our opinion the words used in Section 3, far from being wider than those used in the Bombay Act, are narrower and the quality of the satisfaction called for under Section 3 of the Central Act is, if one may put it that way, higher than the quality called for in the Bombay Act. It is perfectly true that the satisfaction has got to be of the detaining authority, that the Court cannot question that satisfaction; but that satisfaction must be arrived at on materials placed before the detaining authority and on a judgment which he himself has to come to that there is a reasonable probability that but for the detention the personagainst whom the order is to be made will act in a prejudicial manner. The Advocate. General has relied on certain observations of Sir Maurice Gwyer Chief Justice of India, in a case reported in Emperor v. Keshav Talpade . The Federal Court was considering B. 26 which was under Para. (x) of Section 2 (2), Defence of India Act. That Act authorised the making of a rule for the detention of persons reasonably suspected of certain things and the rule which was ultimately made enabled the Central Government and Provincial Government to detain a person about whom it need have no suspicion, reasonable or unreasonable, that he has acted, is acting or is about to act in any prejudicial manner at all. Sir Maurice Gwyer goes on to say (p. 47) :

'The Government has only to be satisfied that with a view to preventing him from acting in a particular way it is necessary to detain him. The Government may come to the conclusion that it would be wiser to take no risks, and may, therefore, subject a person to preventive detention against whom there is no evidence or reasonable suspicion of past or present prejudicial acts, or of any actual intention of acting prejudicially ; and Rule 26 gives it to do so.'

And the learned Chief Justice goes on to say that para (x) does not justify a rule in such terms and the Legislature bad not conferred such a power upon the Central Government. The Advocate-General asked us to read this judgment to mean that when we have language before us which is similar, to Rule 26, the widest possible

power must be assumed to have been given to the detaining authority. But what is overlooked is that in Rule 26 there was no obligation cast upon the Government to supply grounds to the person who was deprived of his liberty. Our Act casts an obligation upon the detaining authority to furnish grounds to the detenu to enable him to make a representation, and the very provision with regard to the furnishing of grounds makes it clear tbat the detaining authority is not to act on suspicion, but to act on proper materials placed before it. If, therefore, a reasonable probability about the doing of a prejudicial act is to be assumed before it could be said that the detaining authority is satisfied about the necessity of detaining a person, it is urged that in this case it is impossible to say that the detaining authority could have been so satisfied when the only materials it had before it were the materials which justified an order made in 1948. What is urged before us is that there must be some present connection between the time when the order of detention is made and the materials on which the order is based. It is said that if thematerials are with regard to activities in some distant past, then those materials cannot possibly furnish a ground for the necessity for detaining a person in order that he should not indulge in any prejudicial activity. Now, it would be very difficult to lay down at what point of time a particular activity of a particular person ceases to furnish any connection with the subsequent order directing him to be detained, and we refuse to express any opinion that necessarily a period of two years would lead the Court to come to the conclusion that there could be no connection whatever between the activities of a detained person two years prior to the making of the order and the apprehension felt by the detaining authority. But there can be no doubt that as the order is made on 26-2-1950, and it is that order which is put forward in support of the detention of the petitioners, the satisfaction must be arrived at at the date when the order was made. The detaining authority must be satisfied that it was necessary to detain the petitioners on 26-2-1960. It is not sufficient that some other authority in 1948 thought that the detention of the petitioners was necessary. There must be a reasonable apprehension in the mind of the detaining authority that if the petitioner was not detained on 26-2-1350, he would act in a prejudicial manner. Therefore in that sense the materials which were present before the detaining authority in 1948 may not be sufficient to lead the detaining authority in 1960 to the same conclusion as arrived at by the other

detaining authority. The detaining authority must examine the materials afresh, and although the past activities of the detenu may afford a ground for detention to the detaining authority examining the materials he must review those past activities in the context of the time at which he is making the order. The past activities must be related to the situation existing at the moment when the detaining authority makes the order, because it is necessary to emphasise again, the satisfaction which the law requires is the satisfaction of the detaining authority making the order at the time when the order is made. It is not open to the detaining authority in 1950 to fall back upon the satisfaction of the detaining authority in 1948. Therefore if in this case we are satisfied that there was not the satisfaction which the law requires, then undoubtedly the petitioner is entitled to succeed even on this ground.

12. Now, what is the position here As I said before, in the petition a clear challenge is made to the detaining authority that he had no materials and he could not have any materials with regard to any prejudicial activity on thepart of the detenu between 1948 and 1950, and it is also suggested that the detaining authority came to make an order without being properly satisfied as to the necessity of making the order. Now, let us consider how this challenge is met by the affidavit filed in this petition by the Police Commissioner. The Police Commissioner who has made the affidavit is Mr. Chudasama; but the order was made by his predecessor Mr. Bilimoria, and all that Mr. Chudasama says in this affidavit ia that before making the order Shri Kakhosru Dhanjisha Billimoria had carefully considered the materials placed before him by experienced police officers. Then in the next paragraph he goes on to say that he himself had carefully considered the materials on which the order was made and be was Ratified that the detention of the detenu was and is necessary with a view to preventing him from acting in a manner prejudicial to the security of the State of Bombay and the maintenance of public order. Now, it is very significant that there is not even a suggestion in this affidavit that any other material besides the materials which were available in 1948 was considered by Mr. Bilimoria. It is not too much to assume that if Mr. Bilimoria was making an order of detention against a person who had already been two years in jail, he would have mentioned in his affidavit or Mr, Chudasama would have mentioned it on his behalf that there were other materials which led the

authorities to the conclusion that in the interests of the State further detention of the detenu was necessary. We agree with the Advocate-General that the authorities are not bound to disclose the materials; but at least the statement could have been made and privilege could have been claimed. But the total absence of any suggestion on the part of Mr. Chudasama that anything else was considered besides the materials on which the previous order of detention was made can only lead us to the conclusion that there were no other materials which the detaining authority considered. We must also come to the conclusion that the detaining authority never applied its mind to the situation as was prevailing in this State on 26-2-1950. As I said before, the essential thing that is required in law is the necessity of detaining the person on 26-2-1950. Whatever the situation might have been in 1948, whatever the necessity of the State might be which required that the petitioner should be deprived of his liberty, what we are concerned with is whether there was that necessity in 1960, whether the detaining authority applied his mind to that necessity and whether he came to the conclusion that that necessity required that the petitioner should be deprived of his liberty for a further period. It is againcurious that in this affidavit apart from mentioning that Mr. Bilimoria considered the materials, Mr. Chudasama does not even state that after considering the materials, he came to the conclusion as to the necessity of detaining the petitioner. The Advocate-General says that the order made by the Commissioner itself says that there was a necessity to detain him. But what we want is not the order; we want an oath of a responsible person, and the more so when the statement in the order is challenged by the petitioner in his petition.

13. I should have mentioned an argument which was urged by the Advocate General on the question of jurisdiction and the argument is that the Commissioner of Police bad constructive jurisdiction over the petitioner and therefore he had the authority to make the order. It is rather difficult to understand what constructive jurisdiction means. But what the Advocate General contends is that the original order of detention was made by the Commissioner of Police; under the old Act the Commissioner of Police had the authority to deal with the detenu in the Yeravada jail; the Commissioner of Police could have ordered his transfer, he could have brought him to Bombay, and having brought him, he could have made the order of detention. Instead of bringing him to Bombay he chose to make the order from his

office in Bombay. This the Advocate. General says clearly shows that, if not actual jurisdiction, the Commissioner of Police had at least constructive jurisdiction. The argument is obviously fallacious, because there was a clear hiatus during which the detention of the petitioner became illegal and the Commissioner of Police could exercise no jurisdiction with regard to the petitioner. It has been urged upon us by the petitioner that on the passing of the Constitution on 25th January, the Bombay Act became void and the detention of the petitioner became illegal. It is unnecessary to decide that question. But the Advocate-General concedes, and fairly concedes, that during the interval between the passing of Act IV [4] of 1950 and the passing of the order by the Commissioner of Police there was certainly a hiatus during which the detention of the petitioner became illegal. If that be so, however short and brief that hiatus might be, during that period at least the jurisdiction of the Commissioner to deal with the petitioner came to an end, and therefore when the order was in fact made on 26th February the petitioner was not within the jurisdiction of the Commissioner either constructively or actually.

14. It has also been argued that under the Constitution there is no authority in the Legislature to pass any law detaining persons who are already detained under different Security Acts. What is argued is that the Constitution provides that as soon as the Constitution comes into force all the detained persons should become free citizens of India and it is only with regard to these free citizens of India in the light of materials placed before the detaining authority that a detention order can be made. The argument is very interesting, but fortunately we do not think it necessary to decide it on this petition. 15. The result, therefore, is that these three petitions must succeed and the petitioners are entitled to be set at liberty and we direct that they should be forthwith set free. Government to pay the costs of the petitioner in Petn. No. 260 of 1960.