

Ramesh Thaper Vs. the Province of Bombay

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Court : Mumbai

Decided On : Sep-19-1949

Reported in : AIR1950Bom213; (1950)52BOMLR62

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

Acts : Bombay Public Security Measures Act, 1947 - Sections 9A

Appeal No. : O.C.J. Appeal No. 52 of 1949

Appellant : Ramesh Thaper

Respondent : The Province of Bombay

Advocate for Def. : M.P. Amin, Adv. General

Advocate for Pet/Ap. : L.M. Jhavery, Adv.

Disposition : Appeal allowed

Judgement :

Chagla, C.J

1. This is an appeal from a judgment of Coyajee J. by which he held that a petition for a writ of certiorari which was asked for by the petitioner and the appellant before us was not maintainable and the writ could not be issued against the Province of Bombay.

2. The short facts which led up to this petition may be stated. The appellant is the editor and publisher of a weekly called 'Cross Roads,' and on 21st July 1948, he made a declaration as required by the Indian Press (Emergency Powers) Act before the Chief Presidency Magistrate. He had some difficulties in getting the necessary paper for printing the weekly and therefore the weekly could not be printed, and he filed a new declaration before the Chief Presidency Magistrate and the Chief Presidency Magistrate made an order calling upon him to deposit a sum of Rs. 1,000 under Section 7 (1), Press (Emergency Powers) Act. This was some time in April 1949, and the petitioner carried out the order by making the necessary deposit. In the third week of July 1949, the petitioner applied to the Chief Presidency Magistrate for the return of this deposit under Section 7 of that Act and the learned Chief Presidency Magistrate made an order on 26th July ordering the refund of the deposit. In the meanwhile, an order was issued by the Government of Bombay dated 20th July calling upon the appellant to cease publication of his paper from 23rd July to 22nd September 1949. This order was issued under Section 9A, Bombay Public Security Measures Act, 1947, and it is this order that is complained of by the appellant and it is with regard to this order that a writ of certiorari was applied for before the learned Judge. The learned Judge did not decide the petition on merits, but contented himself with holding that as the order of the Provincial Government was an executive order and not a judicial or a quasi judicial order, a writ of certiorari could not be issued.

3. In order to determine whether the order made by the Government under Section 9A, Bombay Public Security Measures Act (Bom. VI [6] of 1947) is an executive order or a judicial or a quasi-judicial order, we have to construe that section. Section 9A is in these terms :

'If the Provincial Government is satisfied that such action is necessary for the purpose of preventing any activity prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, the Provincial Government may,--'

Then the section goes on to specify the various kinds of action that Government could take under that section. It is perfectly clear that it is left to the satisfaction of

the Provincial Government what action to take under Section 9A of the Act. They are constituted the sole judges of the necessity of the action. Therefore, it would be for Government to determine whether they should take any action at all, and if so, what should be the nature of the action. The narrow question that we have to decide on this appeal is whether the Legislature equally constituted the Government the sole judges as to the purpose for which action is to be taken. If I may put it in different language, whether the Legislature intended not only that Government should decide subjectively what action should be taken, but also decide subjectively as to the existence of the purpose for which action has to be taken within the meaning of Section 9A.

4. Two views are possible and two views have been contended before us. One is as contended for by the Advocate General that the Legislature left it entirely to the satisfaction of the Provincial Government what action it should take and also left it to the satisfaction of the Provincial Government as to the purpose for which action was necessary. On the other hand, Mr. Jhaveri for the appellant has contended that although Government has to be satisfied with regard to the necessity of the action, as far as the purpose for which action is to be taken has got to be objectively determined. There can be no doubt, as we have already held after a very careful consideration of all the authorities in *Rao v. Advani* 51 Bom. L. R. 342 : A. I. R 1949 Bom. 277 that if the purpose of taking the action has to be objectively determined by Government, then the purpose laid down in Section 9A is a condition precedent to the exercise of the power given to the Provincial Government for taking any action under that section. It would not be enough for Government then to come to its own conclusion as a mental act that action was necessary for the purpose specified in Section 9A. The Government would have to determine objectively that the purpose of taking the action was present and was established, and once it is conceded that the purpose has to be objectively determined, then the jurisdiction of the Court would arise to determine whether in fact the condition precedent was satisfied or not, and if Government has got to determine any objective fact as a condition precedent for the purpose of doing an act which is left to its satisfaction, then the action of Government becomes a judicial or a quasi-judicial action and not merely the performance of an executive act.

5. The Advocate General has contended that the expression 'is satisfied' qualifies not only 'such action is necessary' but also 'for the purpose of preventing any activity which is a prejudicial activity. In my opinion, it is difficult to accept that contention, because when we look to the other provisions of the Act it is clear that the Legislature has advisedly used different language in Section 9A from the language, it has used in other sections of the Act, It is a well established canon of construction that when dealing with the same subject or similar subject the Legislature uses different language, one must attribute to the Legislature the intention of meaning different things when it uses different language, and in a legislation of such great importance where the liberty of the subject and the liberty of the press is involved, one must not lightly credit the Legislature with using different expressions without having carefully applied its mind to the necessity of using different language. When we turn to Section 2 (1) which deals with the power of detention of the Provincial Government, we find that the language used is:

'The Provincial Government may, if it is satisfied that any person is acting or is likely to act in a manner prejudicial to the public safety, the maintenance of public order, or the tranquility of the Province or any part thereof, make an order...' Therefore, as far as detention is concerned, it is left to the subjective satisfaction of the Provincial Government that a person is likely to do a prejudicial act or has actually done a prejudicial act, and on that subjective satisfaction the Government is given the power to order detention of any one in the Province, Turning to Section 5 which deals with control of essential services, there again it is left to the opinion of the Provincial Government whether any employment under the Provincial Government or any other employment or class of employment connected with any other matter specified in the Seventh Schedule to the Government of India Act, is essential for the purpose of public safety, etc., and on that opinion being formed the power is given to the Provincial Government to direct by general or special order that any person or persons engaged in such employment or class of employments shall not depart out of such area or areas as may be specified in such order. Then again in Section 6 which (SIC) power to the Government to impose collective fine, it is left to the satisfaction of Government whether certain facts set out in that section exist or not Again turning to Section 8

which deals with banning the use of certain uniforms, there also it is left to the satisfaction of the Provincial Government whether the facts stated there exist or not ; those facts have not to be objectively established. But when we turn to the section in question, we find that the prevention of a prejudicial act is not left to the satisfaction of the Provincial Government.

Whereas Section 2 (1) in terms states that the question of the prejudicial act must be left to the satisfaction of the Provincial Government, under Section 9A what is left to the satisfaction of the Provincial Government is the necessity of the action, and then we have the purpose stated without the qualification that that purpose is also to be determined subjectively by the Provincial Government.

6. It is conceded by the Advocate General, and very rightly and very fairly, that the Legislature did not intend to give uncontrolled power to the Provincial Government to take action under Section 9A and that Section 9A places a limitation and a restriction upon the power of the Provincial Government to take action under that section. The only question is as to whether that limitation is merely the subjective determination of the Provincial Government that action is necessary for the purpose of preventing a prejudicial act, or that limitation is that the purpose of taking the action must be objectively determined. The Advocate General has argued that in construing this Act we must try and not defeat the purpose for which this legislation was enacted. I entirely agree. It is the duty and function of the Court when it has a statute before it to see that the object and the purpose of the legislation is not impeded or defeated, but rather by the construction it puts upon it the object of the Legislature is carried out. But I fail to see why we should assume that the Legislature intended to give wide and autocratic powers to Government in order to restrict the freedom of the press. I also fail to see why we are not carrying out the purpose of this legislation by taking the view that the purpose for which action is to be taken is to be objectively determined and not subjectively. It is an important canon of construction, and I think that is a canon which still holds good today, that one must not assume that the Legislature of this Province would unnecessarily and unduly restrict, the liberty of the press, and therefore if we find in any legislation any restriction on the liberty of the press or the liberty of the subject, we must try and construe that restriction as narrowly as possible and limit

it within the strict words in which the Legislature has chosen to restrict the liberty of the press or the liberty of the subject. Therefore, if we come to the conclusion that the Legislature gave the power to the Government to take any action it thought fit, but limited the right to take action only if the action was justified by a definite purpose, viz prevention of any activity prejudicial to the public safety, the maintenance of public order, or the tranquillity of the Province or any part thereof, we are certainly not defeating in any way the object of this Act. If anything, it would be difficult to hold that the Legislature gave unrestricted power to the Government not only to determine as to the necessity of the action, but also to determine subjectively without any control or check whatsoever the purpose for which that action was being taken.

7. The Advocate General has relied on the well-known decision in *Liversidge v. Sir John Anderson* 1942 A. C. 206 : 110 L. J. K. B. 724 and he has asked us to apply the same canon of construction which was applied by the learned Law Lords in that case. What was contended for by the subject in that case was that the legislation, which was Rule 18B of the Defence Regulations, should be construed if possible in favour of the subject and against the Crown, and Viscount Maugham at p. 218 expressed the opinion that when the Courts were dealing with an executive measure by way of preventing a public danger and when the safety of the State was involved, that principle would have no application. Similarly, Lord Wright in his judgment at p. 260 emphasised the fact that:

'All the Courts today, and not least this House, (viz. the House of Lords), are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty p2confined and controlled by law, whether common law or statute.'

Then he quotes the well known phrase of Burke, viz., that the freedom was a regulated freedom and not an abstract or absolute freedom, and that Parliament was supreme and it could enact extraordinary powers by interfering with personal liberty. We entirely agree, with respect, with what Lord Wright says that the Legislature here is supreme and sovereign and it is open to our Legislature to put any legislation on the statute book or to deprive the subject or the press of their

respective liberties, and if the Legislature did so the Courts would loyally give effect to such legislation. But I do not for a moment accept the view that in times like the present we should adopt a canon of construction which was adopted by Viscount Maugham in 1942 when England was facing a danger which it had never faced before in all her long history and when she was fighting the war with her back to the wall. There is no suggestion that this legislation was passed because of any emergency or any public danger and that we should apply in construing this statute any other canon of construction except the ordinary canon.

8. The Advocate General has also relied on a decision of the Privy Council in *Wijeyesekera v. Festing* 1919 A. C. 646: A. I. R 1919 P. C. 155. Their Lordships of the Privy Council were considering in that case an Ordinance passed by the Ceylon Government, and the material words of the Ordinance which their Lordships were to consider were in Section 4 (p. 647) :

'Whenever it shall appear to the Governor that land in any locality is likely to be needed for any public purpose, it shall be lawful for the Governor to direct the Surveyor General or other officer generally or specially authorised by the Governor in this behalf, to examine such land and report whether the same is fitted for such purpose.'

And then another section of the Ordinance gave power to the Governor to direct the Government Agent to take an order for the acquisition of the land. It was contended that it was not left to the opinion of the Governor as to whether the land was needed for public purposes or not, and the Privy Council took the view that the Governor's action in ordering that acquisition proceeding should be taken was final and conclusive and it could not be questioned in a Court of law as to whether the land was needed for a public purpose or not.

9. Now, in my opinion, the language of Section 4 is materially different from the language of Section 9A. Section 4 provided that the land in any locality was likely to be needed for any public purpose and it was left to the opinion of the Governor whether it was so needed or not. In construing this section, it would be impossible to stop at 'needed' and to distinguish between 'likely to be needed' and 'for any public purpose.' It could not be said that whereas whether it is likely to be needed

or not was left to the opinion of the Governor, for any public purpose was left to be determined as an objective fact, because if you stop at 'needed,' the section would make no sense at all. If something is needed, it must be needed for something, and the sentence is only complete and has some meaning when it is read as a whole and the expression 'for any public purpose' is added to the word 'needed.' But in Section 9A it was quite open to the Legislature to give power to the Provincial Government to take such action as it was necessary if the Provincial Government was as satisfied, without providing anything more whatsoever. If the Legislature was minded to give wide and autocratic powers to the Provincial Government, it could have merely stated that on the Provincial Government being satisfied that action is necessary it could take such action as it thought fit. But the Legislature proceeded, as I have said earlier, to place limitation upon the power of the Provincial Government to take action. Therefore, in my opinion, the Privy Council case relied upon by the Advocate-General does not help us in construing Section 9A. What is more, in the Ceylon Ordinance which the Privy Council was considering, there were no other sections as we have here, viz., Section 2 (1), Sections 5, 6 and 8, where the Legislature has used different language when it intended to confer upon the Provincial Government extraordinary powers with regard to the liberty of the subject and so on.

10. Really, in my opinion, this case is fully covered by our decision in *P. V. Rao v. K. S. Advani* 51 Bom. L. R. 342 : A. I. R 1949 Bom. 277, In that case, my brother and I were considering Section 3, Land Requisition Ordinance, and the language used there was 'if in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by order in writing requisition any land for any public purpose,' and we there distinguished between the power of the Government to requisition any land and the purpose for which the land had to be requisitioned. We took the view that as to the question of the necessity for requisitioning the Legislature had left it to the opinion of the Provincial Government, with regard to the purpose for which land could be requisitioned the Legislature had provided that it should be a public purpose and a public purpose had to be objectively established by Government. Similarly here, in my opinion, the Legislature has left it to the satisfaction of the Provincial Government as to the nature and necessity of the action to be taken, but as far as the purpose for which

action has to be taken it has not chosen to leave it to the subjective determination of the Provincial Government, but has provided that the purpose must be objectively established and be a condition precedent before Government could take the action contemplated by Section 9 A. With great respect to the learned Judge, who decided the case, he has failed to distinguish the two severable parts of Section 9A. He has taken the view that the satisfaction referred to in Section 9A applies both to the necessity of the action and also to the purpose for which action should be taken.

11. I would, therefore, allow the appeal, set aside the order made by the learned Judge, and direct that the petition should go back to the learned Judge for determination on merits and that he should dispose of it according to law. Appeal allowed with costs.

12. Government has filed cross-objections with regard to costs. They do not survive. Cross-objections dismissed with costs.

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