

M.A. Khan Vs. State and anr.

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Court : Mumbai

Decided On : Apr-12-1966

Reported in : 1967CriLJ994

Judge : Tarkunde and ;Wagle, JJ.

Appellant : M.A. Khan

Respondent : State and anr.

Judgement :

Tarkunde, J.

1. The petitioner in this case has been continuously in detention since 7th June 1963, in pursuance of orders passed by the Government of Maharashtra from time to time under Rule 30 (1) (b) of the Defence of India Rules. During this period, he was trying to have certain journals and periodicals at his own cost, but could not get the permission to receive them. The Jail authorities did not allow him to purchase or receive the journals and periodicals on the ground that they were not included in the official list of newspapers allowable to security prisoners of Class I. On 5th July 1965, the petitioner wrote to the Secretary of the Home Department, Government of Maharashtra, that he may be permitted to purchase at his own cost or to receive the following journals and periodicals.

(1) 'The Dawat' (Urdu), Daily of Delhi

- (2) 'The Radiance' (English), Weekly of Delhi
- (3) 'The Margdeep' (Marathi), Biweekly of Poona
- (4) 'The Tajally' (Urdu), Monthly of Deoband
- (5) 'The Kanti' (Hindi), Monthly of Rampur
- (6) 'Zindagi' (Urdu), Monthly of Rampur, and
- (7) 'Fanoos Digest' Monthly of Pakistan.

Having failed to receive any reply from the Government to this letter, he filed the present petition under Article 226 of the Constitution for a writ or direction requiring the respondents, the State of Maharashtra and the Superintendent of the Bombay District Prison, to allow him to receive and use the literature he had asked for. After the petition was filed, the petitioner gave up his claim in respect of the monthly 'Fanoos Digest', which was being published in Pakistan, on account of the commencement of the recent Indo-Pakistan conflict.

2. The conditions under which the petitioner was detained were those provided by the Bombay Conditions of Detention Order, 1951. This order had been issued by the Government of Bombay under Section 4 of the Preventive Detention Act, 1950. Sub-rule (4) of Rule 30 of the Defence of India Rules, 1962, provided that the Central Government or the State Government, as the case may be, may from time to time determine the conditions as to maintenance, discipline and the punishment of offences and breaches of discipline in respect of persons detained under Sub-rule (1) (b) of Rule 30. In exercise of the powers conferred by Sub-rule (4) of Rule 30. the State of Maharashtra issued an order on 9th November 1962, that the conditions as to maintenance, discipline and the punishment of offences and breaches of discipline governing persons ordered to be detained in any place in the State of Maharashtra under the Defence of India Rules. shall be the same as those contained in the Bombay Conditions of Detention Order, 1957.

3. The grievance of the petitioner centres on Clause 16 of the Bombay Conditions of Detention Order, 1951, which relates to books and newspapers which can be

received by security prisoners. Clause 16 runs as follows:

16. (i) Class I security prisoners may be allowed at Government expense one weekly newspaper for every 20, and one daily newspaper for every 15 security prisoners, out of the list of newspapers considered suitable for convicts of Class I and Class II. Class II security prisoners may be allowed one such weekly newspaper for every 40, and one such daily newspaper for every 20 security prisoners. Both Class I and Class II security prisoners may be allowed, at their cost, any other weekly or daily newspapers included in the said list; provided that if any security prisoner wants any newspaper not included in the said list, he shall obtain the orders of Government through the Commissioner or the Superintendent, as the case may be.

(ii) Books (including periodicals not treated as newspapers) may be received by the security prisoners through the post subject to the condition that the postal article containing the books shall first be opened by the Commissioner or the Superintendent, as the case may be, or any person appointed by him in this behalf, and the delivery of such book to the security prisoner shall be refused by the Commissioner or the Superintendent, as the case may be, if in his opinion it is not suitable.

It will be noticed that Sub-clause (i) of this Clause allows security prisoners to have at their cost any of the weekly or daily newspapers which are included in the list of newspapers 'considered suitable for convicts of Class I and Class II'. And such other newspapers as may be allowed to them by orders of the State Government. Under Sub-clause (ii) the detenus are allowed to receive books (including periodicals which are not treated as newspapers) provided, however, that the delivery of any such book to the detenu can be refused by the Commissioner of Police or the Jail Superintendent, as the case may be, if in his opinion the book is 'not suitable'. The petitioner challenged the legality of the above Clause 16 in the course of his petition on the grounds, firstly that the imposition of such a condition was beyond the powers conferred on the State Government by Sub-rule (4) of Rule 30 of the Defence of India Rules, and secondly, that the imposition of the condition was contrary to the provisions contained in Section 44 of the Defence of

India Act, 1962.

4. These contentions were denied on behalf of the respondents in an affidavit in reply filed by the Under Secretary to the Government of Maharashtra in the Home Department and General Administration Department. It was further stated in the affidavit that the Government had considered the request made by the petitioner for being allowed to receive the said journals and periodicals at his own cost and had rejected that request. It was observed that 'Dawat' was a daily newspaper, that 'Radiance' and 'Margdeep' were, periodicals which could be classed as newspapers, and that the Government had de-sisted under Sub-clause (i) of Clause 16 of the Bombay Conditions of Detention Order, 1951, that the petitioner should not be permitted to get the said Journals on the ground that they were 'unsuitable'. In regard to the other publications, viz. 'Tajally', 'Kanti' and 'Zindagi' it was stated in the affidavit that they fell within the category of 'periodicals not treated as newspapers', and that the petitioner was not allowed to have them as the Government found them also to be unsuitable on the ground that they preached violence. In a supplementary affidavit the Under Secretary stated further that several issues of the daily newspaper 'Dawat' were examined by the office of the Inspector General of Police and that, as a result of the detailed scrutiny made by the said office, the Government came to the conclusion that the said paper was unsuitable for being permitted to the petitioner 'as the editorials and notes contain a violent attack on the accepted policies of Government of India particularly in regard to Kashmir'. The affidavit went on to say, 'The said newspaper is positively anti-national and pro-Pakistani. Besides criticising Indian leaders, it advocates a veiled insinuation of extra-territorial loyalty for the Muslims'. The above allegations in regard to daily newspaper 'Dawat' were denied in an affidavit filed by the petitioner in rejoinder.

5. As stated above, the first contention of the petitioner is that the powers which can be exercised by the State Government under Sub-rule (4) of Rule 30 of the Defence of India Rules do not include a power to impose on detenus a condition like the one contained in Clause 16 of the Bombay Conditions of Detention Order, 1951. Sub-rule (4) of Rule 30 lays down-

So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be detained in such place, and under such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government or the State Government, as the case may be, may from time to time determine.

Broadly stated, this sub-rule enables the Central Government or the State Government to determine the conditions as to maintenance and discipline of persons detained under Rule 30 (1)(b) of the Defence of India Rules. Now what is objected to in Clause 16 is that, it enables the Jail authorities and the State Government to prevent a detenu from having, even at his own cost, newspapers and books which can be freely read by the general public but which are regarded by the said authorities to be unsuitable to the detenus. It is obvious that such a condition does not relate to the 'maintenance' of the detenus. It was urged by the learned Assistant Government pleader, who appeared for the respondents, that the condition relates to the discipline of detenus and that the State Government was, therefore, competent to impose such a condition in the exercise of its powers under Sub-rule (4) of Rule 30. In making this submission the learned Assistant Government Pleader attributed to the word 'discipline' a far wider meaning than is justified by the context in which that word occurs. The word 'discipline' as it occurs in Sub-rule (4) can comprise only those rules of behaviour which promote the orderly functioning of the institution where the detenus are accommodated and such further rules which are necessary for effectuating the specific purposes for which the detenus are detained. It follows that the word 'discipline' in Sub-rule (4) cannot be utilised to enable the Government or the Jail authorities to regulate the reading habits of the detenus. It does not empower the State Government to constitute themselves as the mentors of the detenus. The purpose of preventive detention is not to improve the minds of the detenus but to prevent them from acting in any manner prejudicial to the objects mentioned in Sub-rule (1) of Rule 30. It must accordingly be held that the provisions of Clause 16, in so far as they prevent the detenus from having at their cost newspapers, periodicals and books which can be freely read by the general public, have no rational connection with the maintenance and discipline of detenus and are beyond the powers conferred on the State Government by Sub-rule (4) of Rule 30.

6. A reference may be made in this connection to the decision of the Supreme Court in *State of Maharashtra v. Prabhakar Pandurang* : 1966 CriLJ311 . The grievance of the detenu in that case was that the Government of Maharashtra had refused to give him permission to send out of the Jail, where he was detained, the manuscript of book on a scientific topic which he had written and which he wanted to have published. It was contended on behalf of the Government of Maharashtra that a detenu can exercise only such privileges as are conferred on him by the order of detention and that the provisions of Bombay Conditions of Detention Order, 1951, did not confer on the detenu any privilege to write a book and send it out for publication. In rejecting this contention the Supreme Court observed:

We find it difficult to accept the argument that the Bombay Conditions of Detention Order, 1951, which lays down the conditions regulating the restrictions on the liberty of a detenu, conferred only certain privileges on the detenu. If this argument were to be accepted, it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu. In the matter of liberty of a subject such a construction shall not be given to the said rules and regulations, unless for compelling reasons. We, therefore, hold that the said conditions regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him, but are the conditions subject to which his liberty can be restricted.

These observations lend support to our view that the liberties of detenus cannot be curtailed by imposing conditions which are beyond the powers which are granted by the terms of Sub-rule (4) of Rule 30 of the Defence of India Rules.

7. The learned Assistant Government Pleader argued that, it is necessary in the interest of security that detenus should be prevented from receiving an unlimited supply of periodicals and books and that the condition in Clause 16 is thus necessary for ensuring discipline in the Jail or the camp where detenus are accommodated. This argument might have carried weight, if Clause 16 were designed to restrict the number of periodicals and books received by detenus in such manner as to enable the Jail authorities to subject them to a proper scrutiny. The purpose of Clause 16, how ever, is not to restrict the number of periodicals

and books that could be received by a detenu at his own cost; the purpose is that the detenu shall not be able to have, even at his own cost, such periodicals and books as are unsuitable in the opinion of the State Government or the Jail authorities.

8. It was further urged by the learned Assistant Government Pleader, that the terms of Clause 16 are intended to prevent the detenus from having periodicals and books which are vulgar or obscene, or which preach violence, or which are proscribed by law. and that such a restriction is necessary for maintaining discipline in the Camp or the Jail where the detenus are accommodated. Now, in the first place, the restrictions which have been imposed by Clause 16 are not confined to periodicals and books which are vulgar or obscene, or which preach violence, or which are proscribed by law. Under Sub-clause (i) of Clause 16, a detenu can get at his own cost such newspapers as are included in the list of news papers 'considered suitable for convicts of Class I and Class II' and such other news papers as may be allowed by the State Government. We do not know on what basis the list of newspapers 'considered suitable for convicts of Class I and Class II' is prepared. The learned Assistant Government Pleader told us that, he also did not know it. There is similar vagueness with regard to the basis on which the State Government may allow a detenu to have at his cost newspapers other than those included in the aforesaid list. The effect of Sub-clause (i) of Clause 16, is that the right of a detenu to have newspapers of his choice is subjected to an entirely arbitrary and unregulated discretion of the State Government. Under Sub-clause (ii) of Clause 16. detenu can receive books of his choice only if they are 'suitable' in the opinion of the Commissioner of Police or the Jail Superintendent as the case may be. No guidance is provided in Sub-clause (ii) in regard to the basis on which the suitability of books is to be decided by the Commissioner or the Jail Superintendent. In this connection it was pointed out by the learned Assistant Government Pleader that a restricted meaning to the word 'suitable' in Sub-clause (ii) of Clause 16 was given in the judgment of a Division Bench of this Court in *George Fernandes v. State of Maharashtra* 66 Bom LR 185. In that case a Jail Superintendent had arbitrarily fixed the number of books which would be made available to the detenu, and the contention of the detenu was that the provisions of Clause 16 did not permit the Superintendent to restrict the number of books which

could be received by him. That contention of the detenu was upheld by the Court. The validity of Clause 16 was not challenged by the detenu in that case; on the contrary the detenu relied on Clause 16 in support of his contention. While upholding the detenu's contention, the Court made the following observation about the discretion which has been granted by Sub-clause (ii) of Clause 16 to a Jail Superintendent to decide upon the suitability of a book or publication wanted by the detenu:

But as far as we can see. that discretion will have to operate within a well defined field. The book may be unsuitable considering the material or the contents of the book which may be objectionable, because it preaches violence, it may be vulgar or obscene, it may be pornographic, or it may have been proscribed, but beyond the compass of this discretion, we do not find any power in the Superintendent to withhold a book from the detenu on any other ground.

As no dispute arose in that case with regard to the suitability of any book or publication, this observation of the Court was clearly obiter. It appears that the above restriction on the scope of the term 'suitable' was derived by the Court from rules 1357 and 1360 of the Bombay Jail Manual which have been quoted in the said judgment. It appears in us, with great respect, that neither the terms of Sub-clause (ii) of Clause 16. nor the context in which those terms are used, provide any indication of the manner in which the Commissioner or the Superintendent, as the case may be. is to decide on the suitability or otherwise of any book or publication wanted by a detenu. Supposing, however, that such a restriction to the discretion of the Commissioner or the Superintendent can be read in Clause 16 (ii). the discretion so restricted would be unlawful, for there is nothing in sub rule (4) of Rule 30 of the Defence of India Rules, which entitles the State Government to prevent a detenu from receiving any book or periodical which can be lawfully obtained and read by a person, who is not under detention. The State Government may of course, prevent a detenu from receiving periodicals and books which cannot be lawfully obtained by people, who are not under detention. Books and periodicals which are proscribed, or which are obscene, may be disallowed on those grounds, but not books and periodicals which can be freely had by the general public.

9. It will be noticed that, it is not our conclusion that the whole of Clause 16 is invalid. In our view, the two sub-clauses of Clause 16 are invalid in so far as they prevent a detenu from obtaining at his own cost a periodical or a book which can be freely and lawfully obtained by the general public.

10. The second contention advanced on behalf of the petitioner was that the restriction which has been imposed upon him in the matter of receiving newspapers and periodicals at his own cost is contrary to the provisions contained in Section 44 of the Defence of India Act. Section 44 lays down.

44. Ordinary avocations of life to be interfered with as little as possible.-Any authority or person acting in pursuance of this Act, shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence.

The scope and effect of Section 44 was considered by this Court in *State v. Dhanji Virji Bhanusali* Criminal Appln. No. 1576 of 1965, D/-7-12-1965 (Bom). In the course of the judgment in that case it was observed:

It appears to us, on the one hand, that the standard of compliance with Section 44 is a subjective standard, and that the section does not purport to lay down any objective or impersonal standard. In other words, the section requires that every authority or person, acting in pursuance of the Act, shall adopt such action as in its or his judgment accords with the principle of least interference. It appears to us, on the other hand, that the terms of that section are mandatory, that authorities and persons acting in pursuance of the Act. are bound to abide by the principle laid down in that section, and that acts done in violation of that principle are invalid. This does not, however mean that the question whether in a particular case the provisions of that section have been complied with is non-justiciable. If an authority or person makes any order which, in his considered opinion, is in conformity with the principle enunciated in that section, it cannot be challenged in a Court of law on the ground that another order of less severity would have sufficed to meet the situation. If, however, an authority or person makes an order without regard to the principle enunciated in that section, he acts in breach of a legislative mandate and

his order can be held by the Court to be invalid. In our view, Section 44 is thus mandatory, and the question of compliance or otherwise with that section is also justiciable in the limited sense mentioned above.

It was further observed in the judgment:

The result is that an authority or person exercising powers under the Act, is bound to have regard to the principle enunciated in Section 44, that the Court will not examine the propriety of an action adopted by an authority or person after paying due regard to that principle, but that the Court can strike down any such action where it is shown that the authority or person concerned paid no heed to that principle or could not have rationally adopted the action if the principle had been taken into consideration.

11. On the basis of this decision, it was urged by Mr. Singhvi on behalf of the petitioner that Clause 16 of the Bombay Conditions of Detention Order, 1951, contravenes Section 44 of the Defence of India Act, in so far as it prohibits a detenu from receiving at his own cost a periodical or book which can be obtained by the general public. Mr. Singhvi argued that if the State Government had taken into consideration, the principle of least interference laid down in Section 44 while determining the conditions of maintenance and discipline of detenus, the Government could not have rationally come to the conclusion that it was necessary for ensuring public safety and interest or the defence of India and civil defence that persons in preventive detention should be debarred from reading periodicals and books which can be freely read by the public at large.

12. Now, it appears to us that, it would have been necessary for us to decide whether the impugned provisions of Clause 16, are consistent with the principle laid down in Section 44 if we had come to the conclusion that the State Government was given the power under Sub-rule (4) of Rule 30 of the Defence of India Rules, to regulate the literature which may be received and read by the detenus. If such a power had been granted to the State Government by Sub-rule (4) of Rule 30, it would have been necessary to decide whether that power was exercised in conformity with the requirements of Section 44 when the provisions of Clause 16, were applicable by the State Government to persons detained under

the Defence of India Rules. On the finding given by us earlier, no such power was granted to the State Government by Sub-rule (4) of Rule 30,

13. Supposing, however, that it was within the power of the State Government under Sub-rule (4) of Rule 30 to impose conditions on the books and periodicals that may be received by detenus at their own cost, we are of the view that the restrictions in that behalf contained in Clause 16 are violative of the principle laid down in Section 44. It was not denied before us that reading newspapers, periodicals and books is one of the ordinary avocations of life. A reference to any standard dictionary would show that the word 'avocation' originally meant a diversion from one's principal vocation, but that it has now come to include the principal occupation as well as the subsidiary pursuits of life of an individual. It must, therefore, be held that the restriction placed by Clause 16 on the periodicals and books which can be received and read by detenus amounts to an interference with one of the ordinary avocations of detenus. We are further of the view that if the State Government had taken into consideration the principle of least interference laid down in Section 44, when they determined the conditions of maintenance and discipline of detenus, they could not have rationally come to the conclusion that it was necessary for ensuring the public safety and interest or the defence of India and civil defence that persons kept in preventive detention should be debarred from receiving and reading periodicals and books which could be freely received and read by the general public.

14. We hold accordingly that the respondents, the State of Maharashtra and the Superintendent of the Bombay District prison were not entitled to disallow the petitioner from receiving the newspapers and periodicals mentioned in his letter of 5th July 1965, addressed to the Secretary of the Home Department of the Government of Maharashtra except the Urdu monthly 'Fanoos Digest' which is no longer being asked for by the petitioner. The respondents are directed to remove the said restriction and allow the petitioner to receive at his cost the newspapers and periodicals mentioned above. The respondents will pay the petitioner's costs.