

Harish Chander Vs. Emperor

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Court : Allahabad

Decided On : Apr-21-1943

Reported in : AIR1943All277

Appellant : Harish Chander

Respondent : Emperor

Judgement :

Iqbal Ahmad, C. J.

1. This is an application under Section 491, Criminal P. C. and the prayer contained in the application is that an order be passed directing that the applicant be set at liberty. The applicant is one Harish Chandra who was a student of the Medical College, Benares Hindu University. The applicant is a resident of Kaimganj in the District of Farrukhabad. He was arrested at Rudain Railway Station on 6th November 1942, under the orders of Raza Ahmad Rizvi, Circle Inspector of Police, Parrukhabad, and has been in custody ever since. Various applications for bail were presented on behalf of the applicant in the Court of the Magistrate and of the Sessions Judge, but those applications were rejected. The application filed by the applicant was supported by an affidavit and it was stated in the affidavit that 'the applicant is a respectable young man and is not previous convict for any political activity' and that 'the applicant is being wrongfully detained under pretext of Sections 4 and 5, Explosive Substances Act, or Defence of India Rules, Section 129.'

2. Two counter-affidavits were filed by Raza Ahmad Rizvi, Circle Inspector, and it appears from those affidavits that revolutionary activities have been in progress on a serious scale in the District of Parrukhabad and that bombs were thrown at certain railway stations and on the Kotwali at Parrukhabad. It further appears from those affidavits that 'a reliable person had informed the police officers at Parrukhabad that one revolutionary named Jogesh Chatterji, an ex-convict of the Kakori train dacoity case, had started work in the District with Kaimganj as his work centre and he had also given the names of 5 or 6 persons including that of Harish Chandra as the persons who were taking and introducing others at Kaimganj to Jogesh Chatterji.'

3. The counter-affidavits further disclose the fact that, even though Harish Chandra was at first arrested under the Explosive Substances Act, he is since 17th February 1943, under detention in pursuance of an order passed by the Commissioner of Allahabad Division under Rule 26, Defence of India Rules. This fact is not controverted on behalf of the applicant and, in my judgment, the order of detention passed by the Commissioner constitutes a complete answer to the present application. Sir Tej Bahadur Sapru who argued the case on behalf of the applicant stated that the application was in pursuance of the provisions of Section 491 (b), Criminal P. C., which provides that:

Any High Court may, whenever it thinks fit, direct (b) that a person illegally or improperly detained in public or private custody... be set at liberty.

4. It is not, and cannot, be disputed that the powers conferred on this Court by Section 491 are very wide, and impose upon this Court the duty of protecting the liberty of His Majesty's subjects. That power and duty has, however, to be exercised and discharged on certain fixed judicial principles and not in an arbitrary manner. It is manifest that the jurisdiction vested by Clause (b) can be exercised only if this Court is satisfied that the detention is illegal or improper. In the consideration of this question, all that this Court has to see is whether or not the detention is in conformity with the dictates of law, but it is not within the province of this Court to embark on an enquiry as to whether the enactment under which a person is detained is a proper and well-advised legislation. Such considerations

are within the exclusive competence of the Legislature and it is the duty of this Court to faithfully interpret and give effect to enactments passed by a competent Legislature and to scrupulously refrain from questioning the wisdom of the Legislature. It is, however, clear that, in cases in which, even though the forms of law have been observed, the detention constitutes a clear fraud on an enactment or amounts to an abuse of the powers given to the executive by the Legislature, it is the duty of this Court to step in and to order that the person detained be set at liberty.

5. In the present case the applicant's detention is, as already stated, in pursuance of an order passed under Rule 26 of the Defence of India Rules. That rule, like other rules made under the Defence of India Act, arms the executive with extensive powers and constitutes the executive the sole and final arbiter for the decision of the question as to whether or not circumstances exist that warrant the passing of an order under that rule. Clause (1) of Section 16, Defence of India Act, enacts that 'no order made in exercise of any power conferred by or under this Act, shall be called in question in any Court.' It follows that once the executive has bona fide passed an order under Rule 26, the Courts are debarred from enquiring into the propriety or otherwise of such an order. In other words, if a person is detained in pursuance of an order under Rule 26, neither this nor any other Court has the jurisdiction to launch an enquiry for the determination of the question whether or not the circumstances specified in that rule did exist so as to justify the order of detention. It was strongly pressed upon us by Sir Tej Bahadur Sapru that Rule 26 had the effect of completely nullifying the jurisdiction vested in this Court by Section 491 and was ultra vires the Central Government. The argument, in my opinion, is devoid of all substance. By Section 2, Defence of India Act, the Central Government is authorized to

make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or ' the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

6. It is in the exercise of this power that the Defence of India Rules were made and, as by Section 2 the discretion vested in the Central Government is absolute and unfettered, the exercise of that discretion, even though capricious or perverse, cannot be questioned in any Court of law; *Rex v. Secretary of State for Home Affairs*; *Ex parte Lees* (1941) 1 K. B. 72, *Liversidge v. Sir John Anderson* (1942) 1942 A. C. 206 and *Greene v. Secretary of State for Home Affairs* (1942) 1942 A.C. 284. It is well to remember in this connexion that the Defence of India Act is an emergency measure and was enacted with a view 'to provide for special measure to ensure the public safety and interest and the defence of British India . . .' after the Governor-General had, by proclamation, declared that 'a grave emergency exists whereby the security of India is threatened by war.' It may be that some, or most, of the provisions contained in the Defence of India Rules are drastic but, as they have been promulgated by a competent authority, they are binding and have the force of law. I may point out in passing that the Defence of India Act and the Defence of India Rules are not novel legislations but are analogous to the Emergency Powers Defence Act and the Defence (General) Regulations passed and made in England in 1939. It is true that the provisions in the Indian Act and Rules are not identical in every respect with the provisions contained in the English Act and Regulations, but the difference between the two is attributable to the varying conditions in the two countries.

7. I cannot assent to the argument that either Section 16 or Rule 26 in any way nullifies the jurisdiction created by Section 491, Criminal P. C. That jurisdiction remains intact and this Court, as heretofore, has the jurisdiction to entertain applications under that section. If, however, after entertaining an application under that section, it transpires that the detention is not illegal or improper, the application will fail on the merits. There are numerous provisions of law which justify the detention of a person, and the Defence of India Rules constitute but an addition to those provisions. In the present case this Court cannot act as a Court of appeal from the discretionary order passed by the Commissioner under Rule 26 and enquire into the grounds which led the Commissioner to pass that order. It must, in view of the provisions of Section 16, Defence of India Act, hold that that order is a valid order, and as such, the applicant is lawfully and properly detained. I would, therefore, dismiss this application.

Verma, J.

8. I agree and have nothing to add.

Yorke, J.

9. I also agree.

10. This application is dismissed.

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