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CDJ 2011 MHC 2238

Court : High Court of Judicature at Madras

Case No : W.P.NO.28764 OF 2010 & M.P.NO.1 OF 2010

Judges: THE HONOURABLE MR. JUSTICE K. CHANDRU

Parties : Sou.Sundaramoorthi Versus The Commissioner of Police & Others

Appearing Advocates : For the Petitioner: G. Balaji, Advocate. For the Respondents: S. Sivashanmugham, GA.

Date of Judgment : 21-03-2011

Head Note :-

SUBJECT

Judgment :-

(This writ petition is preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the entire records pertinent to the order of the second respondent in Na.Ka.No.216/KAA.VU.Aa.Am Saragam/Mugaam/2010, dated 11.12.2010 and to quash the same and consequently to direct the respondents to grant permission to the petitioner to conduct a public meeting at a future date that may be fixed by the court.)

The petitioner has filed the present writ petition seeking to challenge an order, dated 11.12.2010 issued by the Assistant Commissioner of Police, Ambattur Range. By the impugned order, the petitioner's application to conduct a public meeting near

Korattur Bus stand was rejected.

2. The petitioner had applied for permission in the capacity of Thiruvallur District in-charge of Naam Tamilar Party. In his application, dated 9.12.2010, the petitioner informed the third respondent that they intent to conduct a felicitation meeting for Seeman. In that meeting, apart from Seeman, M/s.Shahul Hameed (Tamil Muzhakkam) and Pugazendhi (Cinema Director) have consented to participate. They also sought for permission to use sound amplifier.

3. On receipt of the said representation, the second respondent by his order, dated 11.12.2010 had declined to grant permission by giving following reasons:

(i) The Commissioner of Chennai Suburban Police by his order, dated 28.11.2010 had directed that no permission to conduct a public meeting should be granted.

(ii) Since the meeting is to be participated by a person who is the supporter of the banned organization, there is likelihood of law and order problem being created.

Hence permission sought for conducting meeting on 13.12.2010 was declined. Challenging the said order, the writ petition came to be filed.

4. When the writ petition came up on 20.12.2010, this court directed the learned Government Pleader to get an appropriate instruction from the respondents. Accordingly, Mr.S.Sivashanmugham, learned Government Advocate appeared. He has also filed a counter affidavit, dated 3.1.2011 on behalf of the second respondent, justifying the denial of permission.

5. It is contended by the petitioner that the respondents' refusal was illegal. The denial has been made contrary to Section 41(4) of the Tamil Nadu City Police Act. The apprehension of law and problem will be created on the meeting being held was

also contrary to records. It is claimed that a mere support of the banned organization cannot be against the sovereignty and territorial integrity of India. The reasons adduced in the impugned order is violative of Article 19(1) of the Constitution of India.

6. In the counter affidavit, it is claimed that the first respondent had imposed a prohibitory order under Section 41 of the Tamil Nadu City Police Act for 15 days commencing from 28.11.2010. Liberation Tigers of Tamil Eelam is a banned organization by the Central Government under the Unlawful Activities (Prevention) Act, 1967. The ban order was also upheld by the Tribunal under Section 13(2) of the said Act. Therefore, an assistance in any way to the unlawful activities of the association is punishable with imprisonment. The ban order is amounting to reasonable restriction under Article 19 of the Constitution.

7. In the light of the rival contentions, it has to be seen whether the impugned order requires any interference from this Court?

8. Under Section 41(4) of the Tamil Nadu City Police Act, without giving an opportunity to person concerned, a ban order cannot be made. On that short ground, the impugned order is liable to be interfered with. Even otherwise, the reasons adduced by the respondents cannot be countenanced by this Court. The meeting is only to have felicitation for one Seeman, S/o.Chenthamizhan, who was detained under the National Security Act. The detention order was set aside by this Court in H.C.P.No.1471 of 2010, dated 09.12.2010 in S.James Peter Vs. The Additional Commissioner of Police (Crime and Headquarters) and Commissioner of Police in-charge, Chennai Police and others. Therefore, the petitioner has every reason to celebrate his release by this Court. Admittedly, all the three persons whose names were mentioned in the application for conducting a public meeting are all Indian Citizens. Even before the meeting could take place, the respondents cannot presume any adverse notice about their conduct. On the other hand, the reason given by the respondents that there is likelihood of supporting the banned organization cannot be a reason to deny permission that was sought for.

9. In this connection, it is necessary to refer to certain decisions of the US Supreme Court as well as our Supreme Court. In those judgments, the view taken was that a mere membership or support by itself cannot be said to be an offence under any law.

10. On the question of support to a banned organization, the Supreme Court very recently in State of Kerala Vs. Raneef reported in (2011) 1 SCC 784 referred to several judgments of the US Supreme Court with approval. In paragraphs 11 to 14, it was stated as follows:

"11. In Scales v. United States3, 367 U.S. 203, Harlan, J. of the US Supreme Court while dealing with the membership clause in the McCarran Act, 1950 distinguished between active “knowing” membership and passive, merely nominal membership in a subversive organisation, and observed:

“The clause does not make criminal all association with an organization which has been shown to engage in illegal activity. A person may be foolish, deluded, or perhaps mere optimistic, but he is not by this statute made a criminal. There must be clear proof that the defendant specifically intends to accomplish the aims of the organization by resort to violence.”

12. In Elfbrandt v. Russell4, 384 US 17-19 (1966), Douglas, J. of the US Supreme Court speaking for the majority observed: (L Ed pp. 325-26)

“Those who join an organization but do not share its unlawful purpose and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. … A law which applies to membership without the ‘specific intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of ‘guilt by association’ which has no place here.”

13. In Joint Anti-Fascist Refugee Committee v. McGrath5, 341 US 123 at 174 (1951) Mr.Douglas, J. of the US Supreme Court observed: (L Ed p.855)

“In days of great tension when feelings run high, it is a temptation to take shortcuts by borrowing from the totalitarian

techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."

14. We respectfully agree with the above decisions of the US Supreme Court, and are of the opinion that they apply in our country too. We are living in a democracy, and the above observations apply to all democracies."

11. Subsequently, the Supreme Court in Arup Bhuyan Vs. State of Assam reported in 2011 (2) Scale 210 = 2011 AIR SCW 976, once again referred to several other US Supreme Court judgments and quoted with approval in interpreting Section 3(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. The following passages found in paragraphs 13 to 16 may be usefully extracted below:

"13.In Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) the U.S. Supreme Court went further and held that mere "advocacy or teaching the duty, necessity, or propriety" of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed "to teach or advocate the doctrines of criminal syndicalism" is not per se illegal. It will become illegal only if it incites to imminent lawless action. The statute under challenge was hence held to be unconstitutional being violative of the First and Fourteenth Amendments to the U.S. Constitution.

14. In United States Vs. Eugene Frank Robel, 389 U.S. 258, the U.S. Supreme Court held that a member of a communist organisation could not be regarded as doing an unlawful act by merely obtaining employment in a defence facility.

15. We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental rights are similar to the Bill of Rights in the U.S. Constitution.

16. In our opinion, Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence."

12. Once again the Supreme Court in Sri Indra Das Vs. State of Assam reported in 2011 (2) Supreme 67 = 2011 AIR SCW 1223 quoted with approval the case of Arup Bhuyan's case (cited supra) and made a further reference to certain other decisions of the US Supreme Court. The following passages found in paragraphs 13 to 18 and 20 to 26 may be usefully extracted below:

13. In Noto vs. U.S. 367 US 290(297-298) Mr. Justice Harlan of the U.S. Supreme Court observed :

".....The mere teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend colour to the otherwise ambiguous theoretical material regarding Communist Party teaching."

14. In Noto's case (supra) Mr. Justice Hugo Black in a concurring judgment wrote :

"In 1799, the English Parliament passed a law outlawing certain named societies on the ground that they were engaged in `a traitorous Conspiracy ..... in conjunction with the Persons from Time to Time exercising the Powers of Government in France .....' One of the many strong arguments made by those who opposed the enactment of this law was stated by a member of that body, Mr. Tierney :

`The remedy proposed goes to the putting an end to all these societies together. I object to the system, of which this is only a branch; for the Right Hon. gentleman has told us he intends to propose laws from time to time upon this subject, as cases may

arise to require them. I say these attempts lead to consequences of the most horrible kind. I see that government are acting thus. Those whom they cannot prove to be guilty, they will punish for their suspicion. To support this system, we must have a swarm of spies and informers. They are the very pillars of such a system of government.' The decision in this case, in my judgment, dramatically illustrates the continuing vitality of this observation. The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force." (emphasis supplied)

15. In Communist Party vs. Subversive Activities Control Board, 367 US 1 (1961) Mr. Justice Hugo Black in his dissenting judgment observed :

"The first banning of an association because it advocates hated ideas - whether that association be called a political party or not -- marks a fateful moment in the history of a free country. That moment seems to have arrived for this country..... This whole Act, with its pains and penalties, embarks this country, for the first time, on the dangerous adventure of outlawing groups that preach doctrines nearly all Americans detest. When the practice of outlawing parties and various public groups begins, no one can say where it will end. In most countries such a practice once begun ends with a one party government."

16. In Joint Anti-Fascist Refugee Committee vs. McGrath, 341 US 123, 174 (1951) Mr. Justice Douglas in his concurring judgment observed :

"In days of great tension when feelings run high, it is a temptation to take short cuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within." (emphasis supplied)

17. In Keyishian vs. Board of Regents of the University of the State of New York, 385 US 589, 606 (1967) the U.S. Supreme Court struck down a law which authorized the board of regents to prepare a list of subversive organizations and to deny jobs to

teachers belonging to those organizations. The law made membership in the Communist Party prima facie evidence for disqualification from employment. Mr. Justice Brennan, speaking for the Court held that the law was too sweeping, penalizing "mere knowing membership without a specific intent to further the unlawful aims."

18. In Yates vs. U.S., 354 US 298 (1957), Mr. Justice Harlan of the U.S. Supreme Court observed :

"In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. The District Court apparently thought that Dennis obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action."

20. In Whitney vs. California (supra) Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court in his concurring judgment (which really reads like a dissent) observed :

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of free speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent... ..... The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind." (emphasis supplied)

21. Mr. Justice Brandeis in the same judgment went on to observe :

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the

incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

22. In Gitlow vs. New York, 268 US 652 (1925) Mr. Justice Holmes of the U.S. Supreme Court (with whom Justice Brandeis joined) in his dissenting judgment observed :

....."If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence my set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result; or, in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more."

23. In Terminiello vs. Chicago, 337 US 1 (1949) Mr. Justice Douglas of the U.S. Supreme Court speaking for the majority observed :

"....[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute,...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest....There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

24. In DeJonge vs. Oregon, 299 US 353 (1937) Chief Justice Hughes of the U.S. Supreme Court wrote that the State could not punish a person making a lawful speech simply because the speech was sponsored by a subversive organization.

25. In Abrams vs. U.S., 250 US 616 (1919) Mr. Justice Holmes of the U.S. Supreme Court in his dissenting judgment wrote :

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more then they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with

the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the 1st Amendment left the common law as to seditious libel in force. History seems to me against the notion."

(emphasis supplied)

26. It has been submitted by the learned counsel for the Government before the TADA Court that under many laws mere membership of an organization is illegal e.g. Section 3(5) of Terrorists and Disruptive Activities, 1989, Section 10 of the Unlawful Activities (Prevention) Act 1967, etc. In our opinion these statutory provisions cannot be read in isolation, but have to be read in consonance with the Fundamental Rights guaranteed by our Constitution."

13. After agreeing with all those opinions of the US Supreme Court in Sri Indra Das case (cited supra), the Supreme Court held that the constitution being Supreme no statute can be violated. In paragraphs 27 to 31 it was observed as follows:

"27. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the Court should be try to sustain the validity of the statute by reading it down. This aspect has been discussed in great detail by this Court in Government of Andhra Pradesh vs. P. Laxmi Devi 2008(4) SCC 720.

28. In this connection, we may refer to the Constitution Bench decision in Kedar Nath Singh vs. State of Bihar AIR 1962 SC 955 where the Supreme Court was dealing with the challenge made to the Constitutional validity of Section 124A IPC (the law against sedition).

29. In Kedar Nath Singh's case this Court observed(vide para 26):

....."If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of thesections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence."....

30. Section 124A which was enacted in 1870 was subsequently amended on several occasions. This Court observed in Kedar Nath's case (supra) observed that now that we have a Constitution having Fundamental Rights all statutory provisions including Section 124A IPC have to be read in a manner so as to make them in conformity with the Fundamental Rights. Although according to the literal rule of interpretation we have to go by the plain and simple language of a provision while construing it, we may have to depart from the plain meaning if such plain meaning makes the provision unconstitutional.

31. Similarly, we are of the opinion that the provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes constitutional."

14. As seen from the above, the Supreme Court also dealt with Section 10 of the Unlawful Activities (Prevention) Act and held that mere support to a banned organization will not by itself can become an offence.

15. In the light of the above factual matrix and the legal precedents set out above, the impugned order is liable to be set aside on both grounds, i.e., not giving an opportunity to the petitioner herein before issuing the rejection order as well as the reasons adduced for rejecting his request was not valid.

16. However when the matter came up for hearing, the learned counsel for the petitioner informed that since the earlier permission for holding the meeting was refused, they intent to conduct the meeting if permitted by this court on 02.04.2011 at 5.00 p.m. near Korattur Bus stand. Hence the respondents are directed to permit the petitioner to conduct the meeting near Korattur Bus Stand on 02.04.2011 at 5.00 p.m. and also to provide sufficient protection to carry out his legitimate constitutional guarantee.

17. The writ petition will stand allowed. However, there will be no order as to costs. Consequently, connected miscellaneous petition stands closed.