

Aeltemesh Rein, Advocate, Supreme ... vs Union Of India & Ors on 4 August, 1988

Equivalent citations: 1988 AIR 1768, 1988 SCR SUPL. (2) 223, AIR 1988 SUPREME COURT 1768, 1988 (4) SCC 54, 1988 (3) JT 275, 1988 (17) IJR (SC) 460, (1988) 3 SCJ 195, (1988) 3 CRIMES 513, (1988) 2 CURCC 625

Author: E.S. Venkataramiah

Bench: E.S. Venkataramiah, M.M. Dutt

PETITIONER:

AELTEMESH REIN, ADVOCATE, SUPREME COURT OF INDIA

Vs.

RESPONDENT:

UNION OF INDIA & ORS.

DATE OF JUDGMENT 04/08/1988

BENCH:

VENKATARAMIAH, E.S. (J)

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VENKATARAMIAH, E.S. (J)

DUTT, M.M. (J)

CITATION:

1988 AIR 1768 1988 SCR Supl. (2) 223

1988 SCC (4) 54 JT 1988 (3) 275

1988 SCALE (2) 301

CITATOR INFO :

D 1990 SC 334 (111)

ACT:

Constitution of India, 1950: Article 32- Mandamus- Scope of- Enforcement of statute or provisions therein left to discretion of Government- Whether mandamus can be issued to enforce them.

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Advocates Act, 1961: Section 30- Right of Advocates to practice in all courts, tribunals, etc.- Enforcement of- Necessity for.

Prisoners (Attendance in courts) Act, 1955: Handcuffing of accused- Resort to- Union of India directed to frame rules and guidelines them to States and Union Territories.

HEADNOTE:

In the writ petition filed before this Court regarding alleged handcuffing of a practising advocate, contrary to law, while he was being taken to the court after he had been arrested on the charge of a criminal offence, it was alleged that the Union Government and the Delhi Administration had not issued necessary instructions to the police authorities with regard to the circumstances in which an accused, arrested in a criminal case, could be handcuffed or fettered in accordance with the judgment of this Court in Prem Kumar Shukla v. Delhi Administration, [1980] 3 SCR 856. The question whether this Court can issue a writ for bringing into force section 30 of the Advocates' Act, 1961, providing the right to every advocate, whose name was entered in the State roll to practice throughout the territories to which the Act extended before the Courts, Tribunals and other authorities or persons referred to in the Section, in view of s. 3(1) of the Act empowering Central Government to decide the dates on which various provisions of the Act, including s. 3, should be brought into force, also came up for consideration.

On behalf of the respondents, it was submitted that it was for the Union of India to issue necessary instructions regarding handcuffing of an accused to all the State Governments and the Governments of Union Territories in accordance with the judgment in P.K. Shukla's case, and that this Court had jurisdiction to issue a writ directing the Central Government to consider the question of bringing into force section 30 of the Advocates' Act.

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Disposing of the writ petition,

HELD: 1.1 It is not open to this Court to issue a writ in the nature of mandamus to the Central Government to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the Central Government. [229D]

A. K. Roy, etc. v. Union of India and Another, [1982] 2 SCR 272, followed.

However, this Court is of the view that this cannot come in the way of this Court issuing a writ in the nature of mandamus to the Central Government to consider whether the time for bringing s. 30 of the Advocates Act, 1961 into force has arrived or not. [229E]

1.2 Every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. [229F]

In the instant case, the Act was passed in 1961 and nearly 27 years have elapsed since it received the assent of the President of India. In several conferences and meetings of lawyers resolutions have been passed in the past

requesting the Central Government to bring into force section 30 of the Act. It is not clear whether Central Government has applied its mind at all to the question whether s. 30 of the Act should be brought into force. [229F-G]

Even today there are laws in force in the country which impose restrictions on the right of an advocate to appear before certain courts, tribunals and authorities. In many of the cases which come up before the Courts or Tribunals before which advocates cannot appear, as of right, questions of law affecting the rights of individuals arise for consideration and they need the assistance of advocates. We have travelled a long distance from the days when it was considered that the appearance of a lawyer on one side would adversely affect the interests of the parties on the other side. The Legal Aid and Advice Boards, which are functioning in different States, can now be approached by people belonging to weaker sections, such as, Scheduled Castes, Scheduled Tribes, women, labourers etc. for legal assistance and for providing the services of competent lawyers to

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appear on their behalf before the Courts and Tribunals in which they have cases. In these circumstances prima facie there is no justification for not bringing into force s. 30 of the Act. [227D, G-H, 228A-B]

1.3 Even though the power under s. 30 of the Advocates' Act is discretionary, this Court is of view that the Central Government should be called upon to consider within a reasonable time the question whether it should exercise the discretion one way or the other having regard to the fact that more than a quarter of a century has elapsed from the date on which the Act received the assent of the President of India. [230A]

A writ in the nature of mandamus will issue to the Central Government to consider within a period of six months whether s. 30 of the Act should be brought into force or not.

2. The Union of India is directed to frame rules or guidelines as regards the circumstances in which handcuffing of the accused should be resorted to in conformity with the judgment of this Court in *Prem Shankar Shukla v. Delhi Administration*, and to circulate them amongst all the State Governments and the Government of Union Territories within three months. [226E]

Prem Shankar Shukla v. Delhi Administration, [1980] 3 SCR 855, referred to.

JUDGMENT:

ORIGINAL CRIMINAL JURISDICTION: Writ Petition (Crl) No. 163 of 1988.

(Under Article 32 of the Constitution of India). Petitioner-in-person.

K. Parsaran, Attorney General, Kuldeep Singh, Additional Solicitor General and Ms. A. Subhashini for the Respondents. The Judgment of the Court was delivered by VENKATARAMIAH, J. On the basis of the allegations made in the above Writ Petition at the time of the preliminary hearing the Court felt that notice should be issued to the Union of India regarding two matters and accordingly the court made an order that the Union Government shall show PG NO 226 cause (i) why it should not be directed to implement faithfully the decision of this Court in *Prem Shankar Shukla v. Delhi Administration*, [1980] 3 SCR 855 as regards the handcuffing of the accused arrested under the provisions of the Criminal Law; and (ii) why it should not be directed to consider the question of issuing a Notification bringing section 30 of the Advocates Act, 1961 (hereinafter referred to as 'the Act') into force since already more than 25 years had elapsed from the date of the passing of the Act. The first question referred to above arose on account of the allegations relating to the alleged handcuffing of an advocate practising in Delhi contrary to law while he was being taken to the Court of the Metropolitan Magistrate at Delhi after he had been arrested on the charge of a criminal offence. It is urged that the Union Government and the Delhi Administration had not issued necessary instructions to the police authorities with regard to the circumstances in which an accused, arrested in a criminal case, could be handcuffed or fettered in accordance with the judgment of this Court in *Prem Shankar Shukla v. Delhi Administration*, (supra). The learned Attorney General of India very fairly conceded that it was for the Union of India to issue necessary instructions in this behalf to all the States Governments and the Governments of Union Territories. We accordingly direct the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused should be resorted to in conformity with the judgment of this Court referred to above and to circulate them amongst all the State Governments and the Governments of Union Territories. This part of the order shall be complied with within three months.

We shall now take up for consideration the second question referred to above. The Advocates Act, 1961 received the assent of the President of India on the 19th of May, 1961. Sub-section (3) of section 1 of the Act provides that it shall in relation to the territories other than those referred to in sub-section (4) come into force as the Central Government may by notification in the Official Gazette appoint and different dates may be appointed for different provisions of the Act. Chapters I, II and VII of the Act were brought into force on 16.8.1961, Chapter III and section 50(2) on 1.12.1961, section 50(1) on 15.12.1961, sections 51 and 52 on 24.1.1962, section 46 on 29.3.1962, section 32 and Chapter VI (except sections 50(1) and (2), 51, 52 and 46 which had already come into force) on 4.1.1963, Chapter V on 1.9.1963 and sections 29, 31, 33 and 34 of Chapter IV of the Act on 1.6.1969. Section 30 of the Act, with which we are concerned, has not yet been brought into force. Section 30 of the Act reads thus:

PG NO 227 "30. Right of advocates to practise-Subject to the provisions of this Act, every Advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends-

(i) in all courts including the Supreme Court,

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."

When section 30 of the Act is brought into force every advocate whose name is entered in the State roll will be entitled as of right to practise throughout the territories to which the Act extends, before the Courts, Tribunals and other authorities or persons referred to therein. Even today there are laws in force in the country which impose restrictions on the right of an advocate to appear before certain Courts, Tribunals and authorities. Section 36(4) of the Industrial Disputes Act, 1947 provides that in any proceeding before a Labour Court, Tribunal or National Tribunal a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be. Section 13 of the Family Courts Act, 1984 provides that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. There is a proviso to the said section whereunder if the Family Court considers it necessary in the interests of justice it may seek the assistance of a legal expert as *amicus curiae*. There are certain land tribunals constituted under some of the Acts which are in force in certain States before which advocates cannot appear at all. In many of the cases which come up before the Courts or Tribunals before which advocates cannot appear as of right complicated questions of law affecting the rights of individuals arise for consideration and they need the assistance of advocates. We have travelled a long distance from the days when it was considered that the appearance of a lawyer on one side would adversely affect the interests of the parties on the other side. The Legal Aid and Advice Boards, which are functioning in different States, can now be approached by people PG NO 228 belonging to weaker sections, such as, Scheduled Castes, Scheduled Tribes, women, labourers etc. for legal assistance and for providing the services of competent lawyers to appear on their behalf before the Courts and Tribunals in which they have cases. In these circumstances *prima facie* there appears to be now no justification for not bringing into force section 30 of the Act.

It is no doubt true that the Central Government has been given the power by Parliament to appoint the date on which any of the provisions of the Act shall come into force by sub-section (3) of section 1 of the Act and the said provision does not lay down any objective standards for the determination of the date on which any of the specific provisions of the Act should be brought into force. The question for consideration is whether this Court can issue a writ in the nature of mandamus to the Central Government to bring section 30 of the Act into force. Dealing with a similar question a Constitution Bench of this Court in *A.K. Roy, etc. v. Union of India & Another*, [1982] 2 SCR 272 has taken the view that a writ in the nature of mandamus directing the Central Government to bring a statute or a provision in a statute into force in exercise of powers conferred by Parliament in that statute cannot be issued. Chandrachud, C.J., who spoke for the majority of the Constitution Bench has observed at pages 314 to 316 of the Report thus:

"But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of section 3 into force. The Parliament having left to the unfettered judgment of the Central

Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive. It would be quite anomalous that the inaction of the executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus But, the Parliament has left the matter to the judgment of the Central Government without PG NO 229 prescribing any objective norms. That makes it difficult for us to substitute our own judgment for that of the Government on the question whether section 3 of the Amendment Act should be brought into force It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of section 3 of the 44th Amendment into force If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament."

The effect of the above observations of the Constitution Bench is that it is not open to this Court to issue a writ in the nature of mandamus to the Central Government to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the Central Government. As long as the majority view expressed in the above decision holds the field it is not open to this Court to issue a writ in the nature of mandamus directing the Central Government to bring section 30 of the Act into force. But, we are of the view that this decision does not come in the way of this Court issuing a writ in the nature of mandamus to the Central Government to consider whether the time for bringing section 30 of the Act into force has arrived or not. Every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. The Act was passed in 1961 and nearly 27 years have elapsed since it received the assent of the President of India. In several conferences and meetings of lawyers resolutions have been passed in the past requesting the Central Government to bring into force section 30 of the Act. It is not clear whether the Central Government has applied its mind at all to the question whether section 30 of the Act should be brought into force. In these circumstances, we are of the view that the Central Government should be directed to consider within a reasonable time the question whether it should bring section 30 of the Act into force or not. If on such consideration the Central Government feels that the prevailing circumstances are such that section 30 of the Act should not be brought into force immediately it is a different matter. But it cannot be allowed to leave the matter to lie over without applying its mind to the said PG NO 230 question. Even though the power under section 30 of the Act is discretionary, the Central Government should be called upon in this case to consider the question whether it should exercise the discretion one way or the other having regard to the fact that more than a quarter of century has elapsed from the date on which the Act received the assent of the President of India. The learned Attorney General of India did not seriously dispute the jurisdiction of this Court

to issue the writ in the manner indicated above.

We, therefore, issue a writ in the nature of mandamus to the Central Government to consider within a period of six months whether section 30 of the Act should be brought into force or not. The Writ Petition is accordingly disposed of.

N.P.V.

Petition disposed of.
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