Swami Hariharanand Saraswati And Ors. vs The Jailor I/C Dist. Jail, Banaras on 24 March, 1954

Equivalent citations: AIR1954ALL601, AIR 1954 ALLAHABAD 601

JUDGMENT

Mukerji, J.

1. This is a petition by 26 persons under Article 226 of the Constitution for a writ in the nature of 'habeas corpus'. The petitioners also founded their application under Sections 491 and 561A, Criminal P. C.

2. On 16th March 1954, we pronounced the operative portion of our judgment directing release of the petitioners for we were of the opinion that the petitioners' detention in jail was illegal.

3. The petitioners before us belong to what is known as the Savarna Sanatan Dharmis of the Hindu fold and they are the residents of Banaras and are believers in the strict and the orthodox tenets of the Sanatan Dharma. There is, as is well known, an ancient and a very holy temple of the deity of Sri Vishwanath at Eanaras. This temple undoubtedly is ancient and the deity en-shrined therein is held in the highest esteem by the Hindus and it attracts pilgrims from far and wide. The worship in the temple is carried on according to strict Shastric precepts and it is the belief of the Hindu community that the image which is enshrined in this temple is a self-revealed image of Lord Shiva. Entry to this temple was confined to Savarna Sanatan Dharmis only, that is to say, the caste Hindus alone had the privilage of entering this temple and worshipping therein. The Avarna Sanatan Dharmis, who are now called Harijans, had under a long established custom, no right to enter this temple, but they could have Darshan of the holy image through an aperture which be approached by an outer passage adjacent to and separate from the main sanctuary.

4. It appears that the Harijans smarted under the discrimination that was made between them and the Savarna Sanatanists in regard to having access to the temple of Sri Vishwanath. About 12th or 13th February, 1954 the Harijans decided to enforce their right of entry into this temple and they expressed their desire to do so by means of leaflets which were broadcast by some leaders of their community as also by sticking posters. These leaflets & the posters declared that the Harijans would march in procession to the temple of Sri Vishwanath on the afternoon of 17th February 1954, and effect an entry into it. It appears further to us that the Harijans took their stand on the provisions of the U. P. Removal of Social Disabilities Act, (14 of 1947), for, according to Section 3 (d) of that Act, no person could prevent another from having access to any public temple or enjoying the advantages, facilities and privileges of any such temple to the extent the same were available to other Hindus.

When this desire of the Harijans became known to the Savarna Sanatanists of Banaras, they convened a meeting and it was resolved therein that the aperture which existed in the Eastern wall of the temple and through which the Harijans used to have a glimpse of the sacred deity should be substantially enlarged in order that the Harijans could have greater facility in having Darshan. It was further resolved to meet the Harijans at the main door, called the 'Singhadwar', of the temple and to conduct them to the window, now enlarged, and to let them have 'Darshan' of the scared deity from that place in accordance with the old custom.

5. On the afternoon of 17th February 1954, a batch of Harijans arrived at the temple door headed by Sri Bechan Ram, M. L. A. These Harijans were met by the petitioners and they were garlanded and, according to the petitioners, Invited to have Darshan of the deity from the window or aperture now enlarged for them. So far there appears no controversy in regard to the facts or the sequence of events: There is, however, a controversy as to what followed subsequently. According to the petitioners, the Harijans were not stopped from entering through the main gate by the petitioners while on behalf of the State it was stated that Harijans were refused entrance into the temple through the 'Singhadwar' through which caste Hindus alone could have access to the temple. The executive authorities of Banaras, those authorities which had the responsibility of preserving law and order in the town, apprehended breaches of peace on this occasion and consequently there were a large number of police' officials and at least one Magistrate, namely, the City Magistrate, in attendance at the main gate of the temple at the time wnen the Harijans came in procession and wished to make their entry into the temple.

6. It is clear to us from the affidavits that have been filed in this case that the Harijans could not, uninterrupted, have access to the temple through the main gate, the 'Singhadwar'. This was so because the Santainsts, in particular the petitioners, were at the scene to obstruct their entry.

The City Magistrate, who was there, told the petitioners that not allowing the Harijans to have access to the temple through the main gate would be an offence. It appears that this warning of the City Magistrate had no deterrent effect on the petitioners, for, that did not smoothen the way of the Harijans in getting entry into the temple.

The City Magistrate, therefore, ordered the petitioners to clear out of the temple and ordered the police to take them in custody, as in the opinion of the City Magistrate they had violated the provisions of the U. P. Removal of Social Disabilities Act" and further that they had committed certain other offences, namely, offences under Sections 143 and 341, Penal Code.

7.-17. The petitioners were thereafter taken into police custody and taken to police station Chowk. The petitioners were told that they could be enlarged on bail in the event of their furnishing such bail, but they refused to give bail with the result that they were sent to jail custody by an order of the City Magistrate, sometime on the night of 17th February 1954.

18. The petitioners have contended before us that their detention in jail is illegal, first, because their alleged infringement of Section 3 (d), U. P. Removal of Social Disabilities Act could not amount to an offence, as, that Act itself was 'ultra vires' and unconstitutional. It was further contended that if

the petitioners could not be held guilty under Section 3 (d) of the aforesaid Act then they could not be held guilty under Sections 141 and 341 Penal Code also.

19. It was also contended that their detention was illegal because the petitioners had been arrested without warrant and had not been informed of the grounds of their arrest. Further, the petitioners had not been produced before the nearest Magistrate within 24 hours of their arrest.

20. Mr. Pande on behalf of the petitioners first, contended that the U. P. Removal of Social Disabilities Act was 'ultra vires' the State Legislature because, it was a piece of legislation that did not fall within any specified legislative field of the State Legislature. This legislation was forged when the Government of India Act of 1935 was in force. A Bench of this Court in the case of -- 'State v. Gulab Singh', AIR 1953 All 483 (A), held that the U. P. Removal of Social Disabilities Act, 1947 was not 'ultra vires' the State Legislature. We may, however, point out that the precise point which was raised by Mr. Pandey was not canvassed in the aforementioned case.

A similar piece of legislation, namely, the Madras Temple Entry Act, was the subject of Judicial scrutiny on the ground of 'vires' and it was held by the Federal Court in -- 'Manikkasundara Bhattar v. R. S. Nayudu', AIR 1947 F. C. 1 (B), that legislative measures of the kind under which comes the impugned Act, namely, U. P. Act 14 of 1947, could appropriately fall under Entry 34, List .11 of Schedule VII of the Government of India Act of 1935. In Bombay, 'the Removal of Social Disabilities Act of 1946, a Bombay Act, was challenged as unconstitutional and the Bombay High Court in the case of -- 'Kalidas Amtharam v. Emperor', AIR 1949 Bom 168 (C), held that the Act, which is a similar piece of legislation to the Act that is now being impugned before us, was not ultra vires the State Legislature. According to the Bombay view, the Bombay Act was covered toy item 1, List III of Schedule VII of the Government of India Act of 1935. This item relates to legislation on criminal law.

It was pointed out by the learned Judges of the Bombay High Court that since the scheme of the Government of India Act was to make the three lists exhaustive, all legislative activities, whether of the State or of the Centre had to be brought under one or the other of the items in the lists. They pointed out that Section 104, Government of India Act, was not to be invoked in aid for such legislation as could possibly be brought under any of the three lists. They were further of the view that any legislation that prescribed any punishment would and could appropriately come under item 1 of List III. The attention of the Bombay High Court does not seem to have been drawn to the decision of the Federal Court referred to by us earlier.

In our judgment the impugned piece of legislation falls more appropriately under List II, item 34 of Schedule VII, for, as held by the Federal Court, the word "charities" is a word of very wide scope and meaning and a legislation of the character with which we have to deal with could very well come under that item. It is a well known principle of interpretation that every attempt should be made to uphold the constitutionality of an Act rather than to oppose it and to that end it is permissible to interpret entries of the nature contained in the various lists of the 7th Schedule of the Government of India Act liberally. We are of the opinion, as we have said, before, that the U. P. Removal of Social Disabilities Act was not ultra vires the State Legislature.

21. This legislation was further attacked on the ground that the petitioners were denied by it their fundamental right guaranteed to them under Article 25(1) of the Constitution. Reliance was also placed on the provisions of Article 26 of the Constitution. We may point out that by, the impugned legislation the freedom guaranteed to the petitioners under Article 25(1) of the Constitution has in no manner been affected. As a matter of fact Article 25(2) of the Constitution provides as follows:

> "Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
>
> (a) .....
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

It would be noticed from what has been quoted above of Article 25(2) that a piece of legislation which could appropriately come within the definition of 'existing law' contained in Article 366(10) -- and we may say that the present legislation does fall within the definition of 'existing law' --was protected inasmuch as, this law only provided for the removal of these distinctions which caste Hindus enforced on the Harijans in respect of, among other matters, entry of Harijans in temples on the same footing as caste Hindus.

22. Mr. Pandey on behalf of the petitioners also contended that the impugned legislation, apart from removing disabilities, conferred certain privileges on the Harijans. We are of the view that the argument of learned counsel is not sound for, as we read the Act, we do not find the Act conferring any privileges, as such, on the Harijans.

23. When Mr. Pandey challenged the validity of the U. P. Removal of Social Disabilities Act we wished him to satisfy us as to whether the constitutionality of an Act could be challenged by a writ of the nature of Habeas Corpus. Mr. Pandey conceded that there was no direct authority which he could cite where any court had permitted a challenge to the constitutionality of an Act in Habeas Corpus proceedings. We may point out that Scott in his book at page 16 has opined that a law's constitutionality cannot be raised by a petition in Habeas Corpus; similarly, Bailey in his book -- Volume I, page 52 -- has stated that whatever can be achieved by a 'writ error' cannot be challenged or achieved by a petition in Habeas Corpus. We are also of the opinion that the true position in regard to the scope and nature of a petition of Habeas Corpus excludes the possibility of a challenge in regard to the constitutionality of an enactment. It is clear that the petitioners can challenge the validity of the impugned Act in proceedings which have been initiated under the Act against them. They have, therefore, another and a more appropriate remedy open to them for that purpose.

24. The petitioners next contended that they had not been told the grounds of their arrest by anyone after they had been arrested. Affidavits have been filed in answer to this assertion made by the petitioners in their affidavit. We have examined the affidavits filed in these proceedings and we are satisfied that although there was a slight and an apparent conflict between the affidavit of Sri Bhagwat Singh, the Station Officer of Police Station Chowk, and Sri Gauri Shankar Singh, City

Magistrate, Banaras, yet it is clear on these affidavits that the petitioners were informed of the grounds for their arrest. In paragraph 7 of his affidavit Sri Gauri Shankar Singh has stated thus:

> "That the petitioners were told by the Dy. S. P. City in the presence of the deponent that they were being arrested for having obstructed the entry of the Harijans into the Temple of Sri Viswanathji through the main gate."

25. Sri Bhagwat Singh in his affidavit has also averred that the petitioners were told the grounds of their arrest. We are, therefore, of the opinion that there is no substance in the assertion of the petitioners that they were not informed of the grounds for their arrest after they had been arrested.

26. The last contention which was raised on behalf of the petitioners was that they were not produced before a Magistrate within a period of 24 hours of their arrest. This assertion of the petitioners has also been denied on behalf of the opposite party. The affidavit of Sri Bhagwat Singh indicates that the petitioners were produced before the City Magistrate, Sri Gauri Shankar Singh, immediately after they were arrested, as Sri Gauri Shankar Singh was present at the scene of their arrest. Paragraph 5 of Sri Bhagwat Singh's affidavit is in these words:

> "That the City Magistrate, Sri Gauri Shankar Singh, was present at the time when the petitioners were arrested by the police and they were immediately produced before him & thereafter taken to P. S. Chowk under his orders."

Sri Bhagwat Singh further says this in paragraph 7 of his affidavit:

> "That as the petitioners had been sent to the District Jail under the orders of the City Magistrate, it was not necessary to produce the accused again before a Magistrate as the accused were no longer in police custody."

27. Sri Gauri Shankar Singh, however, states as follows in paragraph 11 of his affidavit:

> "That the petitioners were then produced before the deponent by Sri Bhagwat, Singh, Station Officer, P. S. Chowk, in his capacity as City Magistrate in the office of the Dy. S. P. at the Kotwali at about 10 the same night and the deponent thereafter on a request made by the police made an order for their remand to jail custody after having told them that they would be prosecuted for having unlawfully obstructed the entry of the Harijans into the Temple through the 'Singh Dwar' and the petitioners then left the Kotwali for the District Jail at about 11-30 the same night."

In paragraph 9 of his affidavit, Sri Gauri Shankar Singh stated that he reached the Kotwali at abeut 8-30 p.m. and asked the Dy. S. P. City to produce the arrested persons before him.

To us, there appears to be an inconsistency between the averments made by Sri Bhagwat Singh, and those made by Sri Gauri Shankar Singh in regard to the production of the petitioners before a Magistrate after their arrest. According to Sri Bhagwat Singh, the production of the petitioners was

made immediately after they had been arrested and that the production was at the scene of occurrence while on the affidavit of Sri Gauri Shankar Singh the petitioners were, "called for", by him for production and they were produced before him at the Kotwali at 10 p.m. On the two aforequoted versions, it becomes difficult for us to hold with certainty as to where and when the petitioners were produced before a Magistrate. According to Sri Gauri Shankar Singh, the production of the petitioners before him was made by Sri Bhagwat Singh at police station Kotwali, but according to Bhagwat Singh himself the production had been made by him at the scene of occurrence. It will be noticed that Sri Bhagwat Singh is almost emphatic in maintaining the position that he has taken in regard to the production of the petitioners before a Magistrate -- that appears to us from what he has stated in paragraph 7 of his affidavit, a paragraph which we have quoted earlier.

28. Whether there was in fact "a physical" production of the petitioners before Sri Gauri Shankar Singh or not loses its importance in view of what was submitted by learned counsel for the petitioners--a submission which we will now consider. It was contended by Mr. Pandey that the production which is contemplated by Article 22(2) of the Constitution must be before a Magistrate other than the one who has acted, along with, the police, in arresting the petitioners. Section 61 of the Code of Criminal Procedure provides-this :

> "No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order by a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

29. Article 22(2) of the Constitution in effect not only gives constitutional protection to this provision but further liberalizes it by making the provision applicable in those cases also where the arrest is made in pursuance of a warrant. It was, however, pointed out by the Supreme Court in --'the State of Punjab v. Ajaib Singh', AIR 1953 SC 10 (D), as follows:

> "Broadly speaking, arrests may be classified into-two categories, namely, arrests under warrants issued by a Court and arrests otherwise than, under such warrants. There can be no manner of doubt that arrests without warrants issued by a Court call for greater protection than do arrests under such warrants."

30. In the case with which we are dealing, it may be pointed out that the arrests made were without warrants. The arrests of the petitioners, were made in substance by the City Magistrate Sri Gauri Shankar Singh because the petitioners were taken into custody under his orders and under his direct supervision. Section 64, Cr. P. C., says this:

> "When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody."

31. In our view Sri Gauri Shankar Singh acted under the provisions quoted above. The question that arises for determination, therefore, is whether Sri Gauri Shankar Singh would be a Magistrate competent to act under the provisions of Section 167(1), Cr. P. C., further, whether a production before Sri Gauri Shankar Singh of the petitioners, under the circumstances of the case, would be a proper production within the meaning of Article 22(2) of the Constitution. In determining this question, we have to bear in mind what their Lordships of the Supreme Court have said in the case of -- 'the State of Punjab v. Ajaib Singh (D)', in particular the following passage:

> "There can be no manner of doubt that arrests without warrants issued by a 'Court' call for greater production than do arrests under 'such warrants'. The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a Court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right."

32. As we have pointed out in this case, Sri Gauri Shankar Singh in directing the arrest of the petitioners did not act as a court nor had he an opportunity of applying a 'judicial mind' to the facts of the case. It can also not be said that Sri Gauri Shankar Singh could properly judge whether the procedure which he adopted was regular, for a person can never be deemed to be a "competent judge of his own cause". The provisions of Section 167(1), Cr. P. C., also indicate to us that the policy of the law is to bring an independent judgment to bear on the matter for, it is provided in that section that the Magistrate before whom an arrested person is produced is also to have before him "a copy of the entries in the diary". That means that the Magistrate before whom the production has to be made has to scrutinize the act of others and to see whether the act was legal and proper and further whether the formalities required by law had been complied with.

In this case Sri Gauri Shankar Singh had remanded the petitioners into jail custody by an order signed by him on 17-2-1954. Whether the order was signed at the place of occurrence or at police station Chowk or at Kotwali is immaterial because on the affidavits we are of the" opinion that the order was signed more or less as a matter of course by Sri Gauri Shankar Singh without his scrutinizing as to the legality and propriety of the procedure adopted by himself. At any rate, it is impossible for us to hold that under the circumstances of the case Sri Gauri Shankar Singh could apply a "judicial mind" in regard to these arrests. In paragraph 13 of his affidavit Sri Gauri Shankar Singh has stated as follows:

> "That on the following day (this would be February 18, 1954) the police submitted a report asking for a further remand before the deponent, but as the deponent was just leaving for some important executive work, he directed the police to take the report to his Link Officer Sri Chitrangad Singh, the Additional City Magistrate of Banaras, for necessary orders."

33. On behalf of the State, a copy of the order made by Sri Chitrangad Singh, the Additional City Magistrate, was produced before us. On an examination of this order we discovered that "it was dated "17/18, 2". We have been unable to discover how and why Sri Chitrangad Singh dated his order "17/18". No affidavit by Sri Chitrangad Singh was produced before us explaining this matter. It was, however, admitted on behalf of the State that the petitioners were not produced before Sri Chitrangad Singh when he passed the aforementioned order.

34. On the circumstances stated above, we are of the opinion that there was no proper production of the petitioners before a competent Magistrate within 24 hours of their arrest without warrants and consequently their further detention in jail was illegal and unconstitutional.

35. On behalf of the State, it was contended that even if the incarceration of the petitioners in its inception was illegal yet, their present detention in jail was not so because the trial of the petitioners had commenced before a proper court and we were, therefore, asked to presume that they were in jail custody by virtue of an order made by the trying Magistrate for such custody. We are unable to make the presumption which wt were asked to make. We may point out that no such assertion was made by the opposite party in the return that he made to the writ 'nisi' issued to hurt. The opposite party, who is the Jailor of the District Jail Banaras, has not taken his stand for detaining the petitioners on an order by a court directing him to detain the petitioners. It was incumbent upon the opposite party in return to the writ 'nisi' issued by this Court to disclose the authority on which he was detaining the petitioners in his custody.

No such return has been made and we are unable to presume anything against the petitioners. It is well established that a return to a writ off Habeas Corpus has to be unambiguous and it has got to set forth clearly and directly and with sufficient particularity the facts and the cause for the petitioners' detention. The return has to state all the facts and all the grounds which constitute valid and sufficient grounds for the detention of the persons alleged to be detained. There is no scope, in our view, of any presumptions being pressed into service by a court to make up deficiencies in the return which the opposite party was in law bound to make. We are, therefore, of the view that on the materials before us, we cannot hold that the present detention of the petitioners in jail is legal or constitutional, even though we have expressed the opinion earlier that the charge against them under Section 3(d)/6 of the Removal of Social Diabilities Act (Act XIV of 1947) was not void for want of the Act being unconstitutional.

36. We should like to point out that although we have held that the petitioners' detention at the present moment in jail by the opposite party is illegal and unconstitutional yet this does not mean our holding that the charges which have been levelled against them are unfounded or illegal. The order which we have already made on 16-3-1954, will not entitle the petitioners to escape their trial. We have thought it proper to state this clearly because we are aware of certain cases in which courts have expressed the view that once a prisoner is released on a writ of Habeas Corpus, he cannot be tried again in respect of the same accusation.

37. In the result we allow the petition and direct that the petitioners be set at liberty forthwith. The petitioners will have the costs of this petition from the opposite party.