Narendra Govind Mangela vs The Inspector Of Police, Virar Police ... on 9 September, 1991

Equivalent citations: 1992(2)BOMCR478, 1992CRILJ2711

JUDGMENT

Pendse, J.

1. On November 20, 1990 at about 2.30 a.m. police party attached to Virar police station proceeded towards Kopari to arrest some of the absconding accused in respect of a crime registered under Section 302 read with Section 34 of the Indian Penal Code. The police party could not trace the suspects and while returning noticed three persons standing in dark on Narangi Road. On being intercepted, all the three started running away, but the police chased them and on search found that the petitioner Narendra govind Mangela was carrying a country revolver and three live cartridges in a rexin cloth pouch. The pouch was found on the person of the petitioner. The petitioner could not disclose any authority to possess the revolver. The police then brought the petitioner and his two associates to the police station and filed F.I.R. and registered an offence under section 25(1)(c) of the Indian Arms Act, 1960. The petitioner was produced before the Judicial Magistrate, First Class, Vasai on November 20, 1990 and was remanded till November 26, 1990. The application made by the petitioner for being released on bail was turned down by the Magistrate. The Judicial Magistrate set free the other two associates of the petitioner as the investigation did not disclose any incriminating material against them.

2. The petitioner moved the Second Additional Sessions Judge, Thane for release on bail by filing Criminal Bail Application No. 1454 of 1990. At the hearing of the application, the Public Prosecutor informed the Additional Sessions Judge that the Investigating Officer has invoked provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the Act") and offence under section 5 of the Act is registered. The Additional Sessions Judge thereupon observed that jurisdiction of the Court stands ousted by virtue of Section 11 of the Act and rejected the bail application by order dated January 4, 1991.

The petitioner thereupon filed Criminal Writ Petition No. 75 of 1991 challenging the constitutional validity of Section 5 and Section 2(f) of the Act and sought quashing of the registration of offence under Section 5 of the Act in respect of crime registered at Virar Police Station and the petitioner having been found in possession of unauthorised revolver. The petitioner also sought relief of release on bail. The petition was admitted on February 14, 1991, but bail was not granted. The petitioners thereupon filed separate application, being Criminal Application No. 302 of 1991 in Criminal Writ Petition No. 75 of 1991 for being released on bail, and on that application the Division Bench of this Court directed that the petitioner should approach the designated court and the designated court should consider whether the provisions of the Act are attracted and then pass

suitable orders in accordance with law.

In accordance with the directions, the petitioner approached Judge, designated court, Pune by filing Application (Exhibit '1') in Terrorist Criminal Miscellaneous Application No. 7 of 1991. The application for bail was rejected by order dated April 10, 1991 after the designated court recorded finding that there are reasonable grounds for believing that the petitioner is guilty of offence under Section 5 of the Act. The petitioner thereupon filed Criminal Application No. 1464 of 1991 requesting for release on bail during pendency of Criminal Writ Petition No. 75 of 1991 Both, Criminal Writ Petition No. 75 of 1991 and Criminal Application No. 1464 of 1991 are disposed of by this judgment.

3. The principal grievance of the petitioner is registering offence under Section 5 of the Act, and the first attack is to the constitutional validity of provisions of Section 5 of the Act and Section 2(f) of the Act. Secondly, it is claimed that even if the provisions of Section 5 of the Act are valid, still application of Section 5 of the Act to the facts of the present case was not called for and the application of Section 5 by the investigating officer is done mala fide only with a view to prevent the petitioner from obtaining order of bail.

Before examining the contentions advanced, it would be appropriate to make reference to the salient provisions of the Act.

4. The legislation was enacted to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto. Section 2(d) defines the expression 'disruptive activity' to have the meaning assigned to it in Section 4. Section 2(h) of the Act defines the expression 'terrorist act' to have the meaning assigned to it under Section 3(1) of the Act. The relevant part of Section 3(1) provides that whoever with intent (i) to overawe the Government as by law established or (ii) to strike terror in the people or any section of the people or (iii) to alienate any section of the people or (iv) to adversely affect the harmony amongst different sections of the people, does any act or thing by using any of the lethal weapons mentioned therein in such a manner as to cause death of or injuries to any person or persons, commits a terrorist act. Section 4(2) defines a disruptive activity to mean any action taken in whatever manner (i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India, or (ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the secession of any part of India or the secession of any part of India from the Union.

Section 2(f) of the Act defines the expression "notified area" and which means such area as the State Government may, by notification in the Official Gazette specify. The expression "notified area" finds place only in Section 5 of the Act, and Section 5 reads as under :

"5. Where any person is in possession of any arms and ammunition specified in columns 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to

fine."

Section 5, inter alia, provides that any person found to be in posession of unauthorised arms and ammunition specified in the Section in a notified area, then such a person is liable to be punished with imprisonment for life and/or also to be liable to fine and the minimum punishment shall not be for a term less than five years. The three ingredients for offence under section 5 of the Act are :

(a) possession of specified arms and ammunition;

(b) such possession is unauthorised; and

(c) person with possession of arms is found in a notified area.

Section 6 of the Act provides that even if any person with intent to aid any terrorist or disruptionist, contravenes any provisions or any rules made under the Arms Act, 1959, the Explosives Act, 1884, the Explosive Substances Act, 1908 or the Inflammable Substances Act, 1952, then such person shall be liable to punishment which may extend to imprisonment for life but which shall not be for a term less than five years and also liable to fine. Section 3 to Section 6 are covered by Part II of the Act which deals with "Punishments for and measures for coping with, terrorist and disruptive activities".

5. In Usmanbhai Dawoodbhai Memon v. State of Gujarat, it was observed that the Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country. The Supreme Court then observed that since however the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails. In other words it is only in those cases where the law enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling menace of terrorist and disruptive activities, that resort should be had to the drastic provisions of the Act. The decision was reiterated in the judgment Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja, and to which judgment we will revert at a later stage.

6. Shri Chitnis, learned counsel appearing on behalf of the petitioner, submitted that the Legislature has conferred unguided and arbitrary powers u/S. 2(f) of the Act on the State Government and the State Government has issued notification on July 13, 1990 declaring entire Thana District as a notified area without assigning any reason whatsoever. The area covered by Thane District is 9558 sq. Kilometres and the population in accordance with the 1981 Census was 33,21,562. A part of the District is heavily populated, being an industrial belt while the rest of the portion, which is spread over covers agricultural land. Shri Chitnis submitted that the Parliament should not have delegated powers to the State Government to declare any area as a notified area without any guidelines and therefore the provisions of S. 2(f) should be struck down. It was urged that an offence u/S. 5 cannot be registered unless the finding of unauthorised arms is within the notified area and therefore conferment of unguided and arbitrary powers on the State Government deprives fundamental rights of the citizen. It is not possible to accede to the submission urged on behalf of the petitioner. It is

now well settled by catena of decisions of the Supreme Court that delegated legislation is permissible. Delegation is entrusting by a person or body of persons of the exercise of power residing in that person or body of persons to another body of persons, with complete power of revocation or amendment remaining in the grantor or the delegator. The Privy Council in the case of R. v. Burah (1878) 3 Appeal Cases page 889 observed that it is the prerequisite to a valid delegation of legislative power that the law must lay down a policy or standard. The hunt by the Court for legislative policy or guidance in the crevices of a statute or the nook and cranny of its preamble is not an edifying spectacle. Since the delegation is to a representative body, there is a guarantee that the delegate will not exercise the powers unreasonably. In the present case there is intrinsic evidence to hold that there are sufficient guidelines for exercising power of declaring a particular area as a notified area. The Act was enacted for prevention of terrorist and disruptive activities and for matters connected therewith or incidental thereto. The perusal of various provisions of the Act makes it clear that when the terrorist acts or disruptive activities are increased on a large scale in a particular area or there is a likelihood of such an increase in that area, then the State Government may very well declare it as a notified area. The only effect of declaring the area as notified area is that the person found in possession of unauthorised arms and ammunition in such notified area is liable to be prosecuted u/S. 5 and the punishment prescribed u/S. 5 is an enhanced punishment than one which will be imposed under the ordinary law for possessing unauthorised arms. In our judgment the delegation of powers to the State Government cannot be faulted and the challenge to S. 2(f) of the Act is required to be turned down.

7. It was then contended by Shri Chitnis that provisions of S. 5 should be struck down as S. 5 violates Art. 14 of the Constitution of India. The submission has no merit, as we are unable to find out how the doctrine of equality is breached by provisions of S. 5 of the Act. A faint attempt was made by the learned counsel to urge that S. 5 makes an unreasonable classification of offenders within the notified area for the purpose of imposition of enhanced punishment. The category of persons who are found in possession of unauthorised arms and ammunition in a notified area are class by themselves and they cannot be compared with persons found with unauthorised arms but outside the notified area. The classification of persons within notified area can by no stretch of imagination be treated as unreasonable, the notified area obviously being that where the disruptive activities and terrorist acts are undertaken on large scale. In our judgment S. 5 of the Act does not suffer from vice of Article 14 of the Constitution and the challenges, both to S. 5 and S. 2(1)(f) of the Act are required to be turned down.

8. That brings us to the important question about ambit of S. 5 of the Act. The issue arises for determination as it was contended on behalf of the petitioner that invocation of S. 5 by investigating officer was mala fide. It was claimed that to attract provisions of S. 5 of the Act it is not sufficient that a person is found with unauthorised arms in a notified area, but the prosecution must show a nexus between the possession of such arms to the terrorist act defined under S. 3(1) of the Act or to the disruptive activities defined u/S. 4(2) of the Act. In absence of any nexus, claims Shri Chitnis, the invocation of S. 5 is totally unjustified. Shri Ponda, learned Public Prosecutor and Shri Agrawal, appearing on behalf of the Attorney General, on the other hand submitted that S. 5 is attracted as soon as the three ingredients of finding person in possession of arms, within the notified area and such possession being unauthorised are satisfied and S. 5 is applicable dehors the provisions of S. 3

or S. 4 of the Act. It was urged that once an area is declared as a notified area, then every person is put on alert that possession of an unauthorised arm in such notified area will be viewed with seriousness and though such possession of unauthorised arm is liable to prosecution under ordinary law, the possessor would be liable to prosecution u/S. 5 of the Act. Shri Ponda also submitted that in the present case the petitioner had a previous history, inasmuch as the petitioner is prosecuted in three cases between the years 1987-88. On January 5, 1987 the petitioner is alleged to have assaulted one Ramchandra Mane along with other associates with the help of countrymade revolver and prosecution u/S. 307, 147 and 148 of the Indian Penal Code read with S. 5 of the Arms Act is pending in the Sessions Court, Thane. Second incident occurred on September 15, 1987 when the petitioner and his two associates were prosecuted for offence u/S. 392 read with S. 34 and that case is also pending. On February 25, 1988 the petitioner was found with countrymade revolver and five live cartridges and is prosecuted for offence u/S. 25 of the Arms Act. Shri Ponda submitted that the petitioner was absconding from 1988 onwards till he was rounded up on November 20, 1990. It was contended that taking into consideration the background of the petitioner application of TADA need not be faulted with.

9. It is not possible to accede to the submission that provisions of S. 5 of the Act must be read independently and dehors of S. 3 and S. 4 of the Act. Sections 3, 4, 5 and 6 set out an integrated scheme for measures for coping with terrorist and disruptive activities and S. 5 makes possession of unauthorised arm in a notified area an offence by itself punishable with imprisonment for life, the minimum not being for a term less than five years. The punishment prescribed u/S. 5 is certainly heavy than the one prescribed under the ordinary law. It is not correct to suggest that mere possession of unauthorised arm in notified area is sufficient to bring home the charge u/S. 5 of the Act and such possession may not have any relation or nexus to the terrorist act or disruptive activity as described u/Ss. 3 and 4 of the Act. The Legislature provided for a specific offence and enhanced punishment u/S. 5 only because an area is notified on the basis that the terrorist act or disruptive activities in such area are undertaken on large scale or likely to be undertaken on a large scale. The area cannot be declared a notified area by the State Government, as surely that could not have been in contemplation of the Parliament, even if there is not a trace of disruptive activity or commission of terrorist act in such area. The occasion to specify any area as a notified area arises only when the Government is satisfied that terrorist acts and the disruptive activities are prevalent in that area. Once this aspect is borne in mind, then it is clear that mere possession of unauthorised arm in the notified area is not sufficient to invoke provisions of S. 5 of the Act, but S. 5 of the Act would be attracted provided such possession has some bearing to the terrorist acts or the disruptive activities. It is not necessary that the person in possession of unauthorised arm in a notified area shall personally be involved in terrorist acts or disruptive activities, but if there is any material to indicate that unauthorised arm is likely to be permitted to be used for terrorist acts or disruptive activities, then S. 5 can be invoked. It is not possible to give any exhaustive list where S. 5 can be invoked, but some illustrations can be useful. In case the investigating officer has material that the possession of unauthorised arm in a notified area was intended for committing terrorist acts or disruptive activities or such arm is likely to be used for committing terrorist act or disruptive activities, then S. 5 can be attracted. In case there is material available to indicate that a person found in possession of unauthorised arm in a notified area has a previous history of indulging in terrorist acts or disruptive activities, then invocation of Section 5 cannot be faulted. It hardly requires to be stated that the

nexus with the terrorist act or disruptive activity need not necessarily be after the date of declaration of the notified area, but can be even on an earlier date, though it should not be separated by long distance or otherwise it would snap the live link. Shri Ponda submitted, on instructions from the police authorities which were present in Court, that directions have been issued by the superior authorities to invoke S. 5 as soon as person is found with unauthorised arms in notified area. In our judgment, such directions are totally incorrect and provisions of S. 5 cannot be mechanically applied in this manner. It is necessary for the authorities and also for the designated court to find out whether any material is available with the investigating officer to even prima facie suggest that possession of unauthorised arm in notified area was for indulging in terrorist acts or disruptive activities as set out in S. 3 and S. 4 of the Act and in absence thereof the person need not be prosecuted u/S. 5 but only in accordance with provisions of ordinary law.

10. In this connection it would be advantageous to refer to the decision Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja. In the case before the Supreme Court the accused were involved in an incident which occurred on July 12, 1989 when there were altercation and heated exchange of words between the two groups and one group assaulted other with knives and iron rods. As a result of the assault, one of the victims died. Initially the crime was registered u/S. 302 read with S. 307 and S. 147, 148, 149 of the Indian Penal Code and S. 37 of the Bombay Police Act. Subsequently S. 3 of the Act was invoked and consequently the proceedings were required to be taken before the designated court. The designated court found that S. 3 was erroneously invoked as the material placed on record and the documents relied on did not even prima facie disclose the commission of offence punishable u/S. 3 of the Act. The designated Court thereupon in exercise of powers u/S. 227 of the Criminal Procedure Code discharged the accused and the case was transferred to the Court of Session for undertaking trial under Ss. 302 and 307 read with Ss. 147, 148 and 149 of the I.P.C. The Supreme Court found that the genesis of the crime was to gain supremacy in the underworld by eliminating the members of the rival gang. From the material produced by the investigating authorities, the Supreme Court concurred with the designated court that the intention of the accused persons was to eliminate the members of the rival gang by violence and a mere statement to the effect that show of violence would create terror or fear in the minds of the people and none would dare to oppose that cannot constitute an offence u/S. 3 of the Act. The Supreme Court held that the intention was not to strike terror in the people or a section of the people and thereby commit the terrorist act. The assault was as a result of the desire to gain supremacy by elimination of the other gang. The Supreme Court approved the conclusion recorded by the designated court as well as the course adopted in transferring the case to the Sessions Court keeping in view the provisions of S. 18 of the Act.

From the decision of the Supreme Court it is obvious that it is the duty of the designated court to ascertain whether the investigating agency has produced material and documents to sustain charge u/S. 5 of the Act. As mentioned hereinabove it is (will ?) not suffice that the person is found in possession of unauthorised arm in a notified area to bring home the charge u/S. 5 of the Act, and it is necessary for the prosecution to establish that such possession was with an intention to commit terrorist act or disruptive activities or such possession is likely to be used for committing terrorist act or disruptive activities.

11. On the facts and circumstances of the case, we are not inclined to strike down application of S. 5 of the Act in the present proceedings, and we will leave to the designated court to determine whether S. 5 of the Act was properly invoked. The designated court in order dated April 10, 1991 while rejecting the bail, application has made certain observations which are not in consonance with the view we are taking and therefore the designated court will ignore those observations and examine the matter afresh. We are adopting this course as the prosecution has not placed before us the material or documents to indicate that the possession was with an intention to commit terrorist act or disruptive activities or was likely to be used for committing terrorist act or disruptive activities. The prosecution did not even care to file any return in these proceedings or produce the papers and proceedings relating to the earlier pending cases to ascertain the facts and the material. In the absence of any data, it is not possible to conclude that S. 5 of the Act was properly attracted or not so attracted, and therefore we leave that question to be determined by the designated court.

12. Accordingly, Writ Petition No. 75 of 1991 fails and rule is discharged.

Criminal Application No. 1464 of 1991 also fails and rule is discharged.

The designated Court shall consider registration of offence u/S. 5 of the Act against the petitioner in accordance with the principles laid down in the present judgment.

13. Order accordingly.