

Harihar Singh Vs State of U.P.

Court: Allahabad High Court

Date of Decision: April 2, 2014

Acts Referred: Constitution of India, 1950 " Article 324, 324(1), 327, 328
Criminal Procedure Code, 1973 (CrPC) " Section 144

Citation: (2014) 4 ADJ 365 : (2014) 3 ALJ 680 : (2014) 85 ALLCC 764 : (2014) 104 ALR 784 : (2014) 5 AWC 5416

Hon'ble Judges: Pankaj Naqvi, J

Bench: Single Bench

Advocate: Jitendra Singh Lodhi, Advocate for the Appellant; B.N. Singh, Advocate for the Respondent

Final Decision: Disposed Off

Judgement

Pankaj Naqvi, J.

Heard learned Counsel for petitioners, Sri J.K. Khanna, learned Standing Counsel for the State and Sri B.N. Singh, learned Counsel for Election

Commission of India in the respective petitions.

Considering the urgency in the matter and subject to consent of learned Counsels for the parties, all the petitions are being disposed of at the stage

of admission itself. Director General, U.P. Police, has been impleaded as respondent No. 4 with the leave of the Court.

1. Come Parliamentary/Assembly elections, this Court is flooded with several writ petitions on behalf of arms licensees alleging that police officials

are threatening them to deposit their firearms and/or are publishing notices by way of news items in local dailies asking them to do so. This has

become a routine phenomena. The grievance of petitioners is that in the absence of any power to insist for a deposit of fire-arms under the Arms

Act, 1959 (for short "the Act") and the Rules framed therein, no power is vested in police authorities to call upon licensees to do so even on the

ground of ensuing Parliamentary elections. It is further submitted that power, if any, is to proceed against an individual licensee on a case-to-case

basis either under the Act or under the Code of Criminal Procedure, 1973. In support of their contention, learned Counsel for petitioners places

reliance upon the judgments of Division Bench of this Court in Mohd. Arif Khan v. District Magistrate 1994 (12) L.C.D. 193, and that of Uma

Kant Yadav Vs. State of U.P. and Station House Officer, .

2. Sri Khanna, learned Standing Counsel submits that respondents are complying with mandate of law as held in the aforesaid judgments and that

petitioners are put to strict proof that police authorities are acting contrary to the dicta of aforesaid judgments. He placed before the Court a

compilation of the Model Code issued by the Election Commission of India, a copy of a notice issued by Officer In-charge, P.S. Mohammadabad,

Mau to one Sanjay Kumar Singh, holder of licence No. HPM 21736 in connected Writ Petition No. 17030 of 2014, directing the licensee to

deposit his arm at the police station concerned or the dealer; the directives of Election Commission of India on the subject and the minutes of the

meeting chaired by District Magistrate, Allahabad on 18.3.2014 in connection with deposit of fire-arms. The aforesaid compilation is taken on

record.

3. The Arms Act, 1959 and the Rules framed therein constitute a complete Code in itself, which contains provisions for grant/acquisition/suspension/cancellation of fire-arms. The issue sought to be raised in the present petition, was already decided in 1994 in the case

of Mohd. Arif (supra) wherein a Division Bench of this Court in paragraphs 13, 14, 15, 17 & 21 held as under:--

13. The impugned direction has been issued by the Election Commission under Article 324 of the Constitution. Under Article 324, the

superintendence, direction and control of the preparation of the electoral rolls for and the conduct of all elections to Parliament and to the State

Legislature of every State and of elections to the offices of President and Vice President held under the Constitution is vested in the Election

Commission. It has been settled by a catena of decisions of the Supreme Court that the use of the expression ""conduct of elections"" in Article 324

specifically points to wide meaning. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared

elected, which consists of several stages and it embraces many steps. The words ""superintendence, direction and control"" are wide enough to

include all powers necessary for the smooth conduct of elections. Even so, the general powers of superintendence, direction and control of the

elections vested in the Commission under Article 324(1) are subject to any law made under Article 327 or under Article 328 of the Constitution.

The Election Commission has no unlimited and arbitrary powers. It is clothed with powers of an executive charged with the duty of securing the

due conduct of elections. It cannot take upon itself a purely legislative activity. Article 324 operates in areas left unoccupied by Legislation and

where the Act or the Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of conduct

of election. (See, for instance, N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, , A.C. Jose Vs. Sivan Pillai and

Others, , Kanhiya Lal Omar Vs. R.K. Trivedi and Others,). It follows that the Election Commission cannot override Legislative enactments and

has no jurisdiction under Article 324 to interfere with the discharge of statutory functions, or to direct or control the exercise of statutory powers,

duties, functions and discretion by the concerned statutory authorities.

14. The power of the District Magistrate or any other concerned Magistrate to take action u/s 144 Cr.P.C. is discretionary. The discretion is to be

exercised according to law. A person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters

which he is bound to consider and must be guided by relevant considerations and not by irrelevant or extraneous considerations. (See Padfield v.

Minister of Agriculture (1968) 1 All ER 694). So, if the District Magistrate does not use his own discretion and acts merely on the directions of

some other authority, his decision will be vitiated by non-application of mind and it cannot stand.

15. If the District Magistrate or other concerned Magistrate intends to take action u/s 144, he should himself consider the material facts of the case

and form a bona fide opinion on relevant considerations whether there is sufficient ground for proceeding under this, section and whether

immediate prevention or speedy remedy is desirable. If in the opinion of the Magistrate concerned, such a situation exists, then he may direct any

person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management. The

precise direction will have to be shaped and issued to meet the situation; but in determining the nature of the specific direction, the Magistrate will

have to consider whether the direction is likely to prevent, or tend to prevent obstruction, annoyance or injury to any person lawfully employed or

danger to human life, health or safety or a disturbance of the public tranquility or a riot or an affray. In other words, the direction must bear a

rational connection with the objects specified in the section, for which it is issued. The scope of section 144 Cr.P.C. cannot be enlarged or altered

by an executive order under Article 324 nor positive directions as contained in the impugned circulars dated July 6, 1993 and October 10, 1993

may be issued for controlling the discretion of the Magistrate u/s 144 or directing him to use the section in a certain manner and pass particular

orders. If the Magistrate takes action on the basis of such directions, his action will be liable to be struck down as being not in conformity with law.

The Magistrate will have to use his own discretion, and take action accordingly, as discussed above, treating the directives under Article 324 to be

suggestive or recommendatory entitled to due weight and utmost consideration.

17. We have accordingly come to the conclusion that the impugned order dated October 18, 1993 passed by the District Magistrate in the instant

case merely on the basis of the directive of the Election Commission and not on the basis of his own opinion suffers from non-application of mind

and cannot be upheld. The Election Commission has jurisdiction to issue appropriate directions within the scope of Article 324 with regard to

conduct of election, but cannot control the exercise of power or discretion by a statutory authority under the provisions of the law, conferring

power on it. Perhaps this aspect of the matter has been appreciated by the Election Commission also necessitating it to issue revised directions in

its circular dated October 20, 1993. The impugned order is, therefore, liable to be quashed.

21. We have no doubt in our mind that the democracy being the basic feature of our Constitution, it must be ensured that free, fair and peaceful

elections are held and for that purpose the Constitutional authorities as well as other authorities must have the fullest scope for taking appropriate

action in exercise of their powers according to their discretion under the Constitution and the existing laws. We have therefore, made it clear that

even after the quashing of the impugned order dated October 18, 1993 it will be open to the District Magistrate to take such action in accordance

with law, whether u/s 144 Cr. P.C. or otherwise, as he considers necessary and appropriate in his discretion in the circumstances of the case.

4. The aforesaid judgment came to be followed by a learned Single Judge of this Court in Uma Kant Yadav (supra).

5. A perusal of aforesaid judgments, would manifest that the Court did not find any power of issuing a general direction to arms licensee to deposit

their fire-arm. The power, if any, was to either proceed under the Arms Act or section 144 Cr.P.C. on a case-to-case basis after complying with

the provisions of law.

6. The Election Commission of India in its purported exercise of powers under Article 324 of the Constitution of India has issued instructions at SI.

No. 67 dated 13.3.1996 addressed to the Chief Secretary and Chief Electoral Officers of all the States and Union Territories as regards

restrictions on possession of arms during elections. The said directives are extracted hereunder.

INSTRUCTION SL. No. 67

Election Commission Order No. 464/96-L&O/PLN-I, dated 13.3.1996 addressed to The Chief Secretary, and Chief Electoral Officers of all

States and Union Territories.

Subject: General Election/Bye-Elections - restrictions on possession of arms during elections.

ORDER

In exercise of the powers conferred on the Commission under Article 324 of the Constitution of India and all other powers enabling it in this behalf

and in supersession of all other instructions, the Commission hereby orders that the following instructions shall be observed during all future

elections:

1. Issue of licence for arms will be totally prohibited during the period commencing with the date of announcement of elections. This ban will

continue to be operative till the completion of the election as notified.

2. The police should be directed to be vigilant and asked to start mopping up operations of the areas infested with known goonda and other bad

elements right from the date of announcement of elections. During such mopping up operations special attention should be paid to unearth and seize

unlicensed arms and ammunition. A very thorough search and seizure by the State Police of unlicensed arms and places of indigenous manufacture

of arms and ammunition shall be carried out and persons involved shall be arrested. While unearthing and seizure of unlicensed weapons is a

normal ongoing responsibility of the police, it shall be vigorously intensified during the election period. Inter-state and intra-State movements of

trucks and commercial vehicles shall be strictly checked with a view to preventing smuggling of arms and ammunition and anti-social elements.

Raids should be carried out regularly and intensively on underground arms factories.

3. Immediately after the announcement of elections, District Magistrates shall make a detailed and individual review and assessment (in accordance

with the prevalent State laws) of all licence holders so that licensed arms in those cases where they consider it essential are impounded in order to

ensure maintenance of law and order so essential for ensuring free and fair elections. These arms should be deposited with the district authorities.

Among cases which may need to be reviewed are the following:

1. persons released on bail,

2. persons having a history of criminal offences, and

3. persons previously involved in rioting at any time but especially during the election period. (The above categories are only illustrative and not

exhaustive)

4. After such review, all such licence-holders who are identified, shall be directed to deposit their arms with the District Administration during the

period of one week from the last date for withdrawal of candidatures.

5. The District Administration shall make fool-proof arrangements for keeping the deposited fire arms in safe custody. Proper receipt must be

given to the licence holders depositing the fire arms. It shall be the bounden duty of the District Administration to ensure that all firearms deposited

with the Administration are returned to the licence holders immediately after one week after the declaration of results.

6. Prohibitory orders u/s 144 of the Criminal Procedure Code, 1973 shall be issued banning the carrying of licensed arms as soon as an election is

announced and should be effective till the declaration of results.

7. This ban shall, not be applicable to those communities who are entitled to display weapons by long standing law, custom and usage. This shall,

however, not prevent the District Administration to impound weapons of any such persons of even such communities if they are found to be

indulging in violence or posing a threat to the maintenance of law and order and peaceful conduct of elections. In these cases also the firearms shall

remain impounded till one week after the declaration of results.

8. Strict vigil shall be maintained by thorough checking of lorries, light vehicles and all other vehicles from three days before the date of poll to

ensure that no undesirable elements or arms and ammunition are being transported into the constituency from outside and to apprehend them if they

are doing so. Such checking of vehicles shall continue till the completion of the counting of votes and the declaration of results. As and when such

culprits are apprehended, the arms and ammunition and vehicles concerned shall be confiscated.

9. A copy of this order in English/Hindi and in the local official language(s) shall be made available to the local units of all recognized National/State

political parties, in each district immediately and to each candidate or the agent authorized by him at the time of his nomination (repeat nominations

and not scrutiny of nominations) under acknowledgement.

10. The receipt of this order shall be acknowledged immediately.

7. A perusal of Clause-3 of aforesaid directive would manifest that on announcement of elections, the District Magistrate's are to carry out

individual review and assessment (in accordance with the prevalent State laws) of licensees in those cases where it is considered essential to

impound the fire-arm for maintaining law and order in order to ensure free and fair elections. Thus, review/assessment is to be carried out by the

competent authority by issuing a notice in writing based on relevant material. But while doing so, the provisions of the Act and law cannot be given

a go-bye, and the power to impound a firearm cannot be exercised by a general fiat. Rather it has to be an exercise carried out on a case-to-case

basis, reflecting objectivity in action.

8. Thus, the inescapable conclusion is that the competent authority has to carry out review and assessment of individual cases objectively in

accordance with law before a licensee can be called upon to deposit his arms licence.

9. It, thus cannot be disputed that in view of the aforesaid explicit mandate, there is hardly any issue to be decided by this Court. All the petitions

allege that either on mere oral dictates of the Station House Officer concerned or by a written notice of the Officer Incharge of the Police Station

concerned, such as, in the connected Writ Petition No. 17030 of 2014, the petitioner has been called upon to deposit his arm either at the police

station or with the arms dealer, but in the letter dated 1.4.2014, addressed to the learned Standing Counsel, the Officer In-charge has attempted to

deny that the said notice has any compulsive binding effect to deposit the arm, which the Court otherwise finds it to be factually incorrect, as the

notice does call upon the licensee to deposit his arm in view of forthcoming Parliamentary elections without complying the mandate of law. Thus,

the notice is in the teeth of the aforesaid legal position as the same was not preceded by any objective review/assessment in accordance with law.

The Court also finds that there is a notice dated 7.3.2014, published in Rashtriya Sahara, Kanpur, annexed with Writ Petition No. 17436 of 2014,

wherein it is alleged that In-charge of P.S. Rath, District Hamirpur has called upon arms licensee to deposit their fire-arms. The notice also states

that Constables have been given directions to visit the area concerned and to ensure deposit of fire-arms. It further provides licensees who fail to

deposit fire-arm, would be appropriately proceeded with. The Court also finds that the District Magistrate, Allahabad convened a meeting on

18.3.2014, which was attended by Senior Superintendent of Police and other officials, wherein it transpires that after considering the directive of

the Election Commission of India, it was resolved at Item No. 6 to direct the Officer In-charge of the police station concerned and Addl. District

Magistrate, City Magistrate of the respective areas to ensure that firearm of desired persons be got deposited. The said resolution at Sl. No. 6 of

the minutes dated 18.3.2014 on the face of it, is in the teeth of the aforesaid judgments of this Court and also the directive of the Election

Commission of India. Undoubtedly, neither law contemplates deposit of fire-arm in a mechanical manner nor is it the mandate of the Election

Commission of India to ensure deposit of fire-arms without complying the provisions of law. As stated above the entire exercise for deposit of fire-

arms is to be preceded by review/assessment on a objective basis after complying the mandate of law and not in a mechanical manner.

10. Maintenance of law and order during elections is of paramount importance. It is always open for State instrumentalities after complying with the

provisions of the Act or of the Code of Criminal Procedure, 1973 or any other law, as the case may be, to proceed against an individual in an

objective manner, if they are of the view that there are materials to direct for deposit of fire-arms. Thus, all petitions are disposed of with the

following directions.

1. A mandamus is issued to the respondents not to compel the petitioners/arms licensees to deposit their fire-arms, unless their case/cases has/have

been objectively (emphasis is mine) reviewed/assessed by a competent authority in writing and after complying with the provisions of law.

2. The Director General, U.P. Police, Lucknow shall forthwith issue instructions to all Senior Supdt. of Police/Supdt. of Police of the districts

concerned to ensure that the aforesaid mandamus is complied with.

Copy of this order be supplied to Sri J.K. Khanna, learned Standing Counsel, who shall forthwith forward the same both to the Chief Secretary,

U.P. Government, Lucknow and to the Director General of Police, Lucknow, U.P for compliance.