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(2014) 11 PAT CK 0006

Patna High Court

Case No: Cr.WJC No. 698 of 2014

Mahendra Sharma

APPELLANT

Vs

The State of Bihar

RESPONDENT

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**Date of Decision:** Nov. 18, 2014

**Acts Referred:**

- Arms Act, 1959 - Section 27
- Bihar Control of Crimes Act, 1981 - Section 12, 17, 21, 22, 3
- Penal Code, 1860 (IPC) - Section 120B, 302, 34

**Citation:** (2014) 4 PLJR 764

**Hon'ble Judges:** Dharnidhar Jha, J; A.K. Lal, J

**Bench:** Division Bench

**Advocate:** Shekhar Kumar Singh and Raja Surendra Mohan, Advocate for the Appellant;  
Prabhat Bharti, Advocate for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

Dharnidhar Jha, J.

The present petition has been filed by petitioner Mahendra Sharma @ Mahendra Sardar seeking an order quashing Annexure-3 which is an order dated 29.5.2014, passed by the District Magistrate, Arwal and communicated to all concerned by his Memo No. 368/Vidhi of that day as also Annexure-4 which order was passed consequent upon passing of the order contained in Annexure-3 by which the present petitioner was directed to remove himself from the limits of district Arwal for a period of six months from that order in the light of provisions of Section 3(3)(a) of the Bihar Control of Crimes Act, 1981 ("the Act" in short). It appears that a report was submitted by the Superintendent of Police, Arwal by his Memo No. 528, dated 31.3.2014 (Annexure-2) stating that the petitioner had committed murder of one Vivek Sharma by shooting him down and Karpi (Bansi O.P.) P.S. Case No. 56 of 2011 had been registered on the 12th of May, 2011 under Sections 302/ 34 and 120-B of

the Indian Penal Code as well as Section 27 of the Arms Act in that behalf " and further that after investigation the case was found true and the police had submitted charge-sheet for the trial of the petitioner. The Superintendent of Police, Arwal also noted in his above report (Annexure-2) that the petitioner was bearing criminal antecedents of three cases including the above noted case. The above report of the Superintendent of Police, Arwal was considered by the District Magistrate (D.M.), Arwal who finally drew satisfaction on that report and issued an order on 29.5.2014 directing the present petitioner to remove himself from the limits of District-Arwal for a period of six months. A copy of the above order was undisputedly served upon the petitioner and this gave cause of action for the petitioner to approach this Court through the present petition.

2. The petitioner has submitted in his petition as also through his counsel that while issuing order contained in Annexures-3 and 4, the District Magistrate was enjoined under law to issue a show-cause first, calling upon the petitioner to appear either personally or through a counsel of his choice to reply to the contents of the notice envisaged under Section 3(1) of the Act and in case he had chosen to lead evidence in rebuttal of the allegations which were made against him by the police through its report, then he was entitled to adduce evidence also. The petitioner has submitted that the provisions of Section 3(2) of the Act was not complied with and, as such, it was an order which suffers from arbitrariness and non-compliance with the provisions of law.

3. We have, perused the counter affidavit filed by the learned counsel for the State which runs into 15 paragraphs and while justifying the order contained in Annexures-3 and 4 issued by the District Magistrate, Arwal, the State does not appear controverting the submissions of the petitioner on non-compliance of Section 3(2) of the Act.

4. Section 3 of the Act reads as under:--

"3. Externment, etc. of anti-social elements.--(1) Where it appears to the District Magistrate that--

(a) any person is an anti-social element, and

(b)(i) that his movements or acts in the district or any part thereof are causing or calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of any offence punishable under Chapter XVI or Chapter XVII of the Indian Penal Code, or under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or abetment of such offence;

The District Magistrate shall by notice in writing inform him of the general nature of the material allegation against him in respect of clauses (a) and (b) and shall give

him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires and also of examining any other witnesses that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) The District Magistrate on being satisfied that the conditions specified in clauses (a) and (b) of sub-section (1) exist, may by order in writing-- (a) direct him to remove himself outside the district or part thereof, as the case may be, by such route, if any, and within such time as may be specified in the order and to resist from entering the district or the specified part thereof, until, the expiry of such period, not exceeding six months as may be specified in the order;

(b)(i) require such person to notify his movement, or to report himself, or to do both, in such manner, at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him of such article as may be specified in the order;

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order;

until the expiry of such period, not exceeding six months, as may be specified in the order."

5. As may appear from Section 3(1), if it appears to the District Magistrate that any person was an anti-social element or that his movement or acts in the district or any part of it was prejudicial so as to be calculated to cause alarm, danger or harm to person or property or that he was engaged or was about to be engaged in the commission of any offence punishable under the two chapters of the Indian Penal Code noted therein or under the provisions of the Suppression of Immoral Traffic in Women and Girls Act, 1956, or abetment of such offence, then the District Magistrate was required to issue a notice in writing informing such a person of the general nature of material which has been received by him and by issuing notice shall give him a reasonable opportunity of tendering an explanation regarding the allegations made against him. It may further appear from sub-section (2) to Section 3 of the Act that not only the person who has been issued the notice to appear and show-cause has a right to appear personally rather he may choose to appear through a counsel of his choice and has the further right of being given an opportunity of examining himself on the allegations. The right to be heard which is envisaged by the first part of sub-section (2) includes the right of adducing evidence in rebuttal of the allegations which were contained or which had appeared in the

notice received by him. What was the need of adducing evidence or ultimately hearing the person who had been issued a notice under Section 3(1) of the Act is very much pointed out by the provisions of Section 3(2) of the Act. The purpose could be for showing the reasons upon which an order of externment as is envisaged by Section 3(3) of the Act may not be passed. It is not a mandatory provision, it is somewhat obligatory on the part of the District Magistrate to grant an opportunity of being heard as is indicated above but in some appropriate cases he may choose to deviate from the requirement of law and not to comply with it in letter and spirit as is required but in that case he shall have to record the reasons for refusing to adduce evidence which must have been made with the purpose of vexation or causing delay in the proceedings.

6. As may appear from the reading of the provision of Section 3, there is some sense of urgency in initiating and taking action under Section 3 of the Act. The urgency is to protect the society from unlawful activities which are noted in the very provisions of Section 3(1) of the Act which may ultimately prejudice and disturb the peace and order and smooth flow of human life and activities in the society so that society moves smoothly without being disturbed by any criminal activities and further, that people live in the society enjoying peaceful atmosphere not only to enjoy their lives but also to prosecute their vocations. It appears necessary that a crime free society is created by taking preventive measures which are envisaged to be taken either by Section 3 or by Sections 12, 17 and 22 of the Act by the authorities at different levels and in the light of reports which might have been received by them. But, it is too well known to be pointed out that passing preventive detention order or orders of the nature which are required to be passed under Section 3 of the Act necessarily curtails the personal liberties of the person proceeded against. The liberties which have to be curtailed or which have to be abridged are guaranteed under Chapter-III of the Constitution of India as the Fundamental Right's of the citizens and persons and courts exist only to safeguard those liberties to the extent unless it becomes utterly necessary to put down some fetters on the enjoyment of those rights that too under some emergent situation. The right to personal liberty, in fact, are the catalysts of human development. Liberty of any nature enthuses persons and citizens of the nation to think and interact, to chart paths of achievements in their personal lives and thus, enhance the prospect of nation building. The ordinary situation could be always viewing with foul eyes such actions which tell upon the personal liberties of persons living anywhere in the society.

Preventive laws are harsh and sometimes they do not appear passed after following the general provisions of trials which could be available to a criminal court. Summary proceedings by perusing the reports so as to drawing the subjective satisfaction so as to issuing the order are the modes of proceeding in such matters, but even in that case, as may appear from the very provisions of Section 3 or other provisions, the right to be heard has been safeguarded by the legislature. In case of Section 3 of the Act, the right is available to a person in a broader manner than what

appears available to him when he is being proceeded against either under Section 12 or 17 or 22 a case of an order which has to be passed under Section 22 of the Act, the legislature has set down more stringent a measure by directing that all materials including the show-cause or explanation submitted by the proposed detainee has to be placed before the State Advisory Board so as to taking a decision under Section 21 of the Act to recommend or not to recommend the detention of a person. We need hardly to point out that the State Advisory Board is constituted by persons of reason and conscience and it is supposed that they had never defaulter (s/c--defaulted?) in making recommendations which are desired to be made by them.

7. We have noted that the right to be heard accrues to a person in our system to administering justice as the same has been set down in a broader manner in Section 3 of the Act. Not only the person has to have a notice calling upon him to tender his explanation but shall also have the opportunity of either appearing himself or to appear through a counsel of his choice for being heard on the contents of the notice. Not only that, he has yet another right vested in him, as may appear from Section 3(2) of the Act itself that if he so chooses, he may lead evidence in opposition of the grounds upon which an order was likely to be made against him directing him to remove himself from the limits of the district or part thereof.

8. The negation of this right by the District Magistrate has to be declared arbitrary if he does not record reasons for denying the right of hearing to a person.

9. We were not required to note into such finer details the scope and ambit of the provision of Section 3 of the Act for disposing of the present petition, but considering that a District Magistrate holds position in the district who heads not only many establishments but has a wider power of passing various orders telling upon the personal liberties of a person, we desired to clarify position so that the personal liberties do not fall prey to personal whims and caprice of a person who might be the District Magistrate of a district on mere information which has not yet been verified and tested by going through the trial procedure. We have noted that detention as well as laws on preventive detention is somewhat draconian. For drawing satisfaction for acting under the provisions of the Act it requires some serious and weighty materials because the satisfaction is never objective it is subjective and one is made to believe generally the report submitted by the police establishment. If a person being at large appears dangerous to the society then in that act his detention may be required, but merely because he has been involved or has been concerned in a few cases may not be requiring him to be detained if the materials past and present other than the first information report do not appear as convincing to a reasonable man as is required under law, This was the reason that we were explaining the provisions in some finer details so as to impressing upon the District Magistrate not only of Arwal, but of all districts of the State that they are supposed, on account of being the officer of the State, to protect the liberties of the

citizens also. Issuing a notice itself is a very serious business and it could be done only for compelling reasons as the very receipt of a notice under the Act by a person may put his personal liberties under some clouds. The District Magistrate should be cautious and should in all cases adhere to the provisions of the Act before they have finally decided to issue an order. Having said the above on the facts as presented before us, we find merit in the present petition. The same succeeds and is hereby allowed. The orders contained in Annexures-3 and 4 are quashed.