Nalini Mohan Chowdhury Vs District Magistrate and Others

Civil Rule No. 1136 of 1950

Court: Calcutta High Court

Date of Decision: Dec. 14, 1950

Acts Referred:
Constitution of India, 1950 â€" Article 213(1), 226

Citation: AIR 1951 Cal 346 : 55 CWN 297 : (1952) 1 ILR (Cal) 168

Hon'ble Judges: Harries, C.J; S.N. Banerjee, J

Bench: Division Bench

Advocate: Chandra Sekhar Sen and Smriti Kumar Roy Chowdhuri, Nirmal Chandra Chakravarty, Subodh Chandra Basak and Amiya Lal Chatterjee, for the Appellant;Debabrata Mookerjee and Ajoy Kumar Basu, for the Respondent

Judgement

Harries, C.J.
This is a petn. filed under Article 226, Const. Ind. praying for the issue of a writ of certiorari or mandamus in respect of an

order of requisition made by the Dist. Mag. of Malda.

2. I would state at the outset that a writ of certiorari is not appropriate, but that this is a case in which the Ct. can be asked to issue a mandamus if

the facts are established as suggested.

3. The petnr. is a pleader who resided in a house No. 34, Bundh Road, English Bazar, Malda. He was a tenant of one Sri Tarapada Das who was

a police officer in the employ of the East Bengal Govt. Apparently, he had been in the service of the old province of Bengal and on partition he

elected to serve under Govt. of East Bengal which is of course a part of Pakistan.

4. In Oct. 1948, Tarapada Das came to reside at Malda and lived in a house which he rented. He eventually applied to the Dist. Mag. who

requisitioned a part of the house, of which the petnr. was tenant. The order requisitioning a part of the premises was made on 12-10-1949 and on

17-10-1949, Tarapada Das was put in possession of the part so requisitioned and the petnr. was left with practically only one room.

5. It is suggested on behalf of the petnr. that his order of requisition was wholly invalid as was not made under any valid provision of aw. The

requisition order was made under Clause 31 (l) read with Clause 41 of Ordinance II [2] of 1949. That Ordinance was replaced by the West

Bengal Security Act, 1950, which came into force on 31-3-1950 and Section 40 of that Act provided that any order issued under the Ordinance

which was in force immediately before the Act came into force was to be deemed to be an order made or issued under the corresponding

provision of the Security Act.

6. On 21-8-1950 the petnr. obtained this rule and shortly afterwards this Bench held that Section 38, West Bengal Security Act, was ultra vires

the Const. Ind. Section 38 dealt with the right of Govt. to delegate their powers under the Act. The section provided that the Govt. could delegate

their powers to any officer and this Bench held that the section was ultra vires and void. The result of that decision was that there was no power in

the Act, when Section 38 was eliminated, providing for delegation and, therefore, orders passed by officers to whom powers had been delegated

were invalid.

7. The present requisition order was made by the Dist. Mag. as powers had been delegated to him u/s 38 of the Act. Therefore, the order, it is

said, could not be regarded as validly made after the decision of this Court to which I have made reference.

8. The State Govt. realised the position and the West Bengal Security (Second Amendment) Ordinance, 1950, that is, West Bengal Ordinance

XIV [14] of 1950, was promulgated. By Clause 2 of that Ordinance, a new section is substituted for old Section 38 of the Act. The new section

provides that powers of Govt. can only be delegated to certain more senior officers of Govt. It is also provided by Clause 3 of the Ordinance that

the same is to be retrospective and that orders previously made are to be deemed to have been always valid as if made under the Ordinance.

9. Later the West Bengal Security Act (LXI [61] of 1950) was passed and the provisions of Ordinance XIV [14] of 1950 were incorporated in

the Act. It is to be observed that this later Act received the assent of the President of the Republic on 31-3-1950.

10. The first point taken by Mr. Chakravarty on behalf of the petnr. was that the Dist. Mag. had no power whatsoever to make the order. The

order was made whilst Ordinance II [2] of 1949 was in force which, as I have said, was superseded by the West Bengal Security Act XIX [19] of

1950. Section 38 of this latter Act having been declared ultra vires and invalid Ordinance XIV [14] of 1950 was passed which was subsequently

replaced by the West Bengal Security Act, LXI [61] of 1950. What is suggested is that Ordinance XIV [14] of 1950 was invalid and, therefore,

no delegation was permissible at all. It is suggested that Ordinance XIV [14] of 1950 was invalid because it had riot received the assent of the

President. It is pointed out that the West Bengal Security Act of 1950 which replaced this Ordinance did receive the assent of the President and it

is suggested that the Ordinance is invalid by reason of the want of instructions from the President. Reliance is placed on Article 213(1), proviso (c)

of the Const. That provision requires that the Governor shall not, without instructions from the President, promulgate any Ordinance if an Act of the

Legislature of the State containing the same provisions would under the Const. have been invalid unless, having been reserved for the consideration

of the President, it had received the assent of the President.

11. The argument is that clearly the Act required the assent of the President because it had obtained it. Therefore, the Ordinance could not have

been passed without instructions from the President and as no instructions were given the Ordinance is invalid.

12. The whole argument is fallacious because it proceeds on the basis that State legislation on an item included in List III, Schedule 7 of the Const,

is invalid, without the President"s assent. Such legislation is only invalid in so far as it is repugnant to Central legislation or existing law. A State may

legislate on an item in List III and such legislation will be perfectly valid if it does not conflict with a piece of Legislation of Parliament or with

existing law as defined by the Const.

13. Mr. Chakravarty for the petnr. has failed to suggest any piece of existing law which can be said to be repugnant to the provisions of Ordinance

XIV [14] of 1950. Therefore, that Ordinance is valid, though the previous instructions of the President were not obtained. The fact that a

subsequent Act required and obtained the assent of the President is by no means conclusive because the subsequent Act deals with many matters

which were not covered by the Ordinance and some of those matters undoubtedly required the assent of the President to make the legislation

valid.

14. For these reasons it appears to me that the act of the Dist. Mag. cannot be challenged on the ground that the legislation under which the order

was made was invalid.

15. Mr. Chakravarty, however, argued in the alternative that the order itself was not made in conformity with the Ordinance and, therefore, the

order is invalid.

16. It has been repeatedly laid down in England and in this country that orders made under Acts of this kind to be valid must be shown to fall

strictly within the provisions of the legislation empowering such orders to be made. If. the orders do not fall within, as it is said, the four corners of

the Act in question, the orders cannot be held to be valid. This point was stressed by my brother Banerjee in the very recent case of Patri Shaw v.

R.N. Roy 54 C. W. N. 855. It is to be observed that S. C. in the case of the Province of Province of Bombay Vs. Kusaldas S. Advani and

Others, , have taken the same view.

17. Mr. Chandra Sekhar Sen on behalf of the State concedes that if the order made is not in strict conformity with the provisions of the legislation

empowering such orders to be made, the order cannot be maintained.

18. The order of requisition was made under Clause 31 (1), West Bengal Security Ordinance, 1949. That provision is in these terms :

If in the opinion of the Provincial Govt. it is necessary or expedient so to do for preventing or suppressing subversive acts or for maintaining

supplies and services essential to the life of the community or for rehabilitating persons displaced from their residences or shops due to communal

strife, it may by order in writing requisition any property, moveable or immovable, and may make such further orders as appear to it to be

necessary or expedient in connection with the requisitioning.

This Ct. cannot question the correctness of the opinion of the State Govt. If the State Govt. was honestly of opinion that it was necessary to

requisition these premises for rehabilitating: a person displaced from his residence due to communal strife, the order could not be challenged.

However, it seems to me on the face of this order that it is not an order made under this provision. It is an order made rehabilitating a refugee from

Eastern Pakistan. It is not an order on the face of it rehabilitating a person displaced from his residence in West Bengal as a result of communal

strife. The order itself makes this clear. The opening part of the order reads as follows :

Whereas having considered the materials before me I am satisfied that the house of Sri Tarapada Das, retired Sub-Inspector of Police, bearing

holding No. 34 Ward No. 1 on the Bundli Road in E. B. Municipality, district Malda, which is now occupied by Sri Nalini Mohan Chowdhury

Pleader, Malda, is required for the bona fide occupation of the owner of the house who is a refugee from East Bengal and I am satisfied that with a

view to rehabilitating persons displaced from their residences or shops due to communal strife it is necessary to make the following orders.

From this it is clear that the order was made to rehabilitate a refugee from East Bengal, that is, to rehabilitate a person who had been driven out of

a foreign country by political disturbances in that country. It may be true that those political disturbances were tinged with communalism. But it

appears to me that Clause 31 of the Ordinance was never intended to cover disturbances outside the State of West Bengal. A State Legislature

has only power to legislate over the State and it has no power to legislate for matters outside the State. Of course it could make provision for the

rehabilitation of refugees from foreign countries. But if such was intended I imagine the legislation would have made it clear.

19. Mr. Chandra Sekhar Sen has contended that what drove the refugees out of East Bengal was communal strife. It was, in a sense, but it was

communal strife coupled with intense political feeling. The Hindu community in East Bengal is not only a separate community, but is a political

minority and the troubles between Hindus and Moslems in Pakistan though communal in one sense are also political. Therefore "the wording of

Clause 31, West Bengal Security Ordinance of 1949, is not appropriate to cases of persons driven out from Pakistan which is a foreign country

and who have taken refuge in West Bengal which is a State in the Republic of India. If Clause 31 of this Ordinance applied to refugees from

Pakistan, it would have to apply to persons who have lost their residence in any country in the world if the loss of their residence was due to

communal strife. For example, there have been Mussalman riots in Singapore during the last few days. Could it be said that an Indian -- and there

are many Hindus and Sikhs residing in Singapore--who had had his house burnt by the rioters and therefore compelled to come back to Calcutta,

was entitled to have premises requisitioned for him under Clause 31 of the Ordinance ? It seems to me clear that the legislators had not in mind

refugees driven from other countries throughout the world. Indians have suffered and are suffering in South Africa. Can it be said that an Indian

who has lost his residence by reason of disturbances between the Indian community and the White South African community or the Negro

community would be entitled to have premises requisitioned for him in Calcutta if he returned here. It seems to me quite clear that the Governor

when he enacted Ordinance II [2] of 1949 merely had in mind persons in the State of West Bengal who had lost their residence by reason of the

serious communal disturbances which occurred in this State since the year 1946. The clause must, I think, be confined to such persons and that

being so, an order of requisition which on the face of it was made to rehabilitate a person not contemplated by Clause 31 of the Ordinance of

1949, is not an order made under the Ordinance at all and therefore must be regarded as invalid. 20. Further it is clear from the application which

Tarapada Das made to the Dist. Mag. that he was not and did not pretend to be a person who had lost his residence due to communal strife. In his

application he states that he was compelled owing to serious heart trouble to take leave upon medical certificate and had thereafter remained under

the treatment of a Dr. Sinha at Mukdampur, Malda. He does state that he had left his quarters for good at Rajshahi in the month of October 1948,

but he did that because he was advised by the medical officer there. He never suggests that he was driven out of Pakistan by communal or political

disturbances. All he suggests is that owing to the state of his health he was compelled to leave Rajshahi and to reside at Malda. It seems to me

quite clear that he was not even a refugee from Pakistan and it might well be argued, although it is not necessary to decide the matter in this case,

that the order in question was not bona fide. However as we find that it was not an order made under the provisions of Clause 31, West Bengal

Security Ordinance, 1949, the order is bad and a mandamus must issue to the Dist. Mag. directing him not to give effect to the said order and to

restore possession of the part of the premises requisitioned to the petnr. forthwith.

21. The Rule is, therefore, made absolute and the petnr. is entitled to the costs of this Rule -- the hearing-fee being assessed at five gold mohurs.

S.N. Banerjee, J.

22. I agree.