

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

THE DIRECTORS OF THE SOORATEE BARA
BAZAAR COMPANY, LIMITED (APPLICANTS)

H.C.
1948

Apl. 5.

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 144—No mention of material facts in order—Invalidity—Succession of temporary orders—If can be imposed—Object of s. 144—Principles for exercise of discretion by Magistrates.

On the 24th January 1948 the District Magistrate passed an *ex-parte* order prohibiting applicants from opening "B" Block of the Sooratee Bara Bazaar. The order was silent as to the material facts of the case on which it was based, namely, the dispute between the Bazaar Company and the Bazaar Unity Council.

Held: That an order under s. 144 of the Code of Criminal Procedure where no mention has been made of the material facts of the case is invalid. The mere fact that the order is drawn up in the form provided in the schedule to the Criminal Procedure Code does not amount to a sufficient excuse for non-compliance with this requirement of law and such defect is fatal to its validity.

Aung Bala v. District Magistrate, (1939) Ran. 294, followed and applied.

Held further: That the conditions set out in s. 144 (2), Criminal Procedure Code, for the making of an order *ex parte* are (1) in case of emergency and (2) when the circumstances do not admit of getting respondents served with notice. Neither of these conditions existed in the present case.

Held further: That it was not in consonance with the spirit of the section to impose a restriction of indefinite duration by successive temporary orders.

Govinda Chetti and eight others v. Perumal Chetti and another, 38 Mad. 489; *F. E. Christian v. Carter*, (1939) A.I.R. Pat. 512, referred to.

The order under s. 144 is a necessary encroachment on personal liberty for preventive purposes. The duty of the Magistrate is not to deprive a man of his lawful rights but to restrain illegal interference with the same. The action should be taken against potential law-breakers and not against peaceful citizens.

R. E. Blong v. King-Emperor, A.I.R. (1924) Pat. 767; *Khazan Chand v. The Crown*, A.I.R. (1927) Lah. 430, applied.

* Criminal Revision No. 7-B of 1948 being review of the order of the District Magistrate of Rangoon, dated the 24th January 1948, passed in Criminal Misc. No. 2 of 1948.

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Foucar for the applicant.

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U Tin Maung (Government Advocate) for the respondent.

U AUNG THA GYAW, J.—In this application the petitioners, who are the Directors of the Sooratee Bara Bazaar Company, Limited, Rangoon, seek the revisional interference of this Court with an order, dated the 24th January 1948, passed by the District Magistrate, Rangoon, under section 144 of the Criminal Procedure Code, prohibiting them from opening the "B" Block of the Sooratee Bazaar. The order complained against has since ceased to have effect through efflux of time, the statutory limit of two months during which it could operate having expired on the 24th March 1948 during the pendency of this matter in this Court. A number of grounds have been urged on behalf of the petitioners against the justice and validity of the said order and it is therefore necessary to go briefly into the facts leading to the unfortunate impasse before dealing with the points so raised.

This "B" Block of the Bazaar, which has formed the subject of the prohibition, had been under repairs in the early part of last year and the completion certificate from the Corporation of Rangoon was said to have been obtained in about the month of April 1947. Arrangements were then made for letting out the stalls to the Company's tenants. The stalls in this "B" Block numbered only 407 while the applications received from prospective tenants numbered nearly 2,000 and in about June 1947 the unsuccessful and dissatisfied applicants thought that the Company had shown racial bias in the allotment of their stalls and a number of them with some outsiders constituted themselves into a

council of action known as The Bazaar Unity Council and proceeded to lay their numerous demands before the Directors of the Company, one of these demands being a right to allot the stalls. Some anonymous threats with which these demands were accompanied made the Directors hesitate in their proposal to open out the said "B" Block of their Bazaar and persuaded them to appeal to the Commissioner of Police, Rangoon, for his protection. The Commissioner of Police was unable to afford the protection asked for and advised the petitioners to put off the opening of the Bazaar to a later date, which was to be intimated to them. On the 28th June 1947 the petitioners wrote again and asked as to when they should open their Bazaar under police protection. They were again told that pending the setting up of a Joint Board of Enquiry and the negotiations between the petitioners and the Bazaar Unity Council it was not advisable to open the "B" Section of the Bazaar. In July, petitioners placed the matter in the hands of their lawyers, who again wrote to the Commissioner of Police on the subject and hinted that if the authorities could not guarantee the safety of the Bazaar and the tenants, the petitioners would be driven to institute legal proceedings in Court. The next communication made by the petitioners' lawyers to the Commissioner of Police, Rangoon, on the 17th July 1947, dealt with a proposed public meeting to be held by the Bazaar Unity Council in the Bazaar premises and the need of police protection for the safety of the Bazaar buildings. The unfortunate events of July last then intervened and the petitioners were advised to withhold their hand in the matter till public excitement should subside. Petitioners were informed that should they decide to open the "B" Section of their Bazaar, a prohibitory order would be served upon them under section 144 of the Criminal Procedure Code. In

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subsequent communications made to the Commissioner of Police in September the petitioners exhibited their impatience with the restraint imposed on their liberty of action in the matter and as a result of their talks with the authorities at a higher level, they decided to open the "B" Bazaar in the week following the 27th September 1947. The petitioners were again advised to withhold action and on the 8th October 1947 they were served with an order under section 144 of the Criminal Procedure Code prohibiting them from opening the "B" Block of their Bazaar. Meanwhile, the differences between the petitioners and the Bazaar Unity Council remained unresolved and finally on the 13th January 1948 petitioners wrote to the Commissioner of Police stating that as the order of the District Magistrate, Rangoon, under section 144, Criminal Procedure Code, had elapsed they saw no reason why they should not proceed forthwith to reopen the Bazaar. They however did not wish to take any course which would embarrass the authorities and accordingly asked whether the latter were prepared to allow them to open the "B" Bazaar. In consequence of this communication the order now complained of was passed by the District Magistrate, Rangoon, in these terms :

"Whereas it has been made to appear before me that the opening of the 'B' Block, Sooratee Bara Bazaar, Rangoon, will tend to cause a breach of the peace or disturbance of the public tranquillity or a riot or an affray, I, U Po Kye, B.A., District Magistrate, Rangoon, do hereby prohibit you, under section 144 of the Code of Criminal Procedure, 1898, from opening the said 'B' Block, Sooratee Bazaar, Rangoon."

This order as it appears is silent as to the material facts of the case on which it was passed, namely the dispute between the petitioners and the Bazaar Unity Council. On the face of it the order in question

requires the petitioner to abstain from doing what is evidently a lawful act, namely management of their own private property, in the way which best serves their convenience. An order of the kind now passed where no mention has been made of the material facts of the case has been held to be invalid in the case of *Aung Bala v. District Magistrate* (1). The mere fact that the order has been drawn up on the lines of the form provided in the schedule annexed to the Code of Criminal Procedure does not amount to a sufficient excuse for non-compliance with this requirement of law. This defect in the order is fatal to its validity.

The order passed against the petitioners on the 24th January 1948 is an *ex-parte* order, which can be passed only under two circumstances, namely (1) in cases of emergency,¹ and (2) when the circumstances do not admit of getting the respondents served with notices of the action proposed against them. The facts disclosed in the affidavits filed in this case and in the correspondence which passed between the petitioners and the Commissioner of Police, Rangoon, do not indicate that these circumstances existed at the time the order in question was passed. The petitioners were in constant communication with the authorities concerned on the question of the reopening of the Bazaar, and there could have been no question that they could not have been served with the requisite notice regarding the order proposed to be passed against them. Nor could the communication they made with the authorities on the 13th January be made the basis of the finding that subsequent to the making of the same an emergency had arisen to justify the passing of the order. In the letter of the 13th January the petitioners merely pointed out that

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(1) (1939) 2 Ran. 294.

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there were no possible obstacles in the way of the reopening of the Bazaar, and as they were anxious to avoid causing embarrassment to the authorities they wanted to know whether the latter had any objections to the course of action proposed by them. The contents of this letter can hardly be described as a threat of immediate action on their part. They did not mention anywhere in their letter that whatever be the consequences they were determined to reopen their Bazaar. In these circumstances, it cannot be said that the conditions set out in sub-section (2) of section 144 of the Criminal Procedure Code have been satisfied.

The order passed on the 24th January 1948 was preceded by an earlier one passed on the 8th October 1947 and this fact renders it more necessary on the part of the authority issuing the order to state clearly his reasons for the continuance of the emergency on which he had first acted in issuing the previous order. It would not be in consonance with the spirit of the section to impose upon the petitioners a restriction of indefinite duration by means of successive temporary orders of the kind complained against. See *Govinda Chetti and eight others v. Perumal Chetti and another* (1) and *F. E. Christian v. Carter* (2).

Again the making of an order under section 144 of the Criminal Procedure Code is a necessary encroachment upon the personal liberty of the person or persons affected thereby for the preventive purposes set out therein. As pointed out in the case of *R. E. Blong v. The King-Emperor* (3) "the object of section 144, Criminal Procedure Code, is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an imminent breach of the peace; but it is not intended to relieve the Magistrate

(1) 38 Mad. 489.

(2) (1939) A.I.R. Pat. 512.

(3) (1924) A.I.R. Pat. 767.

of the duty of making a proper enquiry into the circumstances which made it likely that such breach of the peace would occur, if it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is clear that the duty of the Magistrate is not to continue to deprive the first of the exercise of his legal right, but to restrain the second from illegally interfering with that exercise of his legal right."

"When a breach of the peace is anticipated, action is to be taken against the potential law-breakers and not against the peaceful citizens whom, it is expected, that the law-breakers will molest." [See the case of *Khazan Chand v. The Crown* (1).]

These then are the principles by which the discretion of the Magistrate issuing an order under section 144 of the Code has to be guided. It cannot be said that on the facts and circumstances disclosed in the present case, that discretion of the learned District Magistrate has been so wisely guided, and if the order complained of was still in operation, it would require to be set aside. However, since it has lapsed this application will be dismissed.

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