

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4386 of 2020

=====

Sanjay Singh, Advocate, Male, age about 50 year, son of Sri Bidya Nath Singh, resident of Bara Phatak Road, Near Budh Murti, Lohanipur West, Police Station Kadamkuan, District-Patna 800 003.

Petitioner

Versus

1. The State of Bihar.
2. The Additional Chief Secretary, Cabinet (Vigilance) Department, Government of Bihar, Patna.
3. The Additional Chief Secretary, Home (Police) Department, Government of Bihar, Patna.
4. The Deputy Secretary, Home (Police) Department, Government of Bihar, Patna.
5. The Director General, Vigilance Investigation Bureau, Government of Bihar, Patna.
6. The Deputy Inspector General, Cabinet (Vigilance) Department, Government of Bihar, Patna.
7. The Superintendent, Government Press, Gulzarbag, Patna.

.....Respondents.

=====

Appearance:

For the petitioner : Mr. Santosh Kumar Sinha No.2, Advocate
Mr. Sanjay Singh, Advocate
Mr. Uttam Kumar Mishra, Advocate
Ms. Divya Jyoti, Advocate

For the State : Mr. Lalit Kishore, Advocate General
(Respondent Nos.1 to 4 & 7) Mr. Prabhu Narayan Sharma, AC to AG

For the Vigilance Department: Mr. Anjani Kumar, Senior Advocate
(Respondent Nos. 5 & 6) Mr. Arvind Kumar, Spl. P.P.

=====

**CORAM: HONOURABLE THE CHIEF JUSTICE
AND
HONOURABLE MR. JUSTICE S. KUMAR**



CAV JUDGEMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 11-05-2020

Whether non-publication of the Notification in the Official Gazette establishing Vigilance Police Station in Bihar at Patna, would render registration of the FIR(s); investigation(s) carried out and the trial(s) commenced, conducted or concluded pursuant thereto, to be illegal and void *ab initio* is the question which this Court is called upon to answer.

2. Petitioner contends that by virtue of Section 4(36) of the Bihar and Orissa General Clauses Act, 1917 (hereinafter referred to as 'the Act'), publication of such Notification is mandatory. Also, in the absence of compliance thereof, no judicial notice of a fact can be taken under the provisions of Section 57(7) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act)

3. It is further contended that on 6th June, 1973, though the Government of Bihar had issued a Notification constituting a Vigilance Police Station in Bihar at Patna, but since the same was never published in the Official Gazette, as such all resultant proceedings stand vitiated, being null and void.



4. Assuming the Notification not to have been published in the Official Gazette, we proceed to adjudicate the issue.

5. At the threshold, we may point out that the present petition is in the nature of a public interest litigation. What is the public interest in pursuing such a matter is not reflective or even remotely inferred from the record. Rather than seeking a mandamus asking the State to publish the Notification in the Gazette, on the purported argument of non-compliance of law, petitioner seeks a declaration of all actions (investigation and trial) to be held illegal and inoperative. Petitioner is not a party to any such proceedings. Nor has he been able to highlight any prejudice, be it of whatever nature, caused to anyone of the accused or the State, much less to him. At this point in time, we may only observe that petitioner has also not fulfilled the obligations of approaching the authorities inviting inaction, if any, on their part, which he ought to have so done, prior to approaching this Court, more so, in view of the law laid down in *D. N. Jeevaraj Vs. Chief Secretary, Government of Karnataka & Ors, (2016) 2 SCC 653*, wherein Hon'ble the Apex Court in paragraphs 34 to 39 observed as under:-

“34. The learned counsel for the parties addressed us on the question of the bona fides of Nagalaxmi Bai in filing a public interest litigation. We leave this question open and do not express any opinion on the correctness or otherwise of the decision of the High Court in this regard.



35. However, we note that generally speaking, procedural technicalities ought to take a back seat in public interest litigation. This Court held in *Rural Litigation and Entitlement Kendra v. State of U.P.* [*Rural Litigation and Entitlement Kendra v. State of U.P.*, 1989 Supp (1) SCC 504] to this effect as follows: (SCC p. 515, para 16)

“16. The writ petitions before us are not inter parties disputes and have been raised by way of public interest litigation and the controversy before the court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court.”

36. A considerable amount has been said about public interest litigation in *R&M Trust* [*R&M Trust v. Koramangala Residents Vigilance Group*, (2005) 3 SCC 91] and it is not necessary for us to dwell any further on this except to say that in issues pertaining to good governance, the courts ought to be somewhat more liberal in entertaining public interest litigation. However, in matters that may not be of moment or a litigation essentially directed against one organisation or individual (such as the present litigation which was directed only against Sadananda Gowda and later Jeevaraj was impleaded) ought not to be entertained or should be rarely entertained. Other remedies are also available to public spirited litigants and they should be encouraged to avail of such remedies.

37. In such cases, that might not strictly fall in the category of public interest litigation and for which other remedies are available, insofar as the issuance of a writ of



mandamus is concerned, this Court held in *Union of India v. S.B. Vohra* [*Union of India v. S.B. Vohra*, (2004) 2 SCC 150: 2004 SCC (L&S) 363] that: (SCC p. 160, paras 12-13)

“12. Mandamus literally means a command. The essence of mandamus in England was that it was a royal command issued by the King's Bench (now Queen's Bench) directing performance of a public legal duty.

13. A writ of mandamus is issued in favour of a person who establishes a legal right in himself. A writ of mandamus is issued against a person who has a legal duty to perform but has failed and/or neglected to do so. Such a legal duty emanates from either in discharge of a public duty or by operation of law. The writ of mandamus is of a most extensive remedial nature. The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted.”

38. A salutary principle or a well-recognised rule that needs to be kept in mind before issuing a writ of mandamus was stated in *Saraswati Industrial Syndicate Ltd. v. Union of India* [*Saraswati Industrial Syndicate Ltd. v. Union of India*, (1974) 2 SCC 630] in the following words: (SCC pp. 641-42, paras 24-25)

“24. ... The powers of the High Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless, the well-recognised rule that no writ or order in the nature of a mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Even in cases of alleged breaches of mandatory duties, the salutary general rule, which is subject to certain exceptions, applied by us, as it is in England, when a writ of mandamus is asked for, could be stated as we



find it set out in *Halsbury's Laws of England* (3rd Edn.), Vol. 11, p. 106:

‘198. *Demand for performance must precede application.*—As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that that demand was met by a refusal.’

25. In the cases before us there was no such demand or refusal. Thus, no ground whatsoever is shown here for the issue of any writ, order, or direction under Article 226 of the Constitution.”

6. Be that as it may, coming to the main issue, even on merits, we do not find the submissions so made to be legally sustainable. Here only we may take note of the decision rendered by this Court in *Md. Yunus & Ors. Vs. The State of Bihar & Ors. 2017 (2) PLJR 292* wherein in a reference made, as a result of a difference of opinion between two Hon’ble Judges comprising a Division Bench, matter was referred to the third Hon’ble Judge of this Court for consideration of the following question:-

“The primal question involved in these group of writ petitions is, whether the exercise carried on by the State Government in establishing “Economic Offence Police Station” is an exercise in futility or not, because based thereon what would be the effect on the F.I.R., so registered, police investigation, charge-sheet, trial and conviction?”



7. Answering the reference, the Hon'ble Judge held the action of the State in establishing an Economic Offence Police Station to be one under the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') and not the Bihar Police Act, 2007, which in any case being a Central Legislation, by virtue of the provisions of Article 254 and Entry 2 of List III of the Seventh Schedule would prevail over the State Legislation. Specifically, the Court held that the Notification constituting a Police Station was not required to be regulated by a State Legislation, but a Central Legislation which does not mandate any Gazette publication of the Notification constituting the concerned police station. It held that no Gazette publication of a notification, constituting a Police Station is required at all. That the said decision holds good is not a dispute.

8. Definition of 'Police Station' has been defined under Section 4(1) (s) of Code of Criminal Procedure, 1898, (hereinafter referred to as the 'Old Code') and under Section 2(s) of the Code of Criminal Procedure, 1973. The same is identical and reads as under:-

“police-station” means any post or place declared, generally or specially, by the Local Government, to be a police-station, and includes any local area specified by the Local Government in this behalf.”

9. The notification issued under the Old Code stands protected, in fact, deemed to have been issued under the Code, by virtue of Section 484(2) (b) thereof.



10. Whereas Section 4(36) of the Act, defines ‘Notification’, which reads as follows:-

“4(36) “Notification” shall mean a notification in the Official Gazette.”

11. Code of Criminal Procedure (old or new), is a complete Code in itself. It is a Central legislation, as such will prevail over the State legislation. Police Station is not only defined but the procedure for its creation is contained therein, which inter alia provides that the State Government may declare any post or place, generally or specially, to be a police station. It does not provide for the police station to be created by a gazette notification of the State Government.

12. In the instant case, the notification has been issued under Section 4(1)(s) of the Old Code, and not under and by virtue of provisions of the Act, as such the ratio laid down in *Md. Yunus* (supra) is squarely applicable to the facts of instant case. The issue is no longer *res integra* and we (Division Bench) are bound by the said view.

13. Hon’ble the Apex Court in *B. K. Srinivasan and others Versus State of Karnataka and others*, (1987) 1 SCC 658 has opined that non-publication of a special resolution imposing a tax is a mere irregularity and that “the effect of the non-performance of a duty imposed by a statute in the manner prescribed by the statute is not discovered by a simple answer to the question whether the statute is mandatory or directory. These are not simple chemical reactions. The question whether



a statutory requirement is mandatory or directory cannot itself be answered easily as was pointed out more than a century ago in *Liverpool Borough v. Turner*, (1861) 30 LJ Ch 379. Many considerations must prevail and the object and the context are the most important.”

14. Further, in *ITC Bhadrachalam PaperBoards and another Versus Mandal Revenue Officer, A.P. and others*, (1996) 6 SCC 634, Hon’ble the Apex Court carved out certain principles to understand as to whether publication of a Notification is a sine-qua-non for making it implementable or not. It clarified that so long as the authority passing the order is empowered and prior publication of such an action is not a condition precedent, even non-publication thereof, would not render the action to be illegal.

15. In *Rajendra Agricultural University Versus Ashok Kumar Prasad and others*, (2010) 1 SCC 730, the Court while dealing with the provisions of the Bihar and Orissa General Clauses Act, 1917 and the Bihar Agricultural Universities Act, 1987 (Section 36), again drew the distinction of the requirement of publication to be mandatory or not. It observed that where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent legislature, the executive can act in its executive capacity



since the executive power of the State extends to matters with respect to which the legislature of a State has the power to make laws (Article 162 of the Constitution).

16. It further observed in paragraph 21 as under:-

“21. In *B.K. Srinivasan v. State of Karnataka*¹ this Court explained why publication in the gazette was mandatory and necessary in regard to subordinate legislations: (SCC p. 672, para 15)

“15. There can be no doubt about the proposition that where a law, whether parliamentary or subordinate, demands compliance, those that are governed must be notified directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the ‘conscientious good man’ seeking to abide by the law or from the standpoint of Justice Holmes’ ‘unconscientious bad man’ seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. We know that delegated or subordinate legislation is all-pervasive and that there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important if not more important, than governance by parliamentary legislation. *But unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed.*”

(emphasis supplied)

However, if the parent law had been silent about the manner of publishing or notifying the Statute, and had not prescribed publication in the Official Gazette as the mode of publication, the contentions of respondents might have merited some consideration. But when the Act clearly provided that the Statute required publication in the gazette, the requirement became mandatory.”



17. Applying the aforesaid principles, we are of the considered view that prior publication of the notification in the Gazette is not the mandate of the Statute as stands held in Md. Yunus (supra).

18. Sub-section (7) of Section 57 of the Evidence Act only enables the Court to take judicial notice of the fact of accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette. Reliance thereupon in support of seeking a declaration of the proceedings to be illegal and void is misconceived. At best, it may be a relevant fact to be established in an appropriate proceeding, in accordance with law, without there being any presumption in that regard. We hasten to add, of not being misunderstood, that such fact is necessarily required to be established during trial in view of our finding in the earlier part of the opinion.

19. As already observed in Md. Yunus (supra), the Notification is issued under the provision of the Code of Criminal Procedure which does not provide that constitution of the police station would be with prior publication of the Notification in the Gazette. It does not make it to be *sine-qua-non*, or a condition precedent. Here, it is not the case where no Notification stands issued. The Parent Department has issued the Notification. The issue is only of its non-publication in the Gazette which we do not find it to be mandatory and as already observed, no public interest lies in holding the Notification to be illegal, for it stands



implemented since its inception from June, 1973 onwards. What is contrary to public interest and what prejudice stands caused to any one, remains unexplained.

20. For all the aforesaid reasons, we find no reason to interfere in the present writ petition. The question of law is answered as under:-

21. Mere non-publication of the Notification dated 6th June,1973 issued by the Government of Bihar, establishing the Vigilance Police Station in Bihar at Patna, in the Official Gazette, would not render the actions taken pursuant thereto, be it registration of the FIR(s), investigation(s) carried out or trials commenced, conducted or concluded pursuant thereto, to be illegal, or void *abinitio*.

(Sanjay Karol, C.J.)

S. Kumar, J. I agree.

(S. Kumar, J.)

Sunil

AFR/NAFR	AFR
CAV DATE	26.02.2020
UPLOADING DATE	11.05.2020
TRANSMISSION DATE	

