IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WRIT PETITION (PIL) NO. 191 of 2015

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GAURAV SURESHBHAI VYAS....Applicant(s)

Versus

STATE OF GUJARAT & 5....Opponent(s)

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Appearance:

MR ASIM PANDYA with MR J S SHAH & MR MANAN V BHATT, ADVOCATE for Applicant

MS ML SHAH, GOVERNMENT PLEADER for the Opponent(s) No. 1 ,5 & 6

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CORAM: **HONOURABLE THE ACTING CHIEF JUSTICE MR. JAYANT PATEL**
and
HONOURABLE MR.JUSTICE N.V.ANJARIA

Date : 15/09/2015

ORAL ORDER

(PER : HONOURABLE THE ACTING CHIEF JUSTICE MR. JAYANT PATEL)

1. The petitioner who is a Law student, claiming to be a public-spirited person has approached to this Court by invoking PIL jurisdiction of this Court seeking to declare that the action and the notification at Annexure:A issued by the State Government/respondent no.6 herein of blocking/banning access to Mobile Internet Services during the relevant period as *void ab initio*, *ultra vires* and unconstitutional. The petitioner has also prayed to issue appropriate writ, permanently restraining

the respondent-State and its officers from imposing a complete or partial ban, blocking access to Internet Mobile/Broadband Services in the State of Gujarat, since as per the petitioner, it is violative of Articles 14, 19 and 21 of the Constitution and consequently beyond the powers of the State Government under the relevant laws. The petitioner has also prayed for additional relief to hold that the respondent no.1 is vicariously liable and respondent no. 6 is personally liable for the unconstitutional and arbitrary action of banning Mobile Internet access and for causing loss as stated in paragraph 4.8 to the nation and further appropriate directions to safeguard to the fundamental rights are also prayed for.

2. We have heard Mr. Asim S. Pandya, learned counsel appearing with Mr. Manan Bhatt and Mr. Jai Shah, learned counsels appearing for the petitioner and we have also heard Ms. Manisha L. Shah, learned Government Pleader, appearing for the respondent nos. 1, 5 and 6 upon advance copy.

3. The contention raised on behalf of the petitioner was that the competent authority could not resort to exercise of power under Section 144 of the Code of Criminal Procedure, 1973 (hereafter to be referred to as " the Code") and if any power was available, such was only under Section 69A of the Information Technology Act, 2000 (hereafter to be referred to as "the Act"). The second contention was that wholesome exercise of power under Section 144 of the Code in any case

was not permissible, because if we consider the notification, it is for alleged misuse of social media. As per the learned counsel, certain social media sites could be blocked, even if the purpose was to be achieved by exercise of the power, like Twitter, Face Book, WhatsApp etc. but complete blockage of access to internet through mobile could not be said as warranted in law. As per the petitioner, except the broadband, all internet facilities on mobile phones were blocked, hence such would not even meet with the minimal restriction to the fundamental rights guaranteed under Article 19(1) of the Constitution. It was submitted that even if the exercise of power under Section 144 of the Code has lived the life, such would not make the petition infructuous nor it can be said to be a mere academic exercise. When a fundamental right is breached and even if challenge is at a later stage, the Court would not decline examination of the challenge merely on the ground that the notification has lived the life. It was also submitted that if such action is found to be bad in law and declared as illegal, in the recent future, when the apprehension has been voiced by the petitioner, such power may not be exercised again which may result into the breach of fundamental right. It was submitted that whenever alleged breach of fundamental right is brought before the Court, it would be for the government officials to satisfy this Court that circumstances did exist and they remained within the bounds of

law. But as per the learned counsel for the petitioner, in the absence thereof, the Court may not proceed on the basis that restriction of fundamental right was valid in law. As regards the apprehended action on the part of the respondent-State and its officials, it was submitted that even if there is no actual breach of fundamental right, but if there is imminent danger or apprehension, the Court may entertain the challenge to the apprehended action also and therefore, the petition may not be termed as on hypothesis or surmises. It was submitted that therefore, this Court may interfere. The learned counsel relied upon various decisions of the Apex Court, however, we think it appropriate to refer to those only which as per our view are relevant for considering the controversy.

4. On behalf of the respondent-State and its officials, Ms. Manisha L. Shah, the learned Government Pleader, by relying upon the voluminous material contended that there was sufficient valid ground for exercise of power under Section 144 of the Code. It was submitted that had the powers not been exercised under Section 144 for blockage of internet facility on mobile phones, possibly, peace could not have been restored with the other efforts made by the State for maintenance of the law and order. She submitted that the petitioner is not having all the details for exercise of power and the ground raised that notification for blocking of internet facility on mobile phones from 25th August 2015 onwards was without there being any

notification, is not correct. She submitted that the notification was already issued and is made part of the record which is tendered before the Court. On the question of law, the learned Government Pleader contended that exercise of power under Section 144 of the Code is operating for general control of the situation, more particularly in case of rioting, wherein, degree of disturbance of the public order will be huge. Whereas Section 69A of the Act operates for certain contingency and for blockage of certain sites only. It was submitted that since the State and its competent authority found that unless the blockage of the internet facility on mobile phones is made, the situation may be worsened or the State may not be in a position to achieve the object of maintaining public tranquility and curbing riot, the power under Section 144 of the Code was exercised. The learned Government Pleader further contended that it is difficult to visualize the situation which may happen on the day of Dandi Yatra or thereafter which is stated by the petitioner. She submitted that normally such power under Section 144 of the Code is exercised as a last resort or when it is extremely required. On the aspect of minimal restriction, the learned Government Pleader submitted that it was not that internet facility was completely banned or blocked, but in order to see that there is internet access available to people wherever broadband facility is available or wi-fi facility is available, such was not banned and therefore, she submitted

that it is not a matter where competent authority exercised power in an arbitrary manner without keeping in view the minimal restriction on the fundamental rights. She submitted that normally, it should be left to the subjective satisfaction on the objective material by the competent authority for exercise of the power under Section 144 of the Code. She, therefore submitted that the petition may not be entertained by this Court.

5. At the outset, we may record that since the contention of no power has been canvassed by taking support of Section 69A of the Act in contradiction with the provisions of Section 144 of the Code, we find it appropriate to refer to reproduce Section 144 of the Code and Section 69A of the Act, which are as under:

> *"**144. Power to issue order in urgent cases of nuisance or apprehended danger.--**(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, 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, if such Magistrate considers that such direction is likely to prevent, or tends 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.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5), or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing."

6. The language used under sub-section (1) of Section 144 is "to prevent, or tends 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". As per the aforesaid provision, power may be exercised if any of the aforesaid contingencies occurs.

7. Section 69A of the Information Technology Act, 2000 reads as under:-

*"**69A. Power to issue directions for blocking for public access of any information through any computer resource.-**(1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2) for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.*

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out,

shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

8. The aforesaid Section shows that the situations envisaged are, "in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above". Further a direction can be issued under Section 69A for blockage of public access to such informations and it may also be relating to "any information generated, transmitted, received, stored or posted in any computer resource".

9. If the comparison of both the sections in the field of operations is made, barring certain minor overlapping more particularly for public order, one can say that the area of operation of Section 69A is not the same as that of Section 144 of the Code. Section 69A may in a given case also be exercised for blocking certain websites, whereas under Section 144 of the Code, directions may be issued to certain persons who may be the source for extending the facility of internet access. Under the circumstances, we do not find that the contention raised on behalf of the petitioner that the resort to only Section 69A was available and exercise of power under Section 144 of the Code was unavailable, can be accepted.

10. On the aspect of sufficiency of material to exercise power under Section 144 of the Code, it is hardly required to be stated that this Court would not be exercising the appellate power. But the Court may examine if the power is exercised in arbitrary manner or there is perverse exercise of the power without there being any material whatsoever. The material produced on behalf of the respondent-State and the competent authority, even if considered at the first glance, would go to show that they were germane to exercise of the power and hence, it could not be stated that the objective materials were not at all considered. Further, once the objective material is considered, this Court would not go into the sufficiency of the material, but at the same time, on objective materials being considered together, if leads the authority to exercise the power with prudence coupled with the public duty, the same, in our view, should be sufficient. Be it noted that during the relevant period, the disturbances went on throughout the State and there were serious disturbances of law and order. Rioting had taken place at various places and the State would be zealous to control the same by applying all modes available in law. We do not want to express any further on the said aspect but leave it at that by observing that it cannot be said that the powers were exercised in arbitrary manner nor it can be said that there was perverse exercise of the power without there being any objective material. Hence the said contention fails.

11. On the aspect of minimal damage, it does appear that the competent authority had taken care, namely, of blocking of internet facility only on mobile phones and not on broadband facility. The attempt made by the learned counsel for the petitioner to contend that only social media sites could be blocked and not complete blockage of the internet access through mobiles, in our view, cannot be countenanced for two reasons; one is that normally, it should be left to the authority to find out its own mechanism for controlling the situation and the second is that there are number of social media sites which may not be required to be blocked independently or completely. But if internet access through mobiles is blocked by issuing directions to the mobile companies, such may possibly be more effective approach found by the competent authority. In any case, it was not complete ban on the internet access, but in comparison to the access available to internet through mobile, the same was only prohibited, whereas access to internet through broadband and wi-fi facility was permitted or rather was not blocked.

12. Under the circumstances, we are not impressed by the contention that the authorities were not conscious nor were they completely ignorant of the aspect of minimal restriction. Further, as observed earlier, each of the situations in exercise of the power under Section 144 of the Code may differ. Had there been complete ban on internet access, may be through

mobiles or may be through wi-fi, the matter might stand on different footing and different considerations. But such was not the fact situation. Further, when the authority itself has taken care on the aspects of minimal restriction, we do not find that this Court will have a microscopic examination website wise or each of the sites available on internet. Hence, the said contention cannot be accepted.

13. On the aspect of apprehended imminent breach of fundamental rights, we may record that the petitioner mainly relied upon the decisions which were pertaining to the imminent danger of breach of fundamental rights of personal liberty keeping in view Article 21 of the Constitution. The degree of protection of the right under Article 21 of the Constitution cannot be fully equated with the protection of fundamental right available to a citizen under Article 19(1) of the Constitution since the rights under Article 19(1) are subject to reasonable restrictions. What type of reasonable restriction may be upon such rights of a citizen is a different aspect altogether but such rights under Article 19(1) are not absolute but are subject to the powers of the State to put reasonable restrictions. In any case, when as per the observations made by us herein above, the power exercised under Article 144 of the Code is not found by us beyond the scope of Section 144 of the Code, we cannot proceed on the basis that power, if situation so demands, under Section 144 of the Code, shall be exercised in arbitrary manner.

What will be the situation in future and what will be the degree of the disturbance of the law and order or what will be the quantum and number of rioting etc. in a given situation cannot be visualized on the ground as stated by the learned counsel for the petitioner. At this stage, all these questions can only be said to be in the field of hypothesis and surmises. We do not see that the basis or the demonstration of reasonable apprehension as sought to be canvassed is sufficient at this stage for us to intervene even before the power is exercised. We only find it appropriate to observe that the competent authority will only exercise power within the limits of law on the basis of the objective material and shall not exercise power in arbitrary manner or in perverse manner without there being any appropriate objective material.

14. Learned counsel for the petitioner relied on decision in **Maneka Gandhi Vs Union of India [AIR 1978 SC 597]** to submit that the Apex Court held in that case that violation of fundamental right under Article 19(1)(a) of the Constitution could also travel into the realm of violation of other fundamental rights like Articles 21 and 14 and that principle of trinity vis-a-vis enforcement of all the three fundamental rights was propounded by the Court. In respect of the contention that powers under Section 144 of the Code could not have been resorted to, the reliance was made upon the decision of Bombay High Court **In re Ardeshir Phirozshaw Murzban**

[A.I.R. 1940 Bom. 42], with the further contention that the Bombay High Court judgment is binding on this Court. Similarly the reliance was also made upon a Sikkim High Court decision in **Gopalji Prasad Vs State of Sikkim [1981 Cri. LJ 60]**. In order to assert that right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution can be used by the mode of Internet use, he relied on recent decision of the Apex Court in case of **Shreya Singhal Vs Union of India [(2015) 5 SCC 1]** wherein the Supreme Court struck down Section 66-A of the Information Technology Act as putting unreasonable restriction on the right to free speech. The said decision was in different context where vires of Section 66-A was considered by the Apex Court and it was held that the said provision was arbitrary and putting excessive restrictions on the enjoyment of fundamental right to free speech.

15. The Notification issued by the Commissioner of Police, City of Ahmedabad, in the present case was in the background of a specific fact situation which in view of the said competent authority was prone for aggravation leading to public tranquility and public safety and the blocking of internet mobile facility was considered to be an appropriate action. Yet another decision in **Ramlila Maidan Incident, In RE [2012 (5) SCC 1]** was relied on by learned advocate for the petitioner to vehemently contend that in that case the Supreme Court came down heavily on the authorities for invoking Section 144 of the

Code. Learned advocate relied on various paragraphs and attempted to submit that Section 144, Cr.P.C. could not be invoked to smother the enjoyment of fundamental right. The facts of that case were entirely different where the order was passed under Section 144 of the Code at 11.30 p.m. and the officers of police were shown to have unleashed *lathi charge* on the persons and devotees who were sleeping at the Ramlila Maidan. The Supreme Court found that the action of the policemen was brutal and arbitrary. It was in that background of fact situation that the Supreme Court did not approve issuance of order under Section 144 of the Code.

16. In view of the above, we do not find any case made out for interference. Hence, the petition is dismissed.

(JAYANT PATEL, ACJ.)

(N.V.ANJARIA, J.)

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