

March 10, 2022
Sl. No.327
Court No.1
SG/s.biswas
PA(SS)

WPA (P) 104 of 2022

Ashlesh Biradar

vs.

The State of West Bengal

(Through Video Conference)

Mr. Ranjan Bachawat, Senior Advocate
Mr. Manoj Tiwari,
Mr. Sarosij Dasgupta,
Ms. Vrinnda Bhandari,
Mr. Shwetank Ginodia,
Mr. Tanmay Singh,
Mr. Abhinav Sekhri,
Mr. Satyaki Mukherjee, Advocates

... for the petitioner

Mr. S. N. Mookherjee, Id. AG
Mr. Samrat Sen, Id. AAAG
Mr. Anirban Ray, Id. GP
Mr. Debashis Ghosh,
Mr. Nilotpal Chatterjee, Advocates

... for the State

This public interest petition challenges the order dated 03rd of March, 2022 issued by the Additional Chief Secretary, Home & Hill Affairs Department, Government of West Bengal temporarily suspending the internet service in data related message or class of messages to or from any person or class of persons relating to any particular subject, brought for transmission by or transmitted or received by any telegraph within the ambit of the India Telegraph Act, 1885 within the specified blocks/police stations. The order has been made effective from 11 A.M. to 3:15 P.M. on the specified date. The order is applicable to various blocks/areas of as many as seven districts of the State of West Bengal.

Challenging the above order learned Counsel for the petitioner has submitted that on account of this order bank to bank payments, online clearance and other business activities through internet and even online teaching classes are affected and that though no clear reason has been mentioned in the order but apparently the impugned order has been issued to control cheating in the Madhyamik Examination, therefore, it does not satisfy the test of proportionality. He has further submitted that if the State authorities apprehend cheating in the examination through WhatsApp and other means then they can prohibit use of mobile phones in the examination centres, put jammers, increase vigilance, enhance security etc., but they cannot be permitted to suspend internet service infringing the constitutional right of general public. He has also submitted that the reason assigned in the impugned order is vague, it does not satisfy the requirement of Section 5(2) of the Indian Telegraph Act and that the impugned order is without jurisdiction. In support of his submission he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Anuradha Bhasin vs. Union of India and others** reported in **(2020) 3 SCC 637** and in the matter of **Secretary and Curator, Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity** reported in **(2010) 3 SCC 732** and in the matter of **People's Union**

For Civil Liberties (PUCL) vs. Union of India and Another reported in **(1997) 1 SCC 301**.

Learned Advocate General supporting the impugned order has submitted that the Review Committee has duly approved the order in terms of Rule 2(6) of the Rules of 2017 and that the order has been issued to prevent cheating in the sensitive areas during the Madhaymik Examination, 2022. He submits that the order satisfies the test of proportionality because there is no restriction imposed on voice calls, SMS and newspaper communication but the order is confined to suspension of only data related messages or calls for transmission in only some sensitive areas of seven districts of the State. He has submitted that the impugned order has been issued in due exercise of power by the competent authority.

Having heard the learned Counsel for the parties and on perusal of the record, we have noticed that the impugned order for suspension of internet service in specified districts has been issued by the Additional Chief Secretary, Home & Hill Affairs Department, Government of West Bengal under Section 144 of the Cr.P.C. But under Section 144, District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate empowered by the State Government only have the jurisdiction to pass the order and once such order is passed by the

District Magistrate then the State Government by notification can extend it upto six months. In the present case, the Additional Chief Secretary, Home & Hill Affairs Department, has exercised the power under Section 144 without there being any order of the District Magistrate, hence prima-facie the impugned order under Section 144 of the Cr.P.C is without jurisdiction.

Learned Advocate General has placed reliance upon the decision of the Hon'ble Supreme Court in the matter of **Mohd. Shahabuddin vs. State of Bihar and others** reported in **(2010) 4 SCC 653** in support of his submission that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision. But that judgment does not carry the case of the State any further because not only the order has been passed under Section 144 of the Cr.P.C. but the order has been passed considering the requirements of Section 144 of the Cr.P.C, therefore, exercise of power and reason for such exercise of power both are prima-facie unsustainable.

In the impugned order, a reference has been made to Rule 2(1) and amended Rule 2(A) of the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. The Rules of 2017 have been issued with the object to regulate the temporary suspension of telecom services due to public emergency

and public safety. In terms of Sub-Rule 6 of Rule 2, the order must be in accordance with the provisions of Sub-Section 2 of Section 5 of the Indian Telegraph Act, 1885 which also provides for issuance of order on occurrence in public emergency or in the interest of public safety by the State Government or the authorized officer. Hon'ble Supreme Court in the matter of **People's Union For Civil Liberties (PUCL)** (supra) has examined the scope of Section 5(2) and has held that:

“**28.** Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. “Occurrence of any public emergency” or “in the interest of public safety” are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression “public safety” means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the

interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

29. The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.”

Till now no cogent material has been placed before us justifying such internet suspension order on the ground of “occurrence of any public emergency” or “in the interest of public safety.”

Hon'ble Supreme Court in the case of **Anuradha Bhasin** (supra) has considered the scope of Rule 2(2) of the Rules of 2017 by holding that such an order must be a reasoned order and reasoning of the authorities and officers should indicate unavoidable circumstances necessitating passing of such an order. It has been so held in paragraph 94 of the judgment as under:

“94. Rule 2(2) is also extremely important, as it lays down twin requirements for orders passed under Rule 2(1). First, it requires that every order passed by a competent authority under Rule 2(1) must be a reasoned order. This requirement must be read to extend not only to orders passed by a competent authority, but also to those orders passed by an authorised officer which is to be sent for subsequent confirmation to the competent authority. The reasoning of the authorised officer should not only indicate the necessity of the measure but also what the “unavoidable” circumstance was which necessitated his passing the order. The purpose of the aforesaid rule is to integrate the proportionality analysis within the framework of the Rules.”

In the present case, the impugned order mentions about some intelligence reports but in the order of the Review Committee no such intelligence report has been mentioned nor any such report has been brought to the notice of this Court. The order of the Review Committee discloses that the impugned order has been issued to ensure the conduct of Madhamik Examination in free and

fair manner and to ensure eradication of unlawful and illegal means during the examination through technology of transmission of messages through transfer of data but the impugned order does not contain any such reason. The impugned order states that the internet services have been suspended to prevent obstruction, annoyance, or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance or the public tranquility, or a riot or any affray, but the reasons mentioned in the order of the Review Committee do not support it nor any material has been placed in support of such reasons.

The affidavit in opposition by the Additional Chief Secretary dated 10th of March, 2022 reveals that a communication was sent by the President, West Bengal Board to discontinue internet services during Madhyamik Pariksha on the ground that in the previous examinations in 2019 and 2020 some WhatsApp groups or Tiktok App had adopted unfair means and 19 examinees were caught with mobile phones in the hall in Bagdogra. The said letter was forwarded by the Principal Secretary to the Additional Secretary, Government of West Bengal on 28.02.2022 and merely on that basis the internet service has been suspended.

We take note of the submission of the Counsel for the petitioner that suspension of internet service by the

impugned order has affected the banking transaction, various other business activities and even online teaching classes in the area concerned and that other effective measures can be taken by the State to prevent use of unfair means and cheating in the Madhyamik Examination without affecting the public at large.

The order of the Division Bench dated 28th November, 2018 passed by the High Court of Judicature for Rajasthan at Jodhpur in **D.B. Civil Writ No. 10304/2018** in the case of **Dhirendra Singh Rajpurohit vs. State of Rajasthan** has been placed before us wherein a similar issue had come up in the PIL and the State had placed the communication on record issued by the Special Secretary of Home directing the Divisional Commissioners of various Divisions that no order suspending the internet services should be issued in future during the examination.

Hon'ble Supreme Court in the matter of **Secretary and Curator, Victoria Memorial Hall** (supra) has already held that administrative and judicial order must be supported by reasons and reasons is the heartbeat of every conclusion.

Though learned Advocate General has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Chairman, All India Railway Recruitment Board and Another vs. K. Shyam Kumar**

and Others reported in **(2010) 6 SCC 614** but that was a case where the reasons assigned in the impugned order was supplemented by subsequent material to suspend the cancellation of examination on the serious allegation of mass copying, but the said judgment was rendered in different fact situation.

Hence, considering the reasons mentioned above and prima facie conclusion that the impugned order under Section 144 of the Cr.P.C has been passed without authority of law and taking note of the requirement of Section 5(2) of the Indian Telegraph Act, 1885, the Rules of 2017, the judgment of the Hon'ble Supreme Court in the case of **Anuradha Bhasin** (supra) and **People's Union For Civil Liberties (PUCL)** (supra) and also the fact that the reason now put forward for issuing the impugned order are not contained in the impugned order and that the State has various other means available to prevent use of unfair means in the Madhyamik Examination and that the prima-facie test of proportionality is not satisfied, we are of the view that a case of grant of interim relief is made out.

Hence, we direct that the operation of the impugned order dated 03rd of March, 2022 shall remain stayed until further orders. We make it clear that this order will not come in the way of the State authorities in taking other

appropriate effective steps to prevent use of unfair means in the Madhyamik Examination.

Learned Counsel for the State is permitted to file affidavit-in-opposition within two weeks and affidavit-in-reply, if any, may be filed within two weeks thereafter.

List on 06th of April, 2022.

[Prakash Shrivastava, C.J.]

[Rajarshi Bharadwaj, J.]