

# Power of Police and Magistrate Under Section 144 of the Code of Criminal Procedure: a Critical Analysis in the Light of Recent Judicial Pronouncements

Ms. Trisha Mittal & Garima Upadhyay<sup>1</sup>

## Abstract

*Section 144 of the Code of Criminal Procedure is imposed in cases where there is a need to immediately avoid or to provide for speedy remedy for obstruction, annoyance or injury to any person lawfully employed. It may be imposed in cases of danger to human life, health or safety. It is relevant in all cases of disturbance of public tranquillity, riot or an affray. It is not an exaggeration to say that Section 144 is one of the most popular legal provisions among the common masses of the nation – perhaps its implications are so dreadful. Section 144 has been interpreted many times by the judiciary. There are certainly many lapses in the text of the provision. However, with judicial caveats issued from time to time along with certain suggestive guidelines, the effectiveness of Section 144 has been made fairer than just a scary imposition of curfew. However, despite such guidelines and provisional suggestions, there are incidences of misuse of Section 144. Are these really incidences of 'misuse' as per previous judicial pronouncements? What is the stand of judiciary on execution of orders under Section 144 in the recent past? What is the scope and ambit of true powers of Police and Magistrate under Section 144? These are some of the questions that the following paper looks forward to address. The paper entails with itself a deep analysis of relevant and contemporary judicial pronouncements and a critical appreciation on how the best interests of the public have been preserved despite the turbulent times.*

**Keywords:** Code of Criminal Procedure, Police; Magistrate; Judiciary; Judicial Pronouncements.

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<sup>1</sup>Author, Ms. Trisha Mittal, Assistant Professor of Law, National Law University Nagpur;  
Co-author, Garima Upadhyay, III Year, B.A.LL.B. (Hons.), National Law University Nagpur.

## Introduction

A wise man had once said, "Precaution is better than cure." Criminal law has imbibed the teaching of this principle by providing for remedies not just for instances where a wrong-doing or a crisis has already occurred but also for contingencies. An order under Section 144 falls under this preventive and precautionary measure against disturbance of public order and tranquillity.

Section 144 is imposed in cases where there is a need to immediately avoid or to provide for speedy remedy for obstruction, annoyance or injury to any person lawfully employed. It may be imposed in cases of danger to human life, health or safety. It is relevant in all cases of disturbance of public tranquillity, riot or an affray.

The effect of Section 144 is curtailment of certain fundamental rights pertaining to freedom of speech, expression, movement and assembly. It has been a noted principle of law that whenever a fundamental right is restricted, there should have been certain reasonable grounds for the same. Under what conditions imposition of Section 144 would be considered reasonable has been laid down by the courts through varied case laws.

The following paper is an analysis of power of Police and Executive Magistrate under Section 144. This has done by minutely analysing various case laws that have existed over time. While it is a herculean task to analyse each and every case, the author has attempted to skim through all the important judgements which have presented substantial literature and laid down guidelines to test if imposition of Section 144 in a particular case is valid or not. The analysis of power of Police under Section 144 also involves scrutinizing the consequences that shall follow upon passing of an Order under Section 144 and the manner in which the executive order is carried out. Detailed analysis has been done of *Ramlila Maidan*<sup>2</sup> case in this regard.

This shall be followed with a case study on the situation in Jammu and Kashmir and concluding if the imposition of Section 144 and the manner in which it is executed is valid, legal and rational or not.

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<sup>2</sup> In *Re Ramlila Maidan v. Home Secretary, Union of India and Ors.*, (2012)5SCC1 (India).

## Interpretation of Section 144

At the outset, it is important that Section 144 is produced in order make convenient the job of the author as well as the reader. Section 144 of the Code of Criminal Procedure is an elaborate provision and it is put forth as follows –

*“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 tranquillity, 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.”<sup>3</sup>*

Regardless of however extensive it might seem in length and substance, it is one of the most popular legal provisions in the common mass. Even those belonging to the most remote and rural areas of the nation are very well acquainted with what Section 144 entails. “Arrey! 144 lag gaya”, is not such an incomprehensible statement to anyone regardless of their genders, educational qualification or urban exposure.

Section 144 provides for ‘powers to issue orders in urgent cases of nuisance or apprehended danger’. Orders under this Section can be issued either by a District Magistrate or a sub-divisional Magistrate or any other Executive Magistrate accordingly empowered by the State Government. It should be noted how the term ‘opinion’ has been used by the Legislature. It is indicative of the fact that the very mind of the Magistrate concerned must conclude the facts and circumstances such that he renders immediate prevention and speedy remedy desirable in the cases of –

- (i) Obstruction, annoyance or injury to any person lawfully employed;
- (ii) Danger to human life, health or safety;
- (iii) Disturbance of the public tranquillity, or a riot or an affray.<sup>4</sup>

If any of the above following circumstances require an immediate preventive or precautionary measure in the ‘opinion’ of the Magistrate so concerned then he may issue an order under Section 144.

It should also be noted that the life of an order issued under this Section is only up to a period of two months. However, if the State Government deems that in order to prevent danger to human life, health or safety or to avoid a riot or an affray or to maintain public tranquillity it is necessary for the issued order to exist for a prolonged time then it may direct the Magistrate that an order made by him to effect under this Section shall remain in force for a period not exceeding six months from the date on which the order first made by the Magistrate would have expired.

In simpler terms, suppose there arises a situation in neighbourhood such that the Magistrate considered it necessary to issue an order under this Section. If the order comes into effect on, say, 15<sup>th</sup> of February, 2021 then according to Section 144(4), this

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<sup>3</sup> Code of Criminal Procedure 1973 Section 144 Parliament of India 1973

<sup>4</sup> Srishti Ojha, *Section 144: Before and After*, INDIA LEGAL, (Feb. 7, 2021, 01:06 AM) <https://www.indialegallive.com/top-news-of-the-day/news/section-144-before-and-after/>.

particular order can stay into effect for maximum two months i.e. up to 15<sup>th</sup> of April, 2021. However, if the situation is not brought into control or despite the order, the State Government deems it appropriate to extend the order in order to preserve human safety or health or public tranquillity then the State Government may, by notification, direct the Magistrate to issue an order for six months. This period of six months would be calculated from the date of issuance of the previous or original order. So, this period of six months would be calculated from 15<sup>th</sup> of February, 2021 and would extend up to 15<sup>th</sup> of August, 2021. So, it can be concluded that an order under Section 144 can stay into effect for a maximum of eight months.

The effect of Section 144 is curfew. It prohibits gathering of four or more people in the concerned area. People are instructed to stay indoors. Complete restriction is put on traffic as well. Markets, schools, colleges and offices remain closed under the curfew. Only essential services are allowed to run that too on prior notice.<sup>5</sup>

The effective interpretation of Section 144 shall be examined through various case laws. It shall be seen if all the answers have been provided by the judiciary effectively over time.

### **Landmark Judgements on Section 144**

One of the earliest judgements on Section 144 is *Madhu Limaye v. Sub-Divisional Magistrate*<sup>6</sup>. In this particular case, constitutional validity of Section 144 was challenged on grounds of violation of Article 19(1)(a), (b), (c) and (d). Clauses (a) to (d) deal with freedom of speech and expression; to assemble peacefully and without arms; to form associations or unions; and to move freely throughout the territory of India respectively. Although these freedoms appear to be absolute however, exercising these freedoms absolutely is not possible and there are restricted by certain exceptions. Other sub-sections to Article 19 deal with these exceptional restrictions. The question before the Court was whether Section 144 could be considered to be a part of these exceptions and whether the concerned fundamental rights under Article 19 be violated by Section 144 of the Code.

It should be noted that the answer to this question was already resolved by the Supreme Court in the case of *Babulal Parate v. State of Maharashtra*<sup>7</sup>. The Court, in this case, held that Section 144 is definitely intra vires to the Constitution. However, the confusion emanates from the varying degrees of the terms that have been used so far.

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<sup>5</sup> Anonymous *What is Section 144*, BUSINESS STANDARD, (Feb. 15, 2021, 07:52 PM) <https://www.business-standard.com/about/what-is-section-144#:~:text=Section%20144%20of%20the%20Criminal,booked%20for%20engaging%20in%20rioting.>

<sup>6</sup> *Madhu Limaye v. Sub Divisional Magistrate* 1971AIR2486.

<sup>7</sup> *Babulal Parate v. State of Maharashtra* 1961AIR884.

The Court referred to 'in the interest of maintenance of public order' or 'duty of maintenance of law and order'. However, the terms used in the second clause to Article 19 are 'in the interest of public order'.<sup>8</sup> This difference in the terms used led to varied interpretation and the same had been highlighted through the case of *Ramesh Thappar v. State of Madras*<sup>9</sup>, *Brijbhushan v. State of Delhi*<sup>10</sup> and *Dr. Ram Manohar Lohia v. State of Bihar & Ors*<sup>11</sup>. Hence, the effect of the judgement given by the Honourable Court in *Babulal Parate*<sup>12</sup> had lost its significance in this regard.

The Court through the case of *Madhu Limaye*<sup>13</sup> shunned the doctrine of 'preferred positions'. It was held that until the Court declares a certain law to be in conflict with a fundamental right, the same would continue to exist. Further, the burden is on the person who so contends that a particular law is void has to prove that such law cannot be maintained under Article 13(1). The burden is not on the State to prove the reasonableness of the restriction.<sup>14</sup>

In respect of the varied terms used by the Court, it was held that the expression 'in the interest of public order' as given under Article 19(2) is much wider in scope than 'maintenance of public order'. A law may not be enacted to directly to maintain public order yet it may be designed to take into its consideration the 'interest of public order'.

The gist of the action under Section 144 is the urgency of the situation and its efficacy is in its likelihood to prevent occurrences of some harmful incidents.<sup>15</sup>

It must also be noted that it is 'public order' that has been referred to under Section 144. It is for the sake of maintaining 'public' order that a curfew under Section 144 can be enforced. It was through the case of *Dr. Ram Manohar Lohia v. State of Bihar & Ors*<sup>16</sup>. That this issue came into light. It was held that a quarrel between two drunkards cannot be held to violate public order and application of Section 144 is irrelevant and unwarranted in such cases.

However, the quarrel between two persons may become an issue of public order if they are fighting for rival communities or sects of the society. In such cases, even a simple quarrel may give way to a riot or an affray. Therefore, if to the satisfaction of

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<sup>8</sup> *Babulal Parate v. State of Maharashtra*, 1961AIR884 (India).

<sup>9</sup> *Ramesh Thappar v. State of Madras* 1950AIR124.

<sup>10</sup> *Brijbhushan v. State of Delhi*1950AIR129.

<sup>11</sup> *Dr. Ram Manohar Lohia v. State of Bihar & Ors* 1966AIR740.

<sup>12</sup> *Babulal Parate v. State of Maharashtra* 1961AIR884.

<sup>13</sup> *Madhu Limaye v. Sub Divisional Magistrate* 1971AIR2486.

<sup>14</sup> *Madhu Limaye v. Sub-Divisional Magistrate*, 1971AIR2486 (India).

<sup>15</sup> Rev. K.N. CHANDRASHEKHARAN PILLAI, R.V. KELKAR, CRIMINAL PROCEDURE, (Easter Book Company, 6<sup>th</sup> ed., 2014).

<sup>16</sup> *Dr. Ram Manohar Lohia v. State of Bihar & Ors*. 1966AIR740.

the Magistrate it is found that a precautionary measure needs to be taken in order to maintain public order and tranquillity then Section 144 may be enforced.<sup>17</sup>

In order to determine whether or not the restrictions under Section 144 are reasonable or not and whether they reasonably curtail the enforcement of fundamental rights, 'test of proportionality' should be used. This test was first elucidated through the case of *Modern Dental College and Research Centre & Ors. V. State of Madhya Pradesh & Ors.*<sup>18</sup> And then later in the case of *K.S. Puttaswamy v. Union of India*<sup>19</sup>.

In the case of *Modern Dental College*<sup>20</sup>, a three-step test of proportionality was laid down –

- (i) PURPOSE: Such curtailment of Fundamental Rights must be brought to achieve a proper purpose.
- (ii) RATIONAL NEXUS: The measures taken must be rationally and reasonably connected to the very purpose itself.
- (iii) ABSOLUTE NECESSITY: Such measure must be the only and absolutely necessary to achieve the purpose.<sup>21</sup>

Later in 2017 when the case of *K.S. Puttaswamy*<sup>22</sup> was decided, a four-fold test of proportionality was provided by the Court –

- (i) LEGITIMATE GOAL: A measure restricting the exercising of Fundamental Rights must be brought only to achieve a legitimate goal.
- (ii) FURTHERANCE OF LEGITIMATE GOAL: The measure taken should be a suitable means of furthering the legitimate goal.
- (iii) NECESSITY: There must be not be any less restrictive but equally effective possible alternative. The impugned measure must absolutely be necessary.
- (iv) BALANCING: The measure should not have a disproportional effect on the right holder. Positively speaking, the effect must be proportional to the necessity of legitimate goal.<sup>23</sup>

The above discussed cases give a rough idea on the substance and consequences of Section 144. They also out forth the tests to determine whether or not the restrictions placed under Section 144 are reasonable.

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<sup>17</sup> Dr. Ram Manohar Lohia v. State of Bihar & Ors, 1966AIR740 (India).

<sup>18</sup> Modern Dental College And Research Centre & Ors v. State of Madhya Pradesh & Ors. (2016)7SCC353.

<sup>19</sup> K.S Puttaswamy v. Union Of India (2017)10SCC1.

<sup>20</sup> Modern Dental College And Researxh Centre & Ors v. State of Madhya Pradesh & Ors. (2016)7SCC353.

<sup>21</sup> Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors., (2016)7SCC353 (India).

<sup>22</sup> K.S Puttaswamy v. Union Of India (2017)10SCC1.

<sup>23</sup> K.S. Puttaswamy v. Union of India, (2017)10SCC1 (India).

However, the discussion on the power of police and executive magistrate has yet not been done. The same shall follow in the following section.

### **Power of Police and Executive Magistrate Under Section 144**

After analysis of the landmark judgements and making literal interpretation of Section 144, most of the facets of the law concerning precautionary and preventive measures is clear. However, a precise note needs to be made on power of Police and Magistrate precisely.

This issue has very well come to light in *Re Ramlila Maidan Case*<sup>24</sup>. One of the landmark judgements of the Supreme Court, this particular case deals not just with the mere interpretation of the law but also the power and duties of various actors and parties to such law. It is almost impossible to reproduce the exact amount of jurisprudence that can be extracted from such an important judgement. However, the author will make an attempt to reiterate the fact, state the issues and underline the stance made by Court on the same. Though, there are many facets to the judgement. This paper would deal only with the relevant portion thus highlighting the Court's interpretation and literature on Section 144.

The judgement which was delivered in early 2012 deals with factual matrix the maze for which started laying in 2008 itself. It was in 2008 when the Yoga icon Baba Ramdev raised the issue of black money in public. According to him, the black money outside the country was estimated to be Rs. 400 lakh crore. These jaw dropping figures led to increase in mass consciousness.

After a few years, it was announced that an Anti-Corruption Rally would be held at Ramlila Maidan, New Delhi on 27<sup>th</sup> of February, 2011. It was anticipated that more than a lakh people would participated and they actually did. These lakhs of persons included Baba Ramdev, Acharya Balkrishna, and Anna Hazare to name a few of them.

Please note that there are many event running parallel to each other. When on one hand such a huge agitation began which caught the attention of the public, media, government etc. then on the other hand, things seemed to be a normal course to many. Business continued to operate. In exercise of one such business, the President of Bharat Swabhimani submitted an application to the MCD proposing to take Ramlila Maidan on rent for holding a yoga training camp for four to five thousand people from 1<sup>st</sup> of June, 2011 to 20<sup>th</sup> of the same month. The said application was made on 20<sup>th</sup> of April, 2011. An application was also submitted to the DCP (Central District) seeking permission for holding the Yoga Training Camp for which the permission was granted vide a letter dated 25<sup>th</sup> of April, 2011. However, this permission was subject to certain

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<sup>24</sup> In *Re Ramlila Maidan v. Home Secretary, Union of India and Ors.*, (2012)5SCC1 (India).



terms and conditions. Condition was put on the number of persons that shall be called for the training and that there should be normal flow of traffic and permission from the land owning agency must also be sought. Also, sufficient number of volunteers is to be deployed at the venue. It was also said that all the instructions by the concerned Police authorities have to be complied with failing which the permission can be revoked any time. There were several other vigorous and strict terms and conditions which do not require a mention here.

As mentioned before, various incidents were running simultaneously. After the successful completion of Anti-Corruption Rally on 27<sup>th</sup> of February, 2011, Baba Ramdev wrote a letter to the then Prime Minister Dr. Manmohan Singh on 4<sup>th</sup> of May, 2011 stating his intention to go on fast as a protest against the government's inaction on the issue. Several attempts were made by the government to negotiate with Baba Ramdev but all in vain. This process of negotiation began from 19<sup>th</sup> of May, 2011 when the Prime Minister wrote to Baba Ramdev asking him to renounce his fast. The Finance Minister also wrote to him in this regard mentioning the steps taken by the government.

These attempts were unsuccessful and finally on 23<sup>rd</sup> of May, 2011 Baba Ramdev also submitted an application for holding a dharna at Jantar Mantar on 4<sup>th</sup> of June, 2011. The permission was granted, however, with the conditions that the same shall be conducted with 'limited gathering' from 0800 Hours to 1800 Hours. Later on 26<sup>th</sup> of May, 2011 it was informed that the protestors accompanying Baba Ramdev must not exceed two hundred.

Now, please note that there were two major event that were to coincide on relatively same dates on the same venue – fast by Baba Ramdev and the Yoga Training Camp by the President of Bharat Swabhiman Trust. The Special Branch of Delhi Police through its intelligence reports gathered that about 30,000-35,000 supporters of Baba Ramdev and around a lakh Yoga participants would be gathering despite the terms and conditions imposed on both the parties.

Baba Ramdev arrived at Delhi Airport on 1<sup>st</sup> of June, 2011. He was received by four senior ministers of the then UPA government. Various rounds of negotiations began from then and there but each one of them failed for their own reasons.

Baba Ramdev continued with his protest with his limited supporters for which he had permission. However, despite the assurance given by Bharat Swabhiman Trust, the event was converted into Anshan the crowd at Ramlila Maidan swelled to fifty thousand persons. No Yoga training was held for the whole day. Around 1300 Hours, Baba Ramdev decided to march to Jantar Mantar for holding a dharna with the entire gathering. Since, Jantar Mantar could not accommodate such a large gathering, the

permission granted on 24<sup>th</sup> of May, 2011 was withdrawn. At around 2315 Hours, Centre's emissary reached Baba Ramdev at Ramlila Maidan with the letter assuring to declare the black money outside the nation as national asset. This emissary was not an Ordinance like Baba Ramdev had wanted the government action to be and hence, it was clear that he would continue his protest. Soon after, in a matter of about 15-20 minutes, a team of Police led by Joint Commissioner of Police arrived at Ramlila Maidan and stated that the permission has been revoked and if the protest is continued, he would be detained.

Later at about 0030 Hours, around total of 5000 personnel from CRPF, RAF and Delhi Police Force reached Ramlila Maidan, while the protestors were peacefully sleeping. Around half an hour later, the Police reached the platform to take Baba Ramdev out. This action of the Force was resisted by his supporters. Soon after, Baba Ramdev jumped into the crowd and his supporters formed barricade to protect him. Tear gas shells were fired and all the protestors were driven out at 0200 Hours. However, by that time Baba Ramdev had fled the Maidan. He was apprehended near Ranjit Singh Flyover early in morning.

The Supreme Court took suo moto cognizance over the matter. The court struck down the law as well the State action in exercise of its power of judicial review.

The Court held that such State action from Police whether taken independently or in consultation with the Ministry of Home Affairs was nothing but a sheer abuse of power and show of arbitrariness. The restriction on the public was unreasonable in the eyes of law. And such restriction on movement and expression cannot be saved under the Code.

Further, the factual matrix don't indicate a sense of emergency which gave rise to such a prompt move on the part of the State. The Police had failed to establish that the circumstance was such that it required immediate action on their part that too of such a nature.

Certain fundamental rights have been provided for under the Constitution which cannot be exercised absolutely. However, restrictions placed on their exercise, if any, have to be reasonable and proportional. If not, then such restriction can be held to be arbitrary, irrational and in breach of principle of natural justice.

It was indeed right that both the parties – Baba Ramdev as well as the Trust sought the permission of respective State authorities including the Police to carry out their respective actions. Such seeking of permission cannot be considered unnecessary in law. However, it is at this point that the Court highlights the powers and duties of Police in such circumstances.

The court held that it is the duty of the Police to maintain social order and public tranquillity and therefore, they should have a say in all the organizational matters especially those related to dharnas, processions, agitations or rallies of any kind. All these activities have the potent to disturb public order and tranquillity. However, the court held that the police while exercising its power of consent in allowing a particular dharna, procession, agitation or rally must frustrate the constitutional principle. It must take into its consideration the Right to Freedom of speech and expression as guaranteed under Article 19. And if it imposes any restriction on exercise of Article 19, then it must do so in a just, fair and reasonable manner.

The Court held that the Executive does have the power to restrict the exercise of constitutional rights but such power must be used sparingly and very cautiously. The restriction must be in the interest of public and such power must be exercised to give way to fundamental right rather invalid and irrational suppression of the said right.

Further, the Court held that the President of Bharat Swabhiman Trust, who was Respondent No. 4 in the given case was guilty of contributory negligence. It was held by the Court that once Section 144 was set into motion, it was the legal and moral duty of the Trust and its members to co-operate with the authorities in full implementation of the same. Further, by the virtue of the social influence and stature that Baba Ramdev carried, it was his duty to request the gathering to disperse peacefully. He ought not have insisted on continuing the rally.

The Court observed that it is, to an extent, obvious that a right to freedom and liberty cannot exist without certain reasonable restrictions on it. However, at the same time, it is unimaginable that such right exists without a corresponding duty to it. The confrontation of Police and other authorities with the general public could have been avoided if those with the power to influence acted in furtherance of their fundamental duties.

Court on one hand reprimanded Baba Ramdev and the Trust to have acted in negative of their duties but it also identified that Section 144 has to be used only in emergent situations. The material facts of such situation should be of such a nature which indicate a disturbance to public order and tranquillity.

In the present set of facts, the demonstrators were simply sleeping and it was midnight. There seemed to be no such need of imposing Section 144 at such an odd hour with such a lethargic show of energy on part of the general public. Even if an order under Section 144 was given effect, certain permissible number of persons still had permission to stay at the Ramlila Maidan as the land owning agency – MCD – had not fully revoked its permission and the same was valid till 20<sup>th</sup> of June, 2011. Hence, it is quite evident that the action of Police was nothing but an abuse of power.

The Court further went on to observe that the act of the Police authorities was not illegal per se as it was not a mala fide action, especially if taken in due consultation with the Ministry of Home Affairs. Since, it was not a mala fide action, the legality of the act cannot be put into question. The Police were right in confronting with the public, if an order under Section 144 has come into being. And it was certainly the duty of the public to cooperate with them.

The Court referred to 'threat perception' and 'care perception'. It was observed that present case is nothing but an example of trust deficit between the governing and the governed. It held that 'threat perception' is a necessary ground for passing an order under Section 144 but such revoking of permission or passing of order has to be integral with 'care perception'. Care must be taken of all the mandatory requirements which include consideration of all the Guidelines, Standing Order and Rules. Also, a proper dispersement plan needs to be made before an order under Section 144 is executed or brought into action.<sup>25</sup>

Ramlila Maidan Case has been one of the most important and most elaborate judgements on Section 144 so far. The substance of the judgement is so self-sustaining that it can by itself take care of many law and order incidents to come.

### **Jammu and Kashmir: a Case Study**

Jammu and Kashmir – the crown of India, the Heaven on Earth, the eternal tourist destination, the significant birthplace of many of India's tradition and values – then State and now and Union Territory has been a hotspot, if that is not an exaggeration to say, for imposition of Section 144. Soon after scrapping of Article 370 and 35-A of the Constitution which guaranteed special status to the State of Jammu and Kashmir, the state has been under constant State surveillance.

An important precautionary measure to maintain public order and tranquillity was imposition of Section 144. However, such imposition comes with limitations of its own. In the given section, the validity of imposition of Section 144 in the particular area would be tested on the basis of literature provided by the Court in the *Ramlila Maidan Case* and other general principles of law. For this, reference would also be made to the judgement provided by the Apex Court through the case of *Anuradha Bhasin v. Union of India* and other data available from newspaper reports.

*Anuradha Bhasin* shall always be one of the most important judgements – because the Court interpreted Section 144. This judgement also holds significance because it came after a time when the principle of proportionality was established by the court through *K.S. Puttasamy*. It was to be seen how the Supreme Court would hold a balance

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<sup>25</sup> In Re Ramlila Maidan v. Home Secretary, Union of India and Ors., (2012)5SCC1 (India).

between the liabilities on the State while curtailing fundamental rights of the citizens and its duties in ensuring public peace and order. The question to be sought is whether the Supreme Court won the battle on establishing the balance or did it have to give a very one-sided order for greater good of either the State or the citizens.

The Court with regard to Section 144 held the following –

1. The first issue with imposing orders under Section 144 was the mode and manner in which these orders were issued. It was alleged that maximum of the population was not even aware as to when and how the orders were issued. This was because the telecommunication and the internet were suspended. The Court held that it is the duty of the magistrate concerned to make relevant considerations. The Magistrate is duty bound to balance the rights and restrictions based on the principles of proportionality and thereafter apply the least intrusive measure. Orders passed under Section 144 have direct effect on fundamental rights of the citizens. Hence, any order passed thereto must be well thought of and should be done after making due considerations. It must be used in bona fide and reasonable manner. It must be exercised only to preserve law and order, not to take advantage over it.
2. The second issue was that if Section 144 is imposed, and imposed often then it may result into suppression of people's rights to express their discontent against the government and other issues. Hence, orders passed under Section 144 must ensure that it does not suppress legitimate expression of opinions and exercise of any democratic rights. Hence, there must be sufficient evidence to show incitement of violence and or threat to public safety. In absence of evidence in this regard, Section 144 cannot be mindlessly used to suppress what the very Constitution guarantees.
3. The third issue was with regard to the nature of Section 144 – whether it was purely preventive in nature or was also remedial. The Court observed that Section 144 carried with itself both the preventive as well as remedial connotation. Hence, the powers under Section 144 can be used not just when there is an imminent danger but also an apprehension for the same. However, the danger contemplated must be of an 'emergency' nature such that there is no remedy available to it but to suspend the rights as under Section 144.
4. The fourth issue was whether repetitive orders can be passed in order to deviate the threat or danger, keeping in purview the historical background of Kashmir and threats associated with it. The Court held that even if consideration of historical background is made, even then repetitive orders cannot be justified. As said,

Section 144 has direct and severe impact on the rights of citizens and hence, repetitive orders under the same would be nothing but an abuse of power.

5. The fifth issue was regarding the number of persons that an association must have in minimum for Section 144 to apply on them. The Court held that Section 144, by literature, is silent on this particular fact. Hence, it can be passed against single person as well as groups of persons. Thus, Section 144 can be imposed against an individual as well.
6. The sixth issue was regarding the duration passed for which the orders could be passed. The Court clarified that the very language of Section 144 is sufficient in this regard. There is a two-month time limit for the Magistrate, however, the State Government may extend the issuance of such an order for up to six months. This was not it. The Court, further, issued a caveat that an order under Section 144 must be issued for least possible time and this cap of minimum time must be driven by principles of reasonableness and proportionality.
7. The seventh issue was regarding an application sent for modification of order issued under Section 144. The Apex Court held that in all such cases where an application is sent to the Magistrate for reconsideration or modification of an order under Section 144, such concerned Magistrate must act in judicial capacity and grant personal hearing to the aggrieved persons. Further, he must also provide for reasons for rejecting an application or any order thus passed therein.
8. Yet another issue was regarding the difference between 'law and order' and 'public order'. The Court remarked that 'law and order', 'public order' and 'security of State' are distinct legal terms. The Magistrate must note the difference between these. The Court explained this by an example quoting that if two families quarrel over irrigation water then it may be a situation of 'law and order' however if the communities of the two families to which they belong to enter into a fight which may or may not emanate from the fight on irrigation would lead to disturbance of 'public order'.
9. One of the most important issues that the Court dealt with was the difference between the fight against terror and restoration of law and order. The Court remarked that the tradition definitions of warfare have taken a drift and recent terror developments aren't limited to territorial disputes. Hence, Section 144 cannot be invoked for purposes of combating terrorism.<sup>26</sup>

The above case, as discussed, has been more than just a landmark judgement. It has created a history in itself. It has issued caveats and generated cautions which were

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<sup>26</sup> Anuradha Bhasin v. Union of India, 2020 SCCOnline 25 (India).

though unique to Jammu and Kashmir but are also at the same time unforeseeable for the rest part of the country. The most interesting facet of the judgement was where the Court discussed the difference between combating terror and that of maintaining law and order. The difference between 'law and order' and 'public order' are quite understood in common parlance, however, the difference between measure to curb terrorism and to maintain law and order is quite significant. This difference is often less understood and it is equally easy to conceive the two as the same. The Court has clarified that measures adopted for fighting terrorism cannot be equated to those adopted for maintenance of 'law and order'. The court also held that orders under Section 144 cannot be issued for fighting terrorism. This is because the meaning of 'terrorism' has drastically changed and provisions of CrPC enabling the Magistrate to take preventive measures cannot be invoked. It is clear that the government, thus, cannot issue such orders under the garb of combating terrorism and militancy.

It must be noted that there is no vote bank politics exercised by curtailing the fundamental rights of the citizens. So, a conspiracy theory that the government is doing so in order to stay in power is flawed. The question is that if orders cannot be issued under Section 144 for the purposes of fighting terrorism and it is argued that no ulterior motives of the government are met by such orders or action then what is the intent and purpose of issuing these orders in the now-turned Union Territory?

It is the author's conclusion from the literature discussed and the arguments put forth that ultimately there is some greater good that is sought by the State and brought into action by the government. How effective these measures are in attaining the purpose has to be questioned. Does the situation so demand that the fundamental rights be curtailed? It is beyond the arguments of common men that it is not just militancy that needs to be fought but there is presence of certain communal elements which are not necessarily militant in nature but if kept free, they would disrupt the public order beyond measure also put the public safety at stake.

Hence, despite the caveats issued, even the Apex Court could not completely deny the need for orders to be passed under Section 144 in Jammu and Kashmir. However, repeated orders are nothing but an abuse of power and hence, personal hearing must be granted in all such cases where an application is made against such impugned order.

## **Conclusion**

In the above paper, the powers of the Magistrate and Police under Section 144 were analysed. It was noted how the provision leaves enough scope for it to be misused. This is where the Judiciary intervenes and contributes to the literature on Section 144 by elaborating further on the interpretation and narrowing the power of the

Magistrate and Police under the same. Hence, a system of checks and balance is maintained.

It was noted how orders under Section 144 were issued during the CAA protests, in Jammu and Kashmir after scraping its special status, during the pandemic and most recently, during the farmers' protests. The question is that can such orders really be called an abuse of power? Are these situations, by their very nature, not volatile enough to call upon curtailment of fundamental rights of certain individuals?

The ulterior motive of the government has been negated. It is not the criticism and protests that a democratic government fears, perhaps, it would be out-voted if that were it. It seems that a much greater goal is being sought. It is not just our duty as citizens but also as academicians and authors to keep faith in the law, in law enforcement mechanisms and most importantly, in the scant institution of the judiciary.