1950

May 26.

# ROMESH THAPPAR

*v.*

# THE STATE OF MADRAS

[SHRI HARILAL KANIA C. J., SAIYID FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN, MUKHERJEA and DAS JJ.]

*Constitution of India, Art.* 19, *cls.* (1) (a) *and* (2), 32—*Application under Art.* 32—*Preliminary objection—Fundamental right of freedom of speech and expression—Law imposing restrictions for securing public order and maintenance of public safety—Validity—Severability of Act—Madras Maintenance of Public Order Act (XXXIII of* 1949), *s.* 9 (1-*A*)—*Validity.*

*Held,* by the Full Court (i) (overruling a preliminary objections) —Under the Constitution the Supreme Court is constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter.

*Urguhar* v. *Brown* (205 U. S. 179) and *Hooney* v. *Kolohan* (294 U. S. 103) distinguished.

(ii) Freedom of speech and expression includes freedom of propogation of ideas and that freedom is ensured by the freedom of circulation.

*Ex parte Jackson* (96 U. S. 727) and *Lovell* v. *City of Griffin* (303 U. S. 444) referred to.

*Held per* KANIA C. J., PATANJALI SASTRI, MEHR CHAND MAHAJAN, MUKHERJEA and DAS JJ.—(FAZL ALI J. dissenting) : (i) Apart from libel, slander etc. unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under cl. (2) of the Art. 19 of the Constitution, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. Section 9 (1-A) of the Madras Maintenance of Public Order Act, XXXIII of 1949, which authorises impositions of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under cl. (2) and is therefore void and unconstitutional; (ii) Where a law purports to authorise the imposition of restrictions on a fundamental right in langauge wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out,

t must be held to be wholly unconstitutional and void. Section ) (1-A) is therefore wholly unconstitutional and void.

*Per* FAZL ALI J.—Restrictions which s. 9 (1-A) authorised are within the provisions of cl. (2) of art. 19 of the Constitution and s. 9 (1-A) is not therefore unconstitutional or void. (1)

*Brij Bhushan and Another* v. *The State* (1950) S.C.R. 605 referred to.

ORIGINAL JURISDICTION: Petition No. XVI of 1950. Application under article 32 of the Constitution for a writ of prohibition and *certiorari*. The facts are set out in the judgment.

*C. R. Pattabhi Raman*, for the petitioner.

*K. Rajah Ayyar, Advocate-General of Madras*, (*Ganapathi Ayyar*, with him) for the opposite party.

1950. May 26. The Judgment of Kania C. J., Mehr Chand Mahajan, Mukherjea and Das JJ. was delivered by Patanjali Sastri, J. Fazl Ali J. delivered a separate judgment.

*Patanjali Sastri J.*

PATANJALI SASTRI J.—The petitioner is the printer, publisher and editor of a recently started weekly journal in English called *Cross Roads* printed and published in Bombay. The Government of Madras, the respondents herein, in exercise of their powers under section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 (hereinafter referred to as the impugned Act) purported to issue an order No. MS. 1333 dated 1st March, 1950, whereby they imposed a ban upon the entry and circulation of the journal in that State. The order was published in the Fort St. George Gazette and the notification ran as follows :—

"In exercise of the powers conferred by section 9 (1-A) of the Madras Maintenance of Public Order, Act, 1949 (Madras Act XXIII of 1949) His Excellency the Governor of Madras, being satisfied that for the purpose of securring the public safety and the maintenance of public order, it is necessary so to do, hereby prohibits, with effect on and from the date of publication of this order in the Fort St. George Gazette the entry into or the circulation, sale or distribution in the State of Madras or any part thereof of the newspaper entitled *Cross Roads* an English weekly published at Bombay."

The petitioner claims that the said order contravenes the fundamental right of the petitioner to freedom of

(1) See the headnote to *Brij Bhushan* v. *The State of Delhi*, p. 605 Infra.

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speech and expression conferred on him by article 19 (1) (a) of the Constitution and he challenges the validity of section 9 (1-A) of the impugned Act as being void under article 13 (1) of the Constitution by reason of its being inconsistent with his fundamental right aforesaid.

The Advocate-General of Madras appearing on behalf of the respondents raised a preliminary objection, not indeed to the jurisdiction of this Court to entertain the application under article 32, but to the petitioner resorting to this Court directly for such relief in the first instance. He contended that, as a matter of orderly procedure, the petitioner should first resort to the High Court at Madras which under article 226 of the Constitution has concurrent jurisdiction to deal with the matter. He cited criminal revision petitions under section 435 of the Criminal Procedure Code, applications for bail and applications for transfer under section 24 of the Civil Procedure Code as instances where, concurrent jurisdiction having been given in certain matters to the High Court and the Court of a lower grade, a rule of practice has been established that a party should proceed first to the latter Court for relief before resorting to the High Court. He referred to *Emperor* v. *Bisheswar Prasad Sinha*(1) where such a rule of practice was enforced in a criminal revision case, and called our attention also to certain American decisions *Urquhart* v. *Brown*(2) and *Hooney* v. *Kolohan*(3) as showing that the Supreme Court of the United States ordinarily required that whatever judicial remedies remained open to the applicant in Federal and State Courts should be exhausted before the remedy in the Supreme Court—be it *habeas corpus* or *certiorari*—would be allowed. We are of opinion that neither the instances mentioned by the learned Advocate-General nor the American decisions referred to by him are really analogous to the remedy afforded by article 32 of the Indian Constitution. That article does not merely confer power on this Court, as article 226 does on the

(1) I. L. R. 56 All. 158. (2) 205 U. S. 179. (3) 294 U.S. 10

High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among articles 131 to 139 which define that jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. No similar provision is to be found in the Constitution of the United States and we do not consider that the American decisions are in point.

Turning now to the merits, there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation. "Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value". *Ex parte Jackson*(1). See also *Lovell* v. *City of Griffin*(2). It is therefore perfectly clear that the order of the Government of Madras would be a violation of the petitioner's fundamental right under article 19(1) (a), unless section 9 (1-A) of the impugned Act under which it was made is saved by the reservations mentioned in clause (2) of article 19 which (omitting immaterial words regarding laws relating to libel, slander, etc., with which we are not concerned in this case) saves the operation of any "existing law in so far as it relates to any matter which undermines the security of, or tends to overthrow, the State." The question accordingly arises whether the impugned Act, in so far as it purports by section 9(1-A) to authorise the Provincial Government "for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into

(1) 96 U.S. 727. (2) 303 U.S. 444.

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or the circulation, sale or distribution in the Province of Madras or any part thereof of any document or class of documents" is a "law relating to any matter which undermines the security of or tends to overthrow the State."

The impugned Act was passed by the Provincial Legislature in exercise of the power conferred upon it by section 100 of the Government of India Act, 1935, read with Entry 1 of List II of the Seventh Schedule to that Act, which comprises among other matters, "public order." Now "public order" is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the government which they have established. Although section 9 (1-A) refers to "securing the public safety" and "the maintenance of public order" as distinct purposes, it must be taken that "public safety" is used as a part of the wider concept of public order, for, if public safety were intended to signify any matter distinct from and outside the content of the expression "public order," it would not have been competent for the Madras Legislature to enact the provision so far as it relates to public safety. This indeed was not disputed on behalf of the respondents. But it was urged that the expression "public safety" in the impugned Act, which is a statute relating to law and order, means the security of the Province, and, therefore, "the security of the State" within the meaning of article 19 (2) as "the State" has been defined in article 12 as including, among other things, the Government and the Legislature of each of the erstwhile Provinces. Much reliance was placed in support of this view on *Rex* v. *Wormwood Scrubbs Prison*(1) where it was held that the phrase "for securing the public safety and the defence of the realm" in section 1 of the Defence of the Realm (Consolidation) Act, 1914, was not limited to securing the country against a foreign foe but included also protection against internal disorder such as a rebellion. The decision is not of much assistance to the respondents as the context in

(1) L.R. [1920] 2 K.B. 305.

which the words "public safety" occurred in that Act showed unmistakably that the security of the State was the aim in view. Our attention has not been drawn to any definition of the expression "public safety," nor does it appear that the words have acquired any technical signification as words of art.

"Public safety" ordinarily means security of the public or their freedom from danger. In that sense, anything which tends to prevent dangers to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context. In the classification of offences in the Indian Penal Code, for instance, Chapter XIV enumerates the "offences affecting the public health, safety, convenience, decency, and morals" and it includes rash driving or riding on a public way (section 279) and rash navigation of a vessel (section 280), among others, as offences against public safety, while Chapter VI lists waging war against the Queen (section 121), sedition (section 124-A) etc. as "offences against the State", because they are calculated to undermine or affect the security of the State, and Chapter VIII defines "offences against the public tranquillity" which include unlawful assembly (section 141) rioting (section 146), promoting enmity between classes (section 153-A), affray (section 159) etc. Although in the context of a statute relating to law and order "securing public safety" may not include the securing of public health, it may well mean securing the public against rash driving on a public way and the like, and not necessarily the security of the State. It was said that an enactment which provided for drastic remedies like preventive detention and ban on newspapers must be taken to relate to matters affecting the security of the State rather than trivial offences like rash driving or an affray. But whatever ends the impugned Act may have been intended to subserve, and whatever aims its framers may have had in view, its application and scope cannot, in the absence of limiting words in the statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to

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endanger the security of the State. Nor is there any guarantee that those authorised to exercise the powers under the Act will in using them discriminate between those who act prejudicially to the security of the State and those who do not.

The Government of India Act, 1935, nowhere used the expression "security of the State" though it made provision under section 57 for dealing with crimes of violence intended to overthrow the Government. While the administration of law and order including the maintenance of public order was placed in charge of a Minister elected by the people, the Governor was entrusted with the responsibility of combating the operations of persons who "endangered the peace or tranquillity of the Province" by committing or attempting to commit "crimes of violence intended to overthrow the Government." Similarly, article 352 of the Constitution empowers the President to make a Proclamation of Emergency when he is satisfied that the "security of India or any part of the territory thereof is threatened by war or by external aggression or by internal disturbance." These provisions recognise that disturbance of public peace or tranquillity may assume such grave proportions as to threaten the security of the State.

As Stephen in his Criminal Law of England(1) observes: "Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other and are not capable of being marked off by perfectly defined boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it." Though all these offences thus involve disturbances of public tranquillity and are in theory offences against public order, the difference between them being only a difference of degree, yet for the purpose of grading the punishment to be inflicted in respect of them they may be classified into different minor categories as has been done by

(1) Vol. II, p. 242.

the Indian Penal Code. Similarly, the Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in article 19 (1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgement of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression, while the right of peaceable assembly "sub-clause (b)" and the right of association "sub-clause (c)" may be restricted under clauses (3) and (4) of article 19 in the interests of "public order", which in those clauses includes the security of the State. The differentiation is also noticeable in Entry 3 of List III (Concurrent List) of the Seventh Schedule, which refers to the "security of a State" and "maintenance of public order" as distinct subjects of legislation. The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind.

It is also worthy of note that the word "sedition" which occurred in article 13 (2) of the Draft Constitution prepared by the Drafting Committee was deleted before the article was finally passed as article 19 (2). In this connection it may be recalled that the Federal Court had, in defining sedition in *Niharendu Dutt Majumdar* v. *The King Emperor*(1), held that "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency", but the Privy Council overruled that

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decision and emphatically reaffirmed the view expressed in *Tilak's case*(1) to the effect that "the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small"—*King Emperor* v. *Sadashiv Narayan Bhalerao*(2). Deletion of the word "sedition" from the draft article 13 (2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security of or tend to overthrow the State. It is also significant that the corresponding Irish formula of "undermining the public order or the authority of the State" [article 40 (6) (i) of the Constitution of Eire, 1937] did not apparently find favour with the framers of the Indian Constitution. Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison who was "the leading spirit in the preparation of the First Amendment of the Federal Constitution," that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits" : [Quoted in *Near* v. *Minnesotta* (3)].

We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of article 19, although the

(1) 22 Bom. 112. (2) L.R. 74 I. A. 89. (3) 282 U.S. 607. 717-8

restrictions which it seeks to impose may have been conceived generally in the interests of public order. It follows that section 9 (1-A) which authorises imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under clause (2), and is therefore void and unconstitutional.

It was, however, argued that section 9 (1-A) could not be considered wholly void, as, under article 13(1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. In so far as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision, as applied to the latter purpose, was covered by clause (2) of article 19 and must, it was said, be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as if may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

The application is therefore allowed and the order of the respondents prohibiting the entry and circulation of the petitioner's journal in the State of Madras is hereby quashed.

FAZL ALI J.—For the reasons given by me in *Brij Bhushan and Another* v. *The State*(1), which practically

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(1) [1950] S.C.R. 605.

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involves the same question as is involved in this case, I hold that the reliefs sought by the petitioner cannot be granted. In this view, I would dismiss this petition, but I should like to add a few observations to supplement what I have said in the other case.

It appears to me that in the ultimate analysis the real question to be decided in this case is whether "disorders involving menace to the peace and tranquillity of the Province" and affecting "public safety" will be a matter which undermines the security of the State or not. I have borrowed the words quoted within inverted commas from the preamble of the Act which shows its scope and necessity and the question raised before us attacking the validity of the Act must be formulated in the manner I have suggested. If the answer to the question is in the affirmative, as I think it must be, then the impugned law which prohibits entry into the State of Madras of "any document or class of documents" for securing public safety and maintenance of public order should satisfy the requirements laid down in article 19 (2) of the Constitution. From the trend of the arguments addressed to us, it would appear that if a document is seditious, its entry could be validly prohibited, because sedition is a matter which undermines the security of the State; but if, on the other hand, the document is calculated to disturb public tranquillity and affect public safety, its entry cannot be prohibited, because public disorder and disturbance of public tranquillity are not matters which undermine the security of the State. Speaking for myself, I cannot understand this argument. In *Brij Bhushan and Another* v. *The State*(1), I have quoted good authority to show that sedition owes its gravity to its tendency to create disorders and an authority on criminal law like Sir James Stephen has classed sedition as an offence against public tranquillity. If so, how could sedition be a matter which would undermine the security of the State and public disorders and disturbance of public safety will not be such a matter? It was argued that a small riot or a affray will not

(1) [1950] S.C.R. 605.

undermine the security of the State, but to this line of argument there is a two-fold answer :—

(1) The Act, as its preamble shows, is not intended for petty disorders but for disorders involving menace to the peace and tranquillity of the Province, (2) There are degrees of gravity in the offence of sedition also and an isolated piece of writing of mildly seditious character by one insignificant individual may not also, from the layman's point of view, be a matter which undermines the security of the State, but that would not affect the law which aims at checking sedition. It was also said that the law as it stands may be misused by the State executive, but misuse of the law is one thing and its being unconstitutional is another. We are here concerned with the latter aspect only. I shall not pursue the matter further as I have said enough on the subject in the connected case.

*Petition allowed.*

Agent for the petitioner :—*K. J. Kale.*

Agent for the opposite party :—*P. A. Mehta.*

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