(1954) 03 BOM CK 0022

Bombay High Court

Case No: None

Shantilal Vadilal Shah and Another		APPELLANT
	Vs	
State of Bombay		RESPONDENT

Date of Decision: March 25, 1954

Acts Referred:

- Press (Objectionable Matter) Act, 1951 - Section 4

Citation: (1954) CriLJ 1549

Hon'ble Judges: Chagla, C.J; Tendulkar, J

Bench: Division Bench

Judgement

Chagla, C.J.

A book by the name of "Aghor Van" was published in Ahmedabad in November 1951. It was published in the Gujrat Printing Press. On 15-8-1953, Government instituted proceedings against the keeper of the press u/s 4, Press (Objectionable Matters) Act (LVI of 1951). While those proceedings were pending, the Advocate General gave a certificate On 24-7-1953, u/s 11 of the Act and acting on that certificate the Government issued an order forfeiting all the books on 5-8-1953.

The keeper of the press has come before us on two petitions, one challenging the order of forfeiture and the other complaining of the action of Government in issuing the order of forfeiture and giving publicity to it in the press while the judicial proceedings were pending and alleging that Government is guilty of contempt.

In the petition challenging the order of forfeiture it has been contended that Act LVI of 1951 is ''ultra vires'' of the Constitution. We Have heard this petition first as it raises an important constitutional question and the Attorney General was made a party to this petition to support the constitutionality of the Act.

2. Turning to the Act and looking to the scheme of the Act, Section 3 defines "objectionable Matter" and the relevant clause is Clause (v) which is

any words, signs or visible representations which are likely to promote feelings of enmity or hatred'' between different sections of the people of India.

The case of the State of Bombay is that the book in question contained passages which promote feelings of enmity or hatred between the Hindus and Muslims living in this State.

Section 4 deals with proceedings for security, and it provides that whenever upon complaint made to him in writing by the competent authority and inquiry made in the manner hereinafter provided, a Sessions Judge is satisfied that a press publishes any newspaper or book containing objectionable matter, he may direct the keeper of the press to deposit security. The power is also given to the Sessions Judge, instead of demanding security, merely to record a warning against the keeper.

Section 5 deals with a demand of further security and it deals with a case where a press against whom an order is made u/s 4 thereafter prints in the press a book or paper containing objectionable matter and after necessary inquiry the power is given to the Sessions Judge to demand further security and also declare security as has been deposited u/s 4 to be forfeited. Power is further given to the Sessions Judge to declare all copies of newspapers, books or other documents containing objectionable matter to be forfeited to Government.

Section 6 deals with the consequences of failure to deposit security as required u/s 4 or 5 and the consequences are that the declaration made by the keeper of the press under the Press Registration Act is deemed to be annulled and the keeper of the press is prevented from making a fresh declaration in respect of the press and the press cannot be used for the printing or publishing of any news-paper or book.

Sections 7, 8 and 9 contain provisions corresponding to Sections 4, 5 and 6 dealing with the case of a publisher of a newspaper.

3. Now, in all the cases contemplated by Sections 4 and 5 and Sections 7 and 8 the inquiry has to take the form laid down in Chapter III. It gives the right to the accused to have a trial by jury and the jury is to consist of persons who have journalistic experience or have connection with printing presses or newspapers.

Section 21 provides for an order being passed by the Sessions Judge in conformity with the opinion of the jury unless the Sessions Judge expresses disagreement with the opinion of the jurors, in which case he has to submit the case to the High Court, and the High Court thereupon may exercise any of the powers conferred on the Sessions Judge by the Act.

Section 11 gives the power to Government to declare certain publications forfeited and this power can only be exercised by the State Government provided the Advocate General or the principal law officer issues a certificate that any issue of a newspaper or news-sheet or any book contains an objectionable matter, and the State of Bombay in the present case purported to act under this section having

obtained, as already stated, a certificate of the Advocate General.

4. Now, although the petition challenges the constitutionality of the whole Act, for the purpose of the petition it is only necessary to consider two provisions and those are Section 3 (5) and Section 11. It is not proper, in our opinion, to consider every section of the Act academically, and what we have to consider are those sections which affect the rights of the petitioner, and as in this petition only the order of forfeiture is challenged, the only relevant sections to be considered are Section 3 (5) and Section 11.

The objection to the constitutionality of these provisions of the Act is based on art. 19 (1) (a) of the Constitution, and that article guarantees to all citizens the right to freedom of speech and expression. Now that right is not an unlimited or unqualified right. It is controlled by art. 19 (2) and the power is given to the State to make any law and impose upon this right reasonable restrictions in the interests of security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court or defamation or incitement to an offence.

Undoubtedly, Section 11 constitutes a restriction upon the right of freedom of speech and expression. The only question that we have to consider is whether it is a reasonable restriction and whether it is in the interest of the matters mentioned in art. 13 (2). It is not disputed that the restriction is in the interest of public order, taut what is contended is that the restriction is not a reasonable restriction.

5. Now, it is pointed out in the first place that very wide power is given to the executive u/s 11 to pass an order of forfeiture without giving the person affected any right to show cause against the order that the Government proposes to make. If the power which can be exercised u/s 11 was an arbitrary power, we would certainly have to consider whether the restriction upon the right of freedom of speech and expression was a reasonable restriction. But there are two important safeguards provided in the Act.

One is that Government can only act u/s 11 after the Advocate General or the principal law officer of the State has given a certificate that in his opinion the paper or the newspaper sought to be forfeited contains objectionable matter. Therefore action would not be taken merely on the opinion of the executive, but that opinion must be fortified by the independent legal opinion given by a responsible law officer of the State.

The other important safeguard is the power given to the party affected to approach the High Court u/s 24. Therefore, the Legislature has not merely provided for the opinion of a law officer as a corrective, also but the decision of the High Court as a judicial corrective. Therefore, it could not be said that the exercise of the power u/s 11 is arbitrary. Any person affected by it can immediately challenge it and get a decision of the High Court and the High Court would judicially consider Whether the executive has properly exercised the very wide and important power conferred

upon it u/s 11.

In view of these two important safeguards which the citizen has, it is difficult to say that the power conferred upon Government u/s 11 is an arbitrary power and therefore the restriction upon freedom of speech and expression is an unreasonable restriction.

It is further urged that u/s 11 the power of the executive Government is in no way circumscribed, nor are any limitations put upon that power. It is said that Section 11 does not provide that Government should exercise that power only in the case of an emergency.

Now, in order that a State should function properly it is essential that the State should be armed with all necessary powers. The press can be a source of great usefulness; it can equally be a source of great danger. It must be left to the State to decide when a power like this should be exercised. The decision to exercise that power to a considerable extent must depend upon questions of policy.

It is said that whereas in the case of security proceedings the person affected is given the right to have a trial by jury and to get a judicial decision, whether the matter complained of is an objectionable matter or not, in the case of an order for forfeiture u/s 11 the decision is arrived at by the Government.

Now, it must be borne in mind that the proceedings under Sections 4 and 5 are very different proceedings from the exercise of the power u/s 11.. The object of proceedings under Sections 4 and 5 is to obtain security from the offending press. The object of Section 11 is to prevent immediately the circulation of a book or paper which contains objection-able matter, and it would be impossible to safeguard public order if the State had to wait for a. judicial decision before it could act and forfeit books or papers containing objectionable matter.

The very essence of the power u/s 11 is that it should be exercised promptly and expeditiously and that promptness would be impossible if the-exercise of the power was postponed till a judicial determination was given as to whether a matter was objectionable or not. However prompt the exercise of the power may be u/s 11 and however much in the first instance it may be an executive decision, as we have already pointed out, so long as ultimately there is a judicial corrective; upon the power of the executive, it cannot be said that the absence of any limitation upon the power of the executive u/s 11 or the failure to circumscribe its power u/s 11 would constitute an unreasonable restriction upon the freedom of speech and expression under art. 19 (1) (a) of the Constitution.

6. It is then said that the penalty of forfeiture is a very severe penalty & u/s 5 it can only be imposed after a second objectionable matter is printed and an order has been made u/s 4, arid what is urged is that if the Legislature thought that the penalty of forfeiture should be imposed as a very severe penalty and that too only in

certain cases and after a judicial investigation, it would not be proper to arm the executive with the power to impose that penalty without any judicial safeguards.

In this connection we can only repeat what we have already said that the proceedings under Sections 4 and 5 and proceedings u/s 11 are different, independent and for different objects. Whereas u/s 5 it is left to the discretion of the Sessions Judge whether or not to forfeit the offending book or publication at the end of a judicial trial, Section 11 arms the executive with the power of forfeiting such publication from an entirely different point of view. Whereas the Sessions Judge merely imposes a penalty at the end of a judicial trial, the executive properly acting u/s 11 acts in the interests of the State because those interests require that immediate action should be taken. Therefore, it is fallacious to compare the. penalty of forfeiture which a Sessions Judge can impose at the end of a judicial trial u/s 5 with an order of forfeiture which the Government can pass u/s 11

A grievance is made of the fact that whereas u/s 5 the order of forfeiture can only be passed after a trial by jury, u/s 11 the party affected has no such right given to him. The right to a trial by jury is a part of the judicial process which Chapter III ensures to a person against whom proceedings are taken under Sections 4 and 5, but if a judicial process is not a proper process for the exercise of the power u/s 11, then clearly no grievance can be made of the fact that the fellow citizens of the party affected-aye not called upon to determine whether a matter is objectionable matter or not.

7. It is then pointed put that the result of proceedings under Sections 4 and 5 and the exercise of the power u/s 11 may result in conflicting decisions being arrived at on the question as to whether a certain matter is an objectionable matter or not. It is pointed out that a jury may take the view that a certain matter is not objectionable matter, the Advocate General may take the view chat it is objectionable matter, the Government may act upon that opinion u/s 11 and the High Court may confirm the view of the Government. The result might be that at the same time there might be two conflicting judicial decisions, one of the Sessions Judge agreeing with the jury that the matter is not objectionable, and the other of the High Court u/s 24 taking the view that the matter was objectionable.

Now, in the first place, mere anomalies in a statute do not necessarily lead to the conclusion that the statute is unconstitutional. The anomalies may be got rid of by the Legislature if they are pointed out to the Legislature. But when one looks at the matter a little more closely, there is not. much possibility of these anomalies occurring, as pointed out by counsel for the State.

If the High Court has taken the view u/s 24 on an appeal by a party affected by an order of forfeiture u/s 11 that a matter is objectionable, it is very difficult to Believe, assuming that the jury were to take a contrary view in proceedings under Sections 4 and 5, that the Sessions Judge would not exercise the power given to him of

disagreeing with the jury and sending the matter up to the highest Court of the State for its ultimate decision, and if the Sessions Judge were to do that, then undoubtedly the High Court would come to the same conclusion u/s 21 as it had already come u/s 24 of the Act.

8. Therefore, taking a broad view of the matter, it seems to us that in the interest of public order it is necessary that the State should be armed with the powers conferred upon it u/s 11, and therefore the restriction upon the freedom of speech and expression is not unreasonable.

9. It is then contended by Mr. Belsare that Section 3 (5) is "ultra vires" of Parliament, in that Parliament was not competent to legislate upon this particular matter. The argument is put this way that before the Constitution was amended the view taken by the Supreme Court was that any restriction upon the freedom of speech and expression which was in the interest of public order was not a restriction justified by the Constitution, because before the amendment "public order" was not one of the matters mentioned in Article 19 (2).

In view of the decision of the Supreme Court in - Romesh Thappar Vs. The State of Madras, the Constitution was amended and therefore now it is competent to the Legislature to place restrictions upon the freedom of speech and expression in the interest of public order. The constitutionality of Section 3 (5) is not disputed, but what is urged is that under the seventh Schedule to the Constitution "public order" is a subject which can only be legislated upon by the State by reason of the entry with regard to public order being in the State List, which is List II to the Seventh Schedule, and therefore when Parliament included in the definition of "objectionable matter" a matter which dealt with public order, it legislated upon a subject exclusively meant for the State Legislature.

Mr. Belsare is perfectly right when he contends that the under the Constitution, Parliament cannot legislate upon "public order". But what we have to consider is whether the legislation which. is impugned is a legislation with regard to public order. In all these matters where the question is of the trespass of one Legislature upon the powers of another, the proper approach is to consider the pith and substance of the legislation.

Now, it is clear that the pith and substance of the legislation is not public order, but is "newspapers, books and printing presses". The Act deals with these subjects mainly and substantially, and. the subject of "newspapers, books and printing presses" falls in the Concurrent List under entry 39.

It is also well settled that all these entries in the different Lists must be liberally construed and the Legisature must be deemed to have the power and the competence not only to legislate with regard to these topics taut with regard to all matters which are subsidiary or ancillary to these topics, and in declaring a particular matter appearing in a newspaper or a book as objectionable matter, the

Legislature was not dealing with "public order" but was dealing with "newspapers and books" and incidentally with questions of "public order".

It is also well settled that if a Legislature is legislating on a topic with regard to which it has competence, a mere incidental trespass upon the field of another Legislature will not constitute a trespass which will make the law passed by the former Legislature unconstitutional, and even assuming that there is some trespass by Parliament upon the field of the State Legislature, in our opinion that trespass is a very minor trespass, a very incidental trespass, and does not constitute a real encroachment upon the field reserved for the State Legislature.

It is difficult to take the view that the Act we are considering or any provisions of that Act is an Act which deals with the subject of public order.

10. Therefore, in our opinion, Parliament was competent to legislate with regard to Section 3 (5), and Section 11 is not ''ultra vires'' of the Constitution.

11. Coming to the merits of the matter, this book was published in November 1951 and the prosecution was launched in 1953 and it is still pending. We will express no opinion as to whether Government is right when it contends that it contains objectionable matter. But assuming it does, we feel that more harm than good will be done by continuing with the prosecution.

Mr. Belsare tells us that all the copies of the book have been long ago sold and he gives an undertaking to this Court on behalf of the printer and the publisher that no copies of the book Will be sold nor will they publish a second edition of this book. In view of this undertaking it seems to us that no useful purpose will be served by continuing with the prosecution, and therefore at our suggestion the Advocate General has agreed to withdraw the prosecution. Mr. Belsare also does not press the petition for contempt.

With regard to the order of forfeiture, although there does not seem to be any books left which the Government can forfeit, Government feel that as the order has been passed after taking the opinion of the Advocate General and on proper materials, it would not set aside that order. But as the order now is more or less academic and it does not in any way affect the rights of the petitioner, the order may well stand.

12. The result is that both the petitions will be dismissed.