

State of Madras

Vs

Union of India & State of Travancore Cochin

(CJI Patanjali Sastri, M. C. Mahajan, B. K. Mukherjea, S. R. Dass, N. Chandrashekar Aiyar JJ)

31.03.1952

JUDGMENT

PATANJALI SASTRI C.J. -

This is an appeal from an order of the High Court of Judicature at Madras adjudging section 15 (2) (b) of the Indian Criminal Law Amendment Act, 1908 (Act No. XIV of 1908) as amended by the Indian Criminal Law Amendment (Madras) Act, 1950, (hereinafter referred to as the impugned Act) as unconstitutional and void, and quashing Government Order No. 1517, Public (General) Department, dated 10th March, 1950, whereby the State Government declared a Society called the People's Education Society an unlawful association.

The respondent, who was the general secretary of the Society, which was registered under the Societies' Registration Act, 1860, applied to the High Court on 10th April 1950, under article 226 of the Constitution complaining that the impugned Act and the Order dated 10th March, 1950, purporting to be issued thereunder infringed the fundamental right conferred on him by article 19 (1) (c) of the Constitution to form associations or unions and seeking appropriate reliefs. The High Court by a full bench of three Judges (Raja manner C.J. Satyanarayana Rao and Vishwanatha Sastri JJ.) allowed the application on 14th September, 1950, and granted a certificate under article 132. The State of Madras has brought this appeal.

The Government Order referred to above runs as follows :-

"WHEREAS in the opinion of the State Government the Association known as the People's Education Society, Madras, has for its object interference with the administration of the Law and the maintenance of law and order, and constitutes a danger to the public peace :

NOW therefore, His Excellency the Governor of Madras, in exercise of the Power conferred by section 16 of the India Criminal Law Amendment Act, 1908 (Central Act XIV of 1908) hereby declares the said association to be an unlawful association with in the meaning of the said Act."

The declared objects of the Society as set out in the affidavit of the respondent are :

- (a) to encourage, promote, diffuse and popularise useful knowledge in all sciences and more specially social science;
- (b) to encourage, prompt diffuse and popularise political education among people;

(c) to encourage promote and popularise the study and under standing of all social and political problems and bring about social and political reforms; and

(d) to promotes encourage and popularise art, literature and drama.

It was, however, stated in a counter-affidavit filed on behalf of the appellant by the Deputy Secretary to Government Public Department, that according to in formation received by the Government, the Society was actively helping the Communist party in Madras which had been declared unlawful in August, 1949 by utilising its funds through its secretary for carrying on propaganda on behalf of the Party, and that the declared on objects of the Society were intended to camouflage its real activities.

As the Madras Amendment Act (No. XI of 1950) was passed on the 12th August, 1950, during the pendency of the petition which was taken up for hearing on the 21st August, 1950, the issues involved had to be determined in the light of the original Act as amended. In order to appreciate the issued it is necessary to refer to the relevant provisions. Before amendment by the Madras Act, the material provisions were as follows :-

"15. IN THIS PART -

(1) "association" means any combination or body of persons whether the same be known by any distinctive name or not; and

(2) "unlawful association" means an association -

(a) which encouraged or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or

(b) which has been declared to be unlawful by the Provincial Government under the Powers hereby conferred.

16. If the Provincial Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes as dangers to the public peace, the Provincial Government may by notification in the official Gazette declare such association to be unlawful."

The amending Act substituted for clause (b) in Section 15 (2) the following clause :-

" (b) which has been declared by the State Government by notification in the official Gazette to be unlawful on the ground (to be specified in the notification) that such association -

(i) constitutes a danger to the public peace, or

(ii) has interfered or interferes with the maintenance of public order or has such interference for its object, or

(iii) has interfered or interferes with the administration of the law, or has such interference for its object".

For the old section 16, section 16 and 16A were substituted as follows :-

"16. (1) A notification issued under clause (b) of sub-section (2) of section 15 in respect of any association shall -

(a) specify the ground on which it is issued, the reasons for its issue, and such other particulars, if any, as may have a bearing on the necessity therefor; and

(b) fix a reasonable period for any office-bearer or member of the association or any other person interested to make a representation to the State Government in respect of the issue of the notification.

(2) Nothing in sub-section (1) shall required the State Government to disclose any facts which it consider to be against the public interest to disclose."

Under section 16A the Government is required after the expiry of the time fixed in the notification for making representations, to place before an Advisory Board constituted by it a copy of the notification and of the representation, if any, received before such expiry, and the Board is to consider the materials placed before it, after calling for such further information as it may deem necessary from the State Government or from any office-bearer or member of the association consigned or any other person, and submit its report to the Government. If it is found by the Board that there is no sufficient cause for the issue of the notification in respect of the association concerned the Government is required to cancel the notification.

These is no amendment of section 17 which prescribes penalties by way of imprisonment or fine or both for membership or management of an unlawful association and for taking part in meeting of such association or muskeg, receiving or soliciting contributions for purposes thereof. Section 17A, which confers power on the Government to notify and take possession of places used for the purposes of an unlawful association, was amendment by the addition of sub-clauses 2 (a) and 2 (b) providing for a remedy, where such power was exercises, by way of application within thirty days of the notification in the official Gazette to the Chief Judge of the Small Cause Court of the District Judge occurring as the place notified is situated in the Presidency Town or outside, for "a declaration that the place has not been used for the purposes of any unlawful association" If such declaration is made, the Government is to cancel the notification in respect of the place. Section 17B empower the officer taking possession of a notified place of forfeit movable property found therein if, in his opinion, such property "is, or may be used for the purpose of the unlawful association" after following the procedure indicated. Section 17E similarly empower the Government to forfeit funds of an unlawful association "if it is satisfied after such enquiry as it may thing fit that such funds are being used or intended to be used for the purposes of an unlawful association". The procedure to be followed in such cases is also prescribed. By section 17E jurisdiction of civil court, save as expressly provided is barred in respect of proceedings taken under section 17A to 17E

By section 6 of the amending Act notification already issued and not cancelled before the amendment are to have effect as if they have been issued under section 15 (2) (b) as amended, and it is provided in such cases a supplementary notification should also be issued a required in section 16 (1) (a) and (b) as amended and thereafter the procedure provided by the new section 16-A should be followed. It was under this provision that the validity of the notification issued on the 10th March, 1950, under old section 16 fell to be considered in the light of the provisions of the amended Act

when the petition came up for hearing in the High Court on 21st August, 1950

It will be seen that while old section 16 expressly conferred on the Provincial Government power to declare association unlawful if, in its opinion, there existed certain specified grounds in relation to them, those grounds are now incorporated in section 15 (2) (b) as amended, and the reference to the "opinion" of the Government is dropped. This led to some discussion before us as to whether or not the grounds referred to in section 15 (2) (b) as amended are justiciable issues. If the factual existence of those grounds could be made the subject of inquiry in a court of law, the restriction sought to be imposed on the right of association would not be open to exception, but then the Government would apparently have no use for section 15 (2) (b). For it was strenuously contended on its behalf by the Attorney-General that the incorporation of these grounds in a definition clause, which made a declaration by Government the test of unlawfulness, rendered the insertion of the words "in its opinion" unnecessary and, indeed, inappropriate, and that the omission of those words could not lead to any inference that the grounds on which the declaration was to be based were intended to be any more justiciable than under the old section 16; more especially as the "opinion" or the "satisfaction" of the Government or of its officers is still the determining factor in notifying a place under section 17A (1) and in forfeiting the movable found therein under section 17B (1) or the funds of an unlawful association under section 17E (1). The provision for an inquiry as to the existence or otherwise of such grounds before an Advisory Board and for cancellation of the notification in case the Board found there was no sufficient cause for declaring the association as unlawful also pointed, it was urged, to the same conclusion. The contention is not without force, and the position was not contested for respondent. It may, accordingly be taken that the test under section 15 (2) (b) is as it was under the old section 16, a subjective one, and the factual existence or otherwise of the grounds is not a justiciable issue.

It is on this basis, then, that the question has to be determined as to whether section 15 (2) (b) as amended falls within the limits of constitutionally permissible legislative abridgment of the fundamental right conferred on the citizen by article 19 (1) (c). Those limits are defined in clause (4) of the same article.

" (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the rights conferred by the said sub-clause."

It was not disputed that the restriction in question were imposes "in the interests of public order". But are they "reasonable" restriction within the meaning of article 19 (4) ?

Before proceeding to consider this question we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the constitution unlike as in America where the Supreme Court has assumed extensive power of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights" as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in

some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.

The learned Judges of the High Court unanimously held that the restrictions under section 15 (2) (b) were not reasonable on the ground of (1) the inadequacy of the publication of the notification, (2) the omission to fix a time-limit for the Government sending the papers to the Advisory Board or for the latter to make its report, no safeguards being provided against the Government enforcing the penalties in the meantime, and (3) the denial to the aggrieved person of the right to appear either in person or by pleader before the Advisory Board to make good his representation. In addition to these grounds one of the learned Judges (Satyanarayana Rao J.) held that the impugned Act offended against article 14 of the constitution in that there was no reasonable basis for the differentiation in treatment between the two classes of unlawful association mentioned in section 15 (2) (a) and (b). The other learned Judges did not, however, agree with this view. Vishwanatha Sastri J. further held that the provisions for forfeiture of property contained in the impugned Act were void as they had no reasonable relation to the maintenance of public order. The other two Judges expressed no opinion on this point. While agreeing with the conclusion of the learned Judges that section 15 (2) (b) is unconstitutional and void, we are of opinion that the decision can be rested on a broader and more fundamental ground.

This Court had occasion in Dr. Khare's case (1) to define the scope of the judicial review under clause (5) of article 19 where the phrase "imposing reasonable restriction on the exercise of the right" also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

Giving due weight to all the considerations indicated above, we have come to the conclusion that section 15 (2) (b) cannot be upheld as falling within the limits of authorised restrictions on the right conferred by article 19 (1) (c). The right to form association or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restriction on such right without allowing the grounds of such imposition both in their factual and legal aspect to be duly tested in a judicial inquiry, is strong element which, in our opinion, must be taken into account in judging the reasonableness of the restriction imposed by section 15 (2) (b) on the exercise of the fundamental right under article 19 (1) (c); for, no summary and what is bound to

be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restriction on fundamental rights. In the case of preventive detention, no doubt, this Court upheld in Gopalan's case (1) deprivation of personal liberty by such means, but that was because the Constitution itself sanctions laws providing of preventive detention, as to which no question of reasonableness could arise in view of the language of article 21. As pointed out by Kania C.J. at page 121, quoting Lord Finlay in *Rex v. Halliday* (2) "the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based"

The Attorney-General placed strong reliance on the decision in *Dr. Khare's case* (3) where the subjective satisfaction of the Government regarding the necessity for the experiment of a person, coupled with a reference of the matter to an Advisory Board whose opinion, however, had no binding force, was considered by a majority to be "reasonable" procedure for restricting the right to move freely conferred by article 19 (1) (b). The Attorney-General claimed that the reasoning of that decision applied a fortiori to the present case, as the impugned Act provided that the Advisory Board's report was binding on the Government. We cannot agree. We consider that that case is distinguishable in several essential particulars. For one thing experiment of individuals, like preventive detention is largely precautionary and based on suspicion. In fact, section 4 (1) of the East Punjab Public Safety Act, which was the subject of consideration in *Dr. Khare's case* (1) authorised both preventive detention and experiment for the same purpose and on the same ground namely, "with a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order it is necessary, etc." Besides, both involve an element of emergency requiring prompt steps to be taken to prevent apprehended danger to public tranquillity, and authority has to be vested in the Government and its officers to take appropriate action on their own responsibility. These features are, however, absent in the ground on which the Government is authorised under section 15 (2) (b) to declare association unlawful. These grounds, taken by themselves, are factual and not anticipatory or based on suspicion. An association is allowed to be declared unlawful because it "constitutes" a danger or "has interfered or interferes" with the maintenance of public order or "has such interference for its object" etc. The factual existence of these grounds is amenable to objective determination by the court, quite as much as the grounds mentioned in clause (a) of sub-section (2) of section 15, as to which the Attorney-General conceded that it would be incumbent on the Government to establish, as a fact, that the association, which it alleged to be unlawful, "encouraged" or "aided" persons to commit acts of violence, etc. We are unable to discover any reasonableness in the claim of the Government seeking by its mere declaration, to shut out judicial enquiry into the underlying facts under clause (b). Secondly, the East Punjab Public Safety Act was a temporary enactment which was to be in force only of a year; and any order made thereunder was to expire at the termination of the Act. What may be regarded as a reasonable restriction imposed under such a statute will not necessarily be considered reasonable under the impugned Act, as the latter is a permanent measure, and any declaration made thereunder would continue in operation for an indefinite period until the Government should think fit to cancel it. Thirdly, while, no doubt, the Advisory Board procedure under the impugned Act provides a better safeguard than the one under the East Punjab Public Safety Act, under which the report of such body is not binding on the Government, the impugned Act suffers from a far more serious defect in the absence of any provision for adequate communication of the Government's notification

under section 15 (2) (b) to the association and its members or office-bearers. The Government has to fix reasonable period in the notification for the aggrieved person to make a representation to the Government. But as statewide already, no personal service on any office-bearer or member of the association converted or service by affixture at the office, if any, of such association is prescribed. Nor in any other mode of proclamation of the notification at the place where such association carries on its activities provided for. Publication in the official Gazette, whose publicity value is by no means great, may not reach the members of the association declared unlawful and if the time fixed expired before they knew of such declaration, their right of making a representation, which is the only opportunity of presenting their case, would be lost. Yet, the consequences to the members which the notification involves are most serious, do, their very membership thereafter is made an offence under section 17.

There was some discussion at the bar as to whether want of knowledge of the notification would be a valid defence in a prosecution under that section. But it is not necessary to ensure upon that question as the very risk of prosecution involved in declaring an association unlawful with penal consequences, without providing for adequate communication of such declaration to the association and its members or office bearers, may well be considered sufficient to render the imposition of restrictions by such means unreasonable. In this respect an externment order stands on a different footing, as provision is made for personal or other adequate mode of service on the individual concerned, who is thus assured of an opportunity of putting forward his case. For all these reasons the decision in Dr. Khare's case (1) is distinguishable and cannot rule the present case as claimed by the learned Attorney General. Indeed, as we have observed earlier, a decision dealing with the validity of restriction imposed on one of the rights conferred by article 19 (1) cannot have much value as a precedent for adjudging the validity of the restriction imposed on another right, even when the constitutional criterion is the same, namely, reasonableness, as the conclusion must depend on the cumulative effect of the varying facts and circumstances of each case.

Having given the case our best and most anxious consideration we have arrived at the conclusion in agreement with the learned Judges of the High Court, that, having regard to the peculiar feature to which reference has been made petition 15 (2) (b) of the Criminal Law Amendment on 1908, as amended by the Criminal Law Amendment (Madras) Act, 1950, falls outside the scope of authorised restrictions under clause (4) of article 19 and is, therefore, unconstitutional and void.

The appeal fails and is accordingly dismissed with costs. Appeal dismissed.

Agent for the appellant : P. A. Mehta.

Agent for the respondent : S. Subrahmanyam.

Agent for the Union of India and the States of Travancore-Cochin : P. A. Mehta.

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