

Rehman Shagoo and Others

Vs

State of Jammu and Kashmir

Criminal Appeal No. 60 of 1958.

(CJI S. R. Dass, S. K. Das, A. K. Sarkar, K. N. Wanchoo, M. Hidayatullah JJ)

10.09.1959

JUDGMENT

WANCHOO J. –

This appeal, on a certificate granted under Art. 132 of the Constitution of India (hereinafter called the Constitution) by the High Court of Jammu and Kashmir, raises the constitutionality of the Enemy Agents Ordinance), No. VIII of S. 2005 hereinafter called the Ordinance), promulgated by His Highness under s. 5 of the Jammu and Kashmir Constitution Act, S. 1996, (hereinafter called the Constitution-Act). The appellants also made an application under Art. 132(3) of the Constitution to this Court for permission to urge other grounds taken by them in the High Court besides those relating to the interpretation of the Constitution. We intimated at the outset of the arguments that this application was being allowed and learned counsel for the appellants was permitted to make his submissions on all points raised in the High Court.

The appellants are being prosecuted before a Special Court constituted under the Ordinance for offences under s. 3 of the Ordinance, ss. 3, 4 and 5 of the Explosive Substances Act, (VI of 1908), s. 120-B of the Penal Code and s. 29 of the Public Security Act read with rr. 28 and 32 of the Rules thereunder. The incidents out of which this prosecution arose took place on June 27 and 28, 1957.

The circumstances in which the Ordinance came to be passed were these : Outside raiders began attacking Kashmir on October 22, 1947. The State acceded to India on October 26, 1947. It appears that the Enemy Agents Ordinance, No. XIX of S. 2004 was enacted soon after in January 1948. There was "case-fire" on January 1, 1949 and the raids came to an end. This was followed by the present Ordinance which became law on January 24, 1949. The preamble to the Ordinance says that an emergency had arisen as a result of wanton attacks by outside raiders and enemies of the State which made it necessary to provide for the trial and punishment of enemy agents and persons committing certain offences with intent to aid the enemy and as it was necessary to amend Ordinance XIX of S. 2004, therefore, the Ordinance was passed consolidating the law and repealing the earlier Ordinance.

The main contentions of the appellants in the High Court were that the Ordinance was unconstitutional and void by the reason of the violation of Art. 14 of the Constitution and that His Highness had no legislative competence to enact it and that in any case it came to an end when s. 5 of the Constitution-Act was repealed in 1951.

The High Court was of the view that there was a reasonable classification and that the classification was founded on an intelligible differentia which distinguished persons or things that were grouped

together from those left out of the group and the differentia had a rational relation with the object sought to be achieved by the Ordinance. It therefore held that the Ordinance was not hit by Art. 14. It was further of the view that His Highness had legislative competence to promulgate the Ordinance when he did so and that when certain subjects were made over to the Government of India by the Instrument of Accession, the State retained its powers to legislate even on these subjects so long as the State law was not repugnant to any law made by the Central Legislature, thus holding that there was concurrent power in the State to legislate even on the subjects transferred to the Government of India. Finally, the High Court held that the repeal of s. 5 of the Constitution-Act did not result in the Ordinance coming to an end, as s. 6 of the Jammu and Kashmir General Clauses Act saved it. It, therefore, dismissed the writ petition filed by the appellants.

The main contentions of the appellants before us are these :-

- (1) The Ordinance is unconstitutional as it violates Art. 14 of the Constitution.
- (2) There was no legislative competence in His Highness to issue the Ordinance under s. 5 of the Constitution Act, as His Highness had executed the Instrument of Accession on October 26, 1947 surrendering his powers regarding Defence, Communications and External Affairs to the Government of India and the Ordinance came under the head "Defence".
- (3) Section 5 of the Constitution-Act was repealed by an amending Act, No. XVII of S. 2005, passed on November 17, 1951, and therefore the Ordinance also came to an end on the day s. 5 was repealed.
- (4) The Ordinance has in any case lapsed as the conditions under which it was enacted had become obsolete and did not exist any more.
- (5) The Ordinance was void as it was inconsistent with Art. 352 of the Constitution and the Articles following.

Re. (1)

The Ordinance defines "enemy" and "enemy agent" in s. 2. Section 3 provides that whoever is an enemy agent or, with intent to aid the enemy, does or attempts or conspires with any other person to do any act which is designed or likely to give assistance to the military or air operations of the enemy or to impede the military or air operations of Indian forces or His Highness' forces or the forces of any Indian State or to endanger life or is guilty of incendiarism shall be liable to various punishments. Section 4 provides that any offence punishable under s. 3 shall be triable under this Ordinance and that where any other offence is committed along with an offence under s. 3 which may be jointly tried under the Code of Criminal Procedure, a special Judge trying the offence under s. 3 shall also try the other offence in accordance with the procedure laid down by the Ordinance. Section 5 provides for appointment and jurisdiction of Special Judges. Section 6 gives power to the government of the State to transfer proceedings from one Special Judge to another and provides for the procedure to be followed by the Special Judge to whom a case is transferred. Section 7 lays down that the procedure for trial of warrant cases shall be followed by Special Judges and no commitment proceedings would be necessary. This action also gives powers to Special Judges in the matter of recording evidence, summoning witnesses and adjournments and the Special Judge is deemed to be a Court of Session. Section 8 provides for sentences to be passed by the Special Judge.

Section 9 provides for power of review by a Judge of the High Court, designated by the Government and the decision of such Judge is made final. Section 10 gives power to the Special Judge and the Reviewing Judge to hear proceedings in camera if it is expedient in the interest of public safety or the defence of the State so to do. Section 11 lays down that an accused person triable under the Ordinance may be defended by a pleader if the Special Judge or the Reviewing Judge grants permission in this behalf and also gives power to the Special Judge or the Reviewing Judge to appoint a pleader for an accused who has not engaged a pleader himself. Section 12 provides for a special rule of evidence empowering the Special Judge to admit certain statements recorded by a magistrate, when the person who made them is dead or cannot be found or is incapable of giving evidence. Section 13 provides for powers to deal with a situation arising out of intransigent conduct of accused persons during the course of trial. Section 14 takes away the power of all courts to interfere with the proceedings or orders of the Special Judge or to transfer any case pending before him or to make any order under s. 491 of the Code of Criminal Procedure. Section 15 prohibits the giving of copies of records of any case before a Special Judge to any one except to an accused or his pleader and makes it punishable for such accused or pleader to show the copy to any other or to divulge its contents to anybody except in the course of proceedings for the purpose of which it was obtained. It further provides for the return of the copies within ten days after the conclusion of the proceedings before the Special Judge. Section 16 provides for the application of the Code of Criminal Procedure or any other law for the time being in force to proceedings under the Ordinance in so far as they are not inconsistent with its provisions. Section 17 makes disclosure of information prohibited under s. 15 punishable. Section 18 gives power to the Government to make rules necessary to carry into effect the purposes of the Ordinance. Section 19 repeals the Enemy Agents Ordinance, XIX of S. 2004, but provides that all rules made, orders issued, prosecution and action taken and punishment awarded under the repealed Ordinance shall be deemed to have been made, issued, taken and awarded under the Ordinance.

It will be clear from this analysis of the provisions of the Ordinance that the procedure under the Ordinance is in material respects different from the ordinary procedure of Criminal Courts dealing with offences. The contention of the appellants is that this amounts to discrimination and therefore the Ordinance is void and unconstitutional as it violates Art. 14 of the Constitution.

The provisions of Art. 14 of the Constitution have come up for discussion before this Court in a number of cases. It is now well established that "while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure." (see *Sri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar* [[1959] S.C.R. 279]). We have, therefore, to see whether there is reasonable classification for the purposes of the Ordinance. Now the Ordinance was passed in January 1949 soon after the cease-fire. But though the attack by the outside raiders and enemies of the State had come to an end it was felt that conditions were such that the emergency continued and it was necessary to provide for trial and punishment of enemy agents and persons committing certain offences with intent to aid the enemy by a special procedure which was enacted in the Ordinance. With that end in view, an "enemy" was defined to mean and include "any person directly

or indirectly, participating or assisting in the campaign recently undertaken by raiders from outside in subverting the Government established by law in the State." An "enemy agent" was defined as meaning "a person, not operating as a member of enemy armed force, who is employed by, or works for or acts on instructions received from the enemy." It is clear, therefore, that "enemy" and "enemy agent" are a clearly defined class of persons and would give rise to a reasonable classification for the purpose of the Ordinance. Section 3 provides for punishment of a person who is an enemy agent or who does certain things with intent to aid the enemy. There can be no doubt in the circumstances existing in the State then and now that the classification is reasonable and is founded on an intelligible differentia which distinguished persons brought under the Ordinance from others. There is also no doubt that the differentia had a rational relation to the object sought to be achieved by the Ordinance. There had recently been a campaign to subvert the government established by law in the State and though the actual raids were over, the danger of subversion of the government was not over and the threat from those who intended to aid the enemy continued. In these circumstances the Ordinance was enacted and provided a special procedure for the trial of enemy agents or those who did certain things with intent to aid the enemy, the object of such persons being to subvert the government established by law in the State. If it is said that the Ordinance does not purport to make any classification of persons at all but only creates an offence and provides a stringent procedure for the punishment of that offence, then there is no discrimination at all, for anybody who commits that offence is subjected to the drastic procedure. It has also to be remembered that in order to repel the charge, of discrimination the permissible classification need not be of persons only. Certain offences may be so heinous or serious that they may in certain circumstances be treated as a class and tried in a different way. The offence created by s. 3 of the Ordinance is not found as such in the Penal Code but is a new offence of an aggravated kind which may in the circumstances prevailing in the State mentioned above be treated as different from the ordinary offences and may well be dealt with by a drastic procedure without encountering the charge of violation of the equal protection clause. We are, therefore, of opinion that on the principles laid down by this Court in the large number of cases summarised in the Dalmia case [[1959] S.C.R. 279], the Ordinance cannot be said to be discriminatory and, therefore, violative of Art. 14 of the Constitution. The contention under this head on the constitutionality of the Ordinance therefore must be rejected.

Re. (2).

The Ordinance purports to have been promulgated under s. 5 of the Constitution-Act, which declared that all powers, legislative, executive and judicial, in relation to the State and its government, were always inherent in and possessed and retained by His Highness and nothing in the Act was to affect or deemed to have affected the right and prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority. It is, however, submitted that on account of the accession of the State to India on October 26, 1947, certain matters were surrendered to the Government of India and therefore His Highness had no power left to legislate on matters so surrendered. These matters are to be found in the Schedule to the Instrument of Accession [Appendix VII of the White Paper on Indian States, p. 165]. This Schedule consists of 20 items, ground under four heads : (A) Defence, (B) External Affairs, (C) Communications and (D) Ancillary. We are not here concerned with heads (B) and (C) and need only consider the items under (A) and (D). There are four items under the head "Defence", namely -

1. The naval, military and air forces of the Dominion and any other armed force raised or maintained by the Dominion, any armed forces, including forces, raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.

2. Naval, military and air force works, administration of cantonment areas.
3. Arms, fire-arms, ammunition.
4. Explosives.

And there are four items under the head "Ancillary", namely -

1. Elections to the Dominion Legislature, subject to the provisions of the Act and of any Order made thereunder.
2. Offences against laws with respect to any of the aforesaid matters.
3. Inquiries and statistics for the purposes of any of the aforesaid matters.
4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters, but except with the consent of the Ruler of the acceding State, not so as to confer any jurisdiction or powers upon any courts other than courts ordinarily exercising jurisdiction in or in relation to that State.

The contention on behalf of the appellants is that the provisions of the Ordinance were in particular covered by item (1) under the head "Defence". It is also urged that the High Court was not correct in holding that there was concurrent jurisdiction in the State as well as the Central Legislature even with respect to items in the Schedule and that on a correct interpretation of the Instrument of Accession, the Central Legislature alone had power to legislate with respect to the matters in the Schedule. We do not think it necessary to decide in this case whether the State had concurrent powers to legislate on matters covered by the Schedule and shall proceed on the assumption that the Central Legislature alone had the power to legislate on these matters. The question then which immediately arises is whether the Ordinance is covered by item (1) under the head "Defence". The other items either under the head "Defence" or under the head "Ancillary" are immaterial for this purpose. If the Ordinance is not covered by item (1) under the head "Defence", it would then be within the competence of the State Legislature or of His Highness to promulgate it, for all other matters besides those covered by the twenty items in the Schedule in any case remained with the State. Item (1) under the head "Defence" deals with the naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion and includes any armed forces including those raised or maintained by any acceding State, which are attached to, or operating with any armed forces of the Dominion. Howsoever wide an interpretation is given to this entry it will be seen that it deals only with the armed forces whether on land or sea or in the air and the raising or maintenance of such forces and their operations. The Ordinance has, in our opinion, nothing to do with the matters covered by this entry. It is true that it defines "enemy" and "enemy agent" and creates offences with reference to certain acts done with intent to aid the enemy including giving of assistance to the military or air operations of the enemy or impeding the military or air operations of Indian forces or His Highness' forces or the forces of any Indian State. But it is only indirectly concerned with the operations of the armed forces and its main purpose is to deal with persons who with intent to aid the enemy commit certain acts including assistance to the military or air operations of the enemy or impediment to the military or air operations of the Indian armed forces. Besides this reference to military or air operations, the rest of the provisions of the Act has nothing to do with the armed forces and if one looks at the pith and substance of the Ordinance it will be found that it deals with persons who are concerned with the subversion of the

government established by law by becoming enemy agents or doing certain acts with intent to aid the enemy. In pith and substance therefore, the Ordinance deals with public order and criminal law and procedure; the mere fact that there is an indirect impact on armed forces in s. 3 of the Ordinance will not make it in pith and substance a law covered by item (1) under the head "Defence" in the Schedule. We are therefore of opinion that there is no force in the contention that the Ordinance was beyond the legislative competence of His Highness because certain matters were ceded in the Instrument of Accession dated October 26, 1947, to the Government of India. This contention must also fail.

Re. (3).

The contention is that as s. 5 of the Constitution-Act was repealed on November 17, 1951, the Ordinance which is stated to have been passed under that section also came to an end. It is enough to say that there is no force in this argument. Clause (b) of s. 6 of the Jammu and Kashmir General Clauses Act, (J.K.XX of S. 1977), clearly saves the Ordinance. It is as follows :-

"Where this Act, or any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not.....

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder;"

It will be clear that the promulgation of the Ordinance was a "thing duly done" under s. 5 of the Constitution-Act and the repeal of s. 5 of the Constitution-Act would thus leave the Ordinance which was promulgated thereunder entirely unaffected. The repeal of s. 5 can only mean the withdrawal of that legislative power on and from the date of repeal. Anything done while the power subsisted cannot be affected by such repeal. A law enacted under a Constitution-Act does not lose its vitality and would continue even though there may be repeal of parts of the Constitution-Act under which it was enacted as long as the law is not inconsistent with the Constitution-Act as it emerges after the amendment and repeal of certain provisions thereof. It derives its binding force from the fact that it was within the competence of the legislature when it was passed and being permanent would continue till amended or repealed under the amended Constitution-Act. We are, therefore, of opinion that the Ordinance did not come to an end on the repeal of s. 5 of the Constitution-Act and remained a valid piece of legislation in view of s. 6(b) of the Jammu and Kashmir General Clauses Act.

Re. (4).

It is urged that the conditions in the State have changed considerably since 1949 and therefore the Ordinance must be held to have lapsed. It is enough to say that there is nothing in this contention, even assuming that conditions in the State are not now exactly the same as they were in 1949. The Ordinance was a permanent piece of legislation. It is true that it came into existence because of an emergency, but that was only the occasion for passing the Ordinance. The Ordinance, however, tries to reach an evil of deeper roots, an evil which cannot be said to have ceased to exist, viz., subversion of the government established by law in the State in conjunction with the enemies of the State. Being a permanent law, it can only be brought to an end by means of repeal by competent authority. It is not the case of the appellants that the Ordinance has been repealed by any competent authority. It must therefore be held to be in force till such repeal even if the conditions now are

assumed not to be exactly the same as in 1949. This contention therefore also fails.

Re. (5).

It is urged that the Ordinance was unconstitutional because it is inconsistent with Art. 352 and the subsequent Articles. We must say that Art. 352 and the subsequent Articles in Part XVIII of the Constitution relating to Emergency Provisions have nothing whatsoever to do with the validity or otherwise of the Ordinance. We have been unable to understand how there can be any inconsistency between the Ordinance and the provisions contained in Part XVIII of the Constitution. This contention also fails.

It now remains to notice three points that were urged during the course of arguments on behalf of the appellants, namely, (i) s. 4(1) of the Ordinance is hit by Art. 20(1) of the Constitution, (ii) s. 11(1) is hit by Art. 22(1) of the Constitution, and (iii) the Special Judge has no jurisdiction to try an offence under the Explosive Substances Act. Apart from the fact that these points not having been raised by the appellants in their writ petition or urged before the High Court, we should be reluctant to permit them to raise these points for the first time in this Court, we may, in passing, point out that the offences for which the appellants are being prosecuted are said to have taken place in June 1957 and that they have been allowed to engage lawyers of their choice. They can therefore have no grievance so far as the first two points are concerned and we leave them to be decided in a case where there is grievance. There is no substance in the third point.

There is no force therefore in this appeal and it is hereby dismissed.

Appeal dismissed.

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