

(1950) 09 P&H CK 0014
In the Punjab And Haryana At Chandigarh

Amar Nath Bali

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 12-09-1950

Acts Referred:

Constitution of India, 1950 — Article 13, 18, 19, 32
GOVERNMENT OF INDIA ACT, 1915 — Section 19
Penal Code, 1860 (IPC) — Section 153A, 295A, 298

Citation : AIR 1951 P&H 18 : (1951) CriLJ 261

Hon'ble Judges : Khosla, J;Kapur, J;Harnam Singh, J

Bench : Full Bench

Judgement

Khosla, J.—This application u/s 23, Press (Emergency Powers) Act, XXIII [23] of 1931, is directed against a notification issued by the Chief Commissioner, Delhi, on 5-4-1950, by which it was declared that all copies of a book entitled "Now It Can be Told" were forfeited. The forfeiture was ordered on the ground that the book contained "matter of the nature described in Clause (h) of Sub-section (1) of Section 4" of Act XXIII [23] of 1931 to which I shall hereafter refer as the Act. The petitioner is the author of this offending book and seeks to set aside the order of forfeiture

2. Before stating the arguments advanced in support of the petition it is necessary to quote the notification of the Chief Commissioner. It is in the following terms:

Notification F. 8 (41) 50 Press.?In exercise of the powers conferred by Section 19, Press (Emergency Powers) Act, 1931, the Chief Commissioner, Delhi, hereby declares to be forfeited to. His Majesti, all copies, wherever found of the book in English "NOW IT CAN BE TOLD", written by Shri A. N. Bali, published by Akaslivani Prakashan Ltd., Gopalnagar Jullundur City (Punjab), and printed at the Bharat Mudranalaya, Delhi Gate, Delhi, and all other documents containing copies or translations of, or extracts from the aforesaid book inasmuch as it contains matter of the nature described in Clause (h) of Sub-section (1) of

Section 4 of the said Act.

Shankar Prasad, 5-4-1950. Chief Commissioner, Delhi

3. It will be noticed that the grounds on which forfeiture was ordered are merely a repetition of the phrase employed in Section 19 of the Act. It is farther clear that the copies of the offending book were forfeited to His Majesty. This notification was issued on 5-4-1950 and the present petition was filed on 31-5-1950. On 19-6-1950 an affidavit of the Homo Secretary to the Chief Commissioner, Delhi, was sworn and presented to this Court. In this affidavit the grounds on which forfeiture had boon ordered were amplified and the error in using the expression "His Majesty" instead of the [word "Government" in the notification was pointed out. This was obviously done in order to forestall an argument regarding the validity of the notification which it was anticipated would be raised. In fact, the argument was raised and the validity of the notification was challenged on the ground that after 26-1-1950 the expression "His Majesty" had no meaning in reference to anything done in India.

4. The book "NOW IT CAN BE TOLD" is a narrative of some of the events which followed the partition of India. In the main it deals with the riots which took place in West Punjab, in the course of which Muslims attacked Sikhs and Hindus. The Chief Commissioner has in particular taken objection to some of the passages of which details were given in an annexure to the affidavit of 19-6-1950. The learned Advocate-General has also drawn our attention to a number of other passages and has contended that those passages also contain matter of the nature described in el. (h) of Sub-section (1) of Section 4 of the Act. In all there were nineteen passages.

5. Mr. Amolak Ram Kapur, learned Counsel for the petitioner, contended in the first place that the notification was bad on two grounds. In the first place it ordered the book to be forfeited to His Majesty and in the second place that it did not give the grounds on which forfeiture was ordered and merely made a reference be Clause (h). On this ground the forfeiture was bad. Next he argued that Clause (h) of Sub-section (1) of Section 4 of the Act was ultra vires the Constitution as it offended against the provisions of Art, 19(1) of the Constitution. In this connection he drew our attention to two recent decisions of the Supreme Court of India reported as Romesh Thappar Vs. The State of Madras, and Brij Bhushan and Another Vs. The State of Delhi, In the third place, he argued that the offending passages read by themselves or, at any rate, in the light of the contents of the rest of the book did not fall within the purview of Clause (h) and therefore, did not contain any offending matter. Lastly he contended that the truth of the statements made in the book had not been challenged by Government and the book was nothing more than a historical and accurate narrative of events that had recently taken place and therefore could not be considered as open to objection under the provisions of the Act.

6. The first point raised by Mr. Kapur relates to a technical defect in the

notification. The notification clearly makes mention of Section 19 of the Act and the petitioner could not have been under any misapprehension as to why and on what grounds the copies of his book were being forfeited. It is not in my view necessary to set out in full the reasons and the grounds for making an order u/s 19. It is sufficient if the relevant clause of Sub-section (1) of Section 4 is mentioned, so that upon a reference being made to it, it at once becomes clear why the notification ordering the forfeiture of the book was issued. All that Section 19 requires is that the notification must state the grounds upon which the order of forfeiture is based, and in my view there was a sufficient compliance with this requirement by making reference to Section 19 and to Clause (h) of Sub-section (1) of Section 4. With regard to the other objection relating to the use of the expression "His Majesty", this, too, is a technical flaw and does not in my view vitiate the notification. What is important is that forfeiture was ordered and the identity of the authority to whom the copies were forfeited is a matter of secondary importance. Had the notification merely said that the copies of the book were forfeited, without saying anything more, it could not have been said that the notification was bad for any defect. The affidavit of the Home Secretary shows that the expression "His Majesty" was used owing to a slight error and this error does not in my view vitiate the notification.

7. The second argument advanced by Mr-Kapur has considerable force. Article 19 of the Constitution declares that all citizens shall have the right

(a) to freedom of speech and expression;....

Article 19(2) further provides:

Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to or prevents the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

The rest of this article is not relevant for the purposes of the enquiry before us. It is clear that to order the forfeiture of a book published by an author is to interfere with freedom of speech and expression in a direct and effective manner, and unless the saving stated in Clause (2) applies the forfeiture must be held to be bad. It is clear that the forfeiture has not been ordered because the contents of the book contain matter which can be described as libel,, slander, defamation, contempt of Court or matter which offends against decency or morality. The only ground on which exception was claimed by the learned Advocate-General was that the contents of the book would "undermine the security of, or tend to overthrow the State." Therefore we have to consider whether Clause (h) of Sub-section (1) of Section 4 of the Act is saved by Clause (2) of Article 19 of the Constitution. Sub-clause (h) contemplates matter which tends directly or indirectly "to promote feelings of enmity or hatred between different classes of His Majesty's subjects."

8. This question was recently considered by their Lordships of the Supreme Court in two recent cases *Romesh Thappar Vs. The State of Madras*, and *Brij Bhushan and Another Vs. The State of Delhi*, Both these cases were considered by the same Bench of the Supreme Court and it was held:

Freedom of speech and expression includes freedom of propagation of ideasThe 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. Thus, 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.

Their Lordships of the Supreme Court pointed out that the word "sedition" occurred in the Draft Constitution but was deleted from the shape which it finally assumed. Their Lordships further pointed out that where a certain law is repugnant to any article in the Constitution it must be deemed to be wholly void and not void only to the extent of the repugnancy. Since Clause (h) of Sub-section (1) of Section 4 of Act xxiii [23] of 1931 makes no reference to undermining the security of the State or tending to overthrow it, it cannot be said that Sub-clause (h) is good to the extent where the matter contemplated is of such a nature that it would undermine the security of or tend to overthrow the State. It is obvious that Clause (h) would cover a vast number of utterances spoken or printed which would not undermine the security of the State or tend to overthrow it but inasmuch as they would create disaffection or feelings of hatred between different classes of Indian citizens they would come within the mischief of the clause. Such utterances cannot be suppressed as they are not covered by Clause (2) of Article 19 of the Constitution. It must, therefore, be held that the whole of Clause (h) of Sub-section (1) of Section 4 is ultra vires the Constitution. I may with great respect quote a sentence from the judgment of Patanjali Sastri J,, in *Romesh Thappar Vs. The State of Madras*, in which this matter was considered:

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 public security 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.

This dictum of their Lordships of the Supreme Court is binding on us.

9. The third argument advanced before us was that the passages pointed out in the book did not in any way tend to create hatred between different classes of Indian citizens and therefore were not covered by Clause (h) of sub. s. (1) of Section 4 of the Act. Some of the passages do contain matter which can be

described as hostile -to the Dominion of Pakistan. There is, however, nothing in any of these passages which would offend the Muslims of India. There is no aspersion on the loyalty of the Muslim citizens of India, nor is there anything in the book derogatory of the Muslim religion. The learned Advocate-General tried to argue that to criticise the Muslim League and the Dominion of Pakistan would have an adverse effect on the mental make up of the Muslims of India and would tend to incite them against the non-Mualims. I find myself unable to accept this view. It is unnecessary to cite the passages and it will be sufficient to say that there is not a word in them against the Muslim citizens of India as such, and I must hold, therefore, that the book does not contain matter which would promote feelings of enmity or hatred between different classes of Indian citizens.

10. It is quite unnecessary to examine the fourth argument raised by Mr. Kapur. The Government have not challenged the correctness of the statements made in this book and the truth or falsity of the statements is hardly a relevant matter. I am unable to verify the correctness of any of the statements contained in this book. We were told at the bar that some of the statements were incorrect but if the book contains passages which offend against any law in force in India the historical truth of that matter would scarcely be a good defence unless it could be pleaded that the statement of this truth was justified on some ground. No attempt was made to show that the publication of this book was in the interest of anyone and therefore the truth or falsity of statements contained in the book is not a matter which appears to mo relevant to the issue before us.

11. For the reasons given above, I would hold that the Chief Commissioner of Delhi erred in ordering the forfeiture of this book and I would, therefore, set aside his order. The petitioner will be allowed Rs. 200 costs of these proceedings.

12. Harnam Singh J. ? Professor Amar Nath Bali is the author of the book "NOW IT CAN BE told" which was printed at the Bharat Mudranalaya, Delhi, in the latter part of the year 1949. Professor Bali holds the copyright of the book and has proprietary interest therein.

13. By notification published in the Gazette of India, Part in, Section 3, dated 2-4-1950, the Chief Commissioner, Delhi, acting u/s 19, Press (Emergency Powers) Act, 1931, hereinafter referred to as the Act, declared to be forfeited to His Majesty all copies, wherever found, of the book "now it can BE told" written by Professor A. N. Bali and published by Akashvani Prakashan, Limited, Gopal Nagarr Jullundur City, on the ground that it contained matter of nature contained in el. (h) of Sub-section (1) of Section 4 of the Act.

14. Professor Amar Nath Bali applies u/s 23 of the Act to set aside the order passed by the Chief Commissioner, Delhi, forfeiting the book and in the application u/s 23 of the Act maintains inter alia that the order of forfeiture contravenes the fundamental right of the applicant to freedom of speech and expression conferred upon him by Article 19(1)(a) of the Constitution of India. Indeed, the applicant challenges the validity of Clause (h) of Sub-section (1) of

Section 4 of the Act as being void under Article 13(2) of the Constitution by reason of its being inconsistent with the fundamental right aforesaid.

15. There can be no doubt that freedom of speech and expression includes freedom of press. On this point *Romesh Thappar Vs. The State of Madras*, may be seen. In *Romesh Thappar Vs. The State of Madras*, it was said:

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 liberty of publication. Indeed, without circulation the publication would be of little value.

Clearly, the order made by the Chief Commissioner would be a violation of the applicant's, fundamental right under Article 19(1)(a) unless Clause (h) of Sub-section (1) of Section 4 of the Act under which it was made is saved by Clause (2) of Article 19 of the Constitution of India. Clause (2) of Article 19 reads:

Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or undermines the security of tends to overthrow the State.

16. Admittedly the offending passages in the publication do not contain matter which can be described as libel, slander, defamation, contempt of Court or matter which offends against decency or morality. The contention raised by the learned Advocate-General is that Clause (h) of Sub-section (1) of Section 4 of the Act is a law relating to "matter which undermines the security of or tends to overthrow the State."

17. In the words of Professor A. N. Bali his object in writing the book is

to raise the conscience of the country, giving it a glimpse of the hell which the prosperous and proud people of the North-West Pakistan had to suffer in those critical days and to appeal to the leaders to learn from their past mistakes and take determined and suitable measures in hand to undo the evil effects of the greatest "wrong" of history.

In the main the book deals with the riots which took place in West Punjab in the course of which Muslims attacked Hindus and Sikhs. The order of forfeiture proceeds upon the passage set out above in which the author gives his object in writing the book and twelve other passages which give in a narrative form some of the events which preceded or followed the partition of India.

18. The question that then arises for decision is whether Clause (h) of Sub-section (1) of Section 4 of the Act is a law relating to "matter which undermines the security of or tends to overthrow the State." Section 4 of the Act, so far as it is material to the present enquiry, reads:

Whenever it appears to the State Government that any printing press is used for

the purposes of printing or publishing any book containing any words, signs or visible representations, which tend, directly or indirectly, to promote feelings of enmity or hatred between different classes of the citizens of India, the State Government may declare all copies of such book, wherever found, in India, to be forfeited to Government.

In *Romesh Thappar Vs. The State of Madras*, , it was said:

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 cl. (2) of Article 19, although the restriction which it seeks to impose may have been conceived generally in the interests of public order.

19. Now, the Act was passed by the Central Legislature in exercise of the powers conferred upon it by Section 45A, Government of India Act, 1915, read with the Devolution Rules made by the Governor-General in Council with the sanction of the Secretary of State in Council on 16-12-1920. The relevant portion of Section 45A reads:

45A (1) Provision may be made by rules under this Act:

(a) for the classification of subjects in relation to the functions of Government, as central and provincial subjects, for the purpose of distinguishing the functions of Local Governments, and local Legislatures from the functions of the Governor-General in Council and the Indian Legislature:

20. As stated above, on 16-12-1920, in exercise of the powers conferred by Section 45A, Government of India Act, 1915, the Governor-General in Council with the sanction of the Secretary of State in Council, was pleased to make the Devolution Rules, the same having been approved by both Houses of Parliament. Rule 3 (1) of the Devolution Rules provided that for the purpose of distinguishing the purposes of the Local Governments and the local Legislatures of Governors' provinces from the functions of the Governor-General in Council and the Indian Legislatures, subjects shall in the provinces be classified in relation to the functions of the Government as central and provincial subjects in accordance with the lists set out in Sch. I. Rule 3 (2) of the Devolution Rules then provided that any matter which was included in the list of provincial subjects set out in Part II of List I shall, to the extent of such inclusion, be excluded from any central subject of which, but for such inclusion, it would form part.

21. Entry No. 34, Part II, Sch. I of the Devolution Rules reads:

34. Control of newspapers, books and printing-presses; subject to legislation by the Indian Legislature.

Entry No. 46, Part 1 of Sch. I reads:

46. All matters expressly excepted by the provisions of Part II of this Schedule, from inclusion among provincial subjects.

22. From what I have said above it follows-that the Act was put on the statute book for the control of newspapers, books and printing presses. Indeed, it is plain that Clause (h) of Sub-section (1) of Section 4 of the Act is a law restricting freedom of speech and expression and unless this law is directed solely against undermining the security of the State or the overthrow of it, the law cannot fall within the reservation under Clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. Now, it is conceded that publications which tend directly or indirectly, to promote feelings of enmity or hatred, between different classes of the citizens of India, may undermine the security of or tend ,to overthrow the State. Clause (h) of Sub-section (1) of Section 4 of the Act, however, covers publications which do not undermine the security of or tend to overthrow the State. That being so, the possibility of the application of Clause (h) of Sub-section (1) of Section 4 of the Act for purposes not sanctioned by the Constitution is not ruled out. Clause (h) of Sub-section (1) of Section 4 of the Act, therefore, falls outside the scope of authorised restrictions under Clause (2) and is, therefore, void and unconstitutional.

23. A similar point arose in Romesh Thappar Vs. The State of Madras, In disposing of the contention their Lordships of the Supreme Court said:

Where a law purports to authorise the imposition of restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits 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 soverable. 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 these proceedings it is not contended that the offending publications fall within clauses other than Clause (h) of Sub-section (1) of Section 4 of the Act.

24. Mr. Basant Kishan Khanna, however, said that the order of forfeiture was a reasonable restriction on the exercise of fundamental right contained in Article 19(1)(f) of the Constitution. As stated above, the Act was put on the statute book for the control of newspapers, books and printing presses. Clearly, the object of the Act was not to impose restrictions on the exercise of the right to acquire, hold and dispose of property.

25. Mr, Amolak Earn Kapur, learned Counsel for the applicant, challenged the order of forfeiture on other grounds as well, but finding as I do that Clause (h) of Sub-section (1) of Section 4 is void and unconstitutional it is unnecessary to give a decision on those points.

26. In the result, I hold that the Chief Commissioner of Delhi erred in ordering forfeiture of the book "now IT CAN BE TOLD" and I would, therefore, set aside his order. The applicant will be allowed Rs. 200 costs of these proceedings.

27. Kapur, J. ? I agree that this appeal should be allowed, Mr. Amolak Earn Kapur has taken us through the various passages of the book "now it can be told" which were considered by the Chief Commissioner to offend against the law and after going through them I am of the opinion that even if the law is as stated in the Press (Emergency Powers) Act the passages are of such an innocuous nature that they do not fall within the mischief of the Act and on that ground alone the appeal should be allowed.

28. As I am unfortunate enough not to be able to agree with the view taken by my learned brother as to the effect of Article 19 on Clause (h) of Section 4 (1), Press (Emergency Powers) Act, I think it is only polite that I should give my reasons for the same. Section 4 (1)(h), Press {Emergency Powers) Act of 1931 provides:

4.(1) Whenever it appears to the Provincial Government that any printing press in respect of which any security has been ordered to be deposited u/s 8 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which.... or which tend, directly or indirectly... -(h) to promote feelings of enmity or hatred between different classes of His Majesty's subjects,....the Provincial Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above,

(i) where security has been deposited, declare such security, or any portion thereof to be forfeited to His Majesty, or

(ii) where security has not been deposited, declare the press to be forfeited to His Majesty, and may also declare all copies of such newspaper, book or other document wherever found in British India to be forfeited to His Majesty.

29. The question to be determined is whether this section has become ultra vires because of the provision in the Constitution Article 19(1). In order to determine this I may refer to some of the relevant Articles which have a bearing on the question now before me. Article 13(1) is as follows:

13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

30. The Article providing for the right of freedom of speech is Article 19 (1)(a) and (2) and it runs as follows:

19,(1) All citizens shall have the right?(a)to freedom of speech and expression;....

(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any

existing law in so far as it relates to, or prevents the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State." Articles 13(2) and 19(1) seem to correspond to the First and the Fourteenth Amendments in the American Constitution, the relevant provisions of which are?

First Amendment. The Congress shall make no law... abridging the freedom of speech or of the press...

The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

31. The Supreme Court in America thus can declare the laws passed by the Congress ultra vires under the First Amendment and by the States under the due process clause of the Fourteenth Amendment. In connection with the due process clause the Supreme Court has adopted the interpretation that due process means whatever is reasonable, and they construe reasonable not merely at the time of the adoption of the provision but at the time of the decision in each particular case. See Willis on Constitutional Law, p. 498.

32. At page 497 Willis says:

It is true the Supreme Court has frequently adopted a strict or conservative interpretation of various clauses in the Bill of Rights of the Constitution, making them continue to mean just what they did at the time of their adoption. But since it has adopted the liberal method of interpretation to the due process clause of the Fourteenth Amendment and has applied the same method of interpretation to the due process of the Fifth Amendment and since it has made the due process clause of the Fourteenth Amendment include freedom of speech and of the press, it must follow that the due process clause of the Fifth Amendment includes it. And if so, the Supreme Court must give to freedom of speech and of the press in the First Amendment the same meaning that it gives it under the due process clause of the Fourteenth Amendment.

33. In the same way it has been held that the crime of sedition may be re-created, vide *Debs v. United States*, (249 U.S. 211) and p. 497 of Willis on Constitutional Law. The test applied in America as to when words give rise to unlawful acts is when there is a clear and present danger that will cause such acts. In the case of *Schenk v. United States* (1919) U.S. 249. Section 47, the Supreme Court of the United States adopted this test, and it has been held that there is a proper exercise of the police power only under such circumstances. After referring to several authors, of Constitutional law, Willis states at p. 499:

The meaning of the guarantee of freedom of speech and of the press then is that

personal liberty is protected against social control either by previous restraint or by subsequent liability unless the Supreme Court, passing both on the utterance and the statute, thinks such social control reasonable.

34. Willoughby on the Constitution of the United States at p. 1194 has referred to *Patterson v. Colerade*, 205 U. Section 454 and says:

The Court pointed out that the character of every act must depend upon the circumstances under which it is done, citing *Aikens v. Wisconsin*, 195 U. Section 194, that, for instance, the right to free speech does not justify a man in falsely shouting fire in a theatre and causing a panic, or protect him against an injunction against using words which may have all the effect of force, citing *Compers v. Buck's Stove and Range Co.*, 221 U. Section 418. "The question in every case" said the Court, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

35. In *Willis on Freedom of Speech and of the Press* 4 IND L. J 445, it is stated:

Hence, if we are getting too little freedom of speech and of the press and too much social control of them, the writer feels that the remedy lies, not in changing the law, but in obtaining a Supreme Court whose personnel will guarantee a fair application of the rule of reasonableness.

36. In spite of the First Amendment the Seditions Act of 1708 was passed by the Congress and it was sustained by lower Federal Courts, but the matter was never canvassed before the Supreme Court. In 1917, when the war was on, the Espionage Act was passed. The constitutionality of this Act was brought before the Supreme Court and Willoughby quotes the following passage from the judgment of the Supreme Court affirming the convictions which had been obtained below:

The plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe.

37. In *Gitlew v. People of the State of New York*, 268 U. Section 652, the accused had been indicted for the statutory crime of criminal anarchy as defined in the New York Penal Law, and the constitutionality of the statute was questioned upon the ground that it was in violation of the liberty of expression guaranteed by the due process clause of the Fourteenth Amendment. This contention was declared by the Supreme Court to be without merit. The following passage from the judgment of the Supreme Court may be quoted:

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It, is not aimed against mere historical or philosophical essays. It does not restrain

the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of Organized government by unlawful means.

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words.

Discussing all this Professor E. S. Corwin in the Yale Law Journal for November 1920 concluded his article in the following words:

"To sum up, the following propositions seem to be established with respect to constitutional freedom of speech and press; first, Congress is not limited to forbidding words which are of a nature "to create a clear and present danger" to national interests, but it may forbid words which, are intended to endanger those interests, if, in the exercise of a fair legislative discretion, it finds it "necessary and proper" to do so; second, the intent of the accused in uttering the alleged forbidden words may be presumed from the reasonable consequences of such words, though the presumption is a rebuttable one; third, the Court will not scrutinize on appeal the findings of juries in this class of cases more strictly than in other penal cases. In short, the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, who so far as there is evidence to show, is just where the framers of the Constitution intended it to be.

Cooley in his Constitutional Limitations, p. 605 has put the rights of the people as follows:

We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character, when tested by such standard as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established, and in reference to which they have been adopted.

Then Willoughby has stated this in the following words:

Thus, after all, the question as to what shall be deemed harmful and therefore punishable comes down, in the case of seditious libel as of ordinary libel or slander, to what the juries may think to be such as tested by the standards of the common law or by the provisions of the statutes. Thus, in the United States, the Federal constitutional question is as to the power of Congress to declare criminal the violation of the prohibitions contained in the Espionage Act of 1917 as amended by the Sedition Act of 1918. When thus viewed, it is clear that no

constitutional objection can be raised to the penalizing of any acts -including words spoken, written, printed, or published?which tend and are intended by these uttering, writing, printing, or publishing them, to interfere with the efficient execution by the Federal Government of its lawful powers.

38. Willoughby has then referred to *Balzae v. Porto Rico* 258 U.S. 298 and has said as follows:

In *Bahae v. Porto Rico*, (258 U. Section 298) the editor of a Porte Rice newspaper was convicted of criminal libel, and that conviction was unanimously affirmed by the Supreme Court. In the opinion in that case the words of the libel are not quoted, but, regarding them, the Court said: "A reading of the two articles removes the slightest doubt that they go far beyond the "exuberant expressions of meridional speech," to use the expression of this Court in a similar case of *Gandia v. Pettingill*, 222 U. Section 452, Indeed they are so excessive and outrageous in their character that they suggest the query whether their superlative vilification has not overleapt itself and become unconsciously humorous. But this is not a defence.

39. In America then the test which is applied is one of reasonableness at the time of the decision in each particular case. What has to be seen is whether there is clear and pre. sent danger that will cause or give rise to unlawful acts. It is the question of proximity and degree and success of incitement alone does not warrant the making of the act a crime.

40. The majority judgment in *Romesh Thappar Vs. The State of Madras*, was strongly relied on by Mr. Amolak Earn Kapur. Now that was a case where the petitioner was the printer, publisher and editor of a recently started journal called "Cross Roads" and the Government of Madras had in the exercise of the powers u/s 9 (I-A), Madras Maintenance of Public Order Act, 1949, issued an order whereby they imposed a ban upon the entry and circulation of the journal and the petitioner brought an application under Article 32 of the Constitution and the constitutionality of that Act dealing with public safety and public order was debated. And the question to be determined was the legality of the order of the Executive. In discussing this case Patanjali Sastri J., who gave the majority judgment discussed the meaning of the words "public Safety" and at p. 241 said as follows:

"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...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 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.

41. Test for determining the constitutionality of an Act was laid down by his Lordship at p. 242 as follows:

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 solo 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...

Again at p. 243 his Lordship said:

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 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 process of popular Government, is possible.

And at p. 244 his Lordship then laid down the law in the following terms:

Unless law restricting freedom of speech is directed solely against the undermining of the security of the State or the overthrowing of it such law cannot fall within the reservation under Clause (2) of Article 19 although the restrictions which it seeks to impose may have been conceived in the interest of public order.

His Lordship went on to consider at p. 244 the argument addressed to the Court that Section 9 (I-A) could not, under Article 13(1), be considered wholly void but only to the extent to which, it was inconsistent with the fundamental rights. This argument was rejected and his Lordship-observed at p. 244:

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 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 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, 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 public:

security 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.

42. This was a case in which the order of the Executive imposing restrictions was in question and the act was held to be ultra vires because, firstly the act could not be restricted to aggravated forms of prejudicial activity; secondly there was no guarantee that there would be no misuse of the power against those who do not act prejudicially against the State; thirdly the constitution has laid down the permissible limits for the legality of the act "solely" within the words "undermining the security of the State or the overthrow of it;" fourthly if the language of a statute is wide enough to cover an imposition within and without the limits above prescribed, the whole is bad as it cannot be severed; and fifthly as it is not severable, Article 13(1) cannot be applied.

43. As this is a judgment of the Supreme Court it is binding on us and I am bound to follow it, but the difficulty arises in its application to the facts of the present case. Must the observations of Patanjali Sastri J., be confined to the facts of that case or should they be read in such a wide sense that they would be applicable to all cases whatever be the facts and whatever the nature of the statute impugned? It may lead to many anomalies and its results may almost be disastrous as I shall indicate at another place. But before I do that I would like to refer to another judgment of the Supreme Court, *Dr. N.B. Khare Vs. The State of Delhi*, wherein Kania C, J. at p. 264 has observed:

Abuse of the power given by a law sometimes occurs; but the validity of the law cannot be contested because of such an apprehension.

44. It appears that the test applied in America or the "liberal interpretation" put on the First and the Fourteenth Amendments was not brought to their Lordships' notice in *Romesh Thappar Vs. The State of Madras*, At least it is not referred to there. Nor does it appear that the opinion of Willoughby or other American jurists was considered. I may here mention that although Article 19 (1)(a) and (2) and 18(2) of the Indian Constitution are not textually the same as the First and the Fourteenth Amendments of the American Constitution yet there is no doubt that the two Amendments are the main basis of the two Articles. The observations of Sir W. James L.J. in *Ex parte Campbell: In re Cathcart* (1870) 5 Ch.A. 703 approved of by the House of Lords in *Barras v. Aberdeem Steam Trawling and Fishing Co., Ltd.* (1933) A.C. 402: 102 L J. P.C. 33) and applied in India in *Strimathoo Moothoo Vijjia v. Dorasinga Tevar* 2 I. A. 169: (is Beng. I. R. 83 P, C.) as to the presumption of a local Legislature knowing the interpretation put on a statute (which is re-enacted) by a Court of competent jurisdiction might not in terms apply, but the principle of that rule might well be looked at for purposes of interpretation. The words of the American Amendments have received a judicial interpretation in the American Supreme Court and as the framers of the Indian Constitution have adopted these two Amendments though in different words meaning essentially the same thing the Indian Courts should in my opinion

govern themselves with this interpretation.

45. Section 4 (1)(h) (Press (Emergency Powers) Act of 1931 corresponds to Section 153A, Penal Code. This section occurs in chap, VIII which deals with offences against public tranquillity and if the test of reasonableness or of proximity and degree is to be taken, then it cannot be said that Section 153A has become void and a fortiori Section 4 (1)(h) of the impugned Act. As was observed by Willoughby at p. 1194 the question in every case is:

Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

A speech which is covered by Section 153A, Penal Code, or a writing which comes within Section 4 (1)(h) of the impugned Act may be so violently worded that it brings about civil war or something almost verging on it or it may tend to do so.-can it be said that this would not undermine or tend to overthrow the State or to affect its stability because undermining is nothing else than weakening or subverting as that is what undermining means. It is possible that the offending speech or article may be of a comparatively milder nature and does not come within the words "aggravated form of prejudicial activity" but if the words are capable of inciting feelings of hatred or enmity it must tend to weaken the State. A State where the citizens are served with impunity with speeches or writings inciting feelings of enmity or hatred towards each other cannot but be weakened, its foundation shaken, and become a prey to all kinds of attacks internal and external. Under this interpretation which is sought to be put on the Supreme Court judgment speeches inciting hatred against the Army or the Navy or the Air Force would also be protected unless it comes under any other Article of the Constitution.

46. Test, if I may say so, of the validity is not; the possibility of the abuse of the power given by a law but the present application of it. If the observations of Patanjali Sastri J., are to be construed in the manner that Mr. Kapur would like us to do, then offences under chap. 15 contained in Ss. 295A and 298, Penal Code, would also become void. Indeed all sections of the Penal Code which make abetment by instigation of offences under chap. 5 and incitement under chap. 22 would also become ultra vires. I may here refer to the pamphlet which was the subject-matter of adjudication in Sohanok and Dabs cases referred to above where one of the passages was in the following words:

"Revolutionists; Unite for action." "Know you lovers of freedom that in order to save the Russian Revolution, we must keep the armies of the allied countries busy at borne," and concluded with the threat. If they will use arms against the Russian people to enforce their standard of order so will we use our arms and they shall never see the ruin of the Russian Revolution.

47. Words such as those then cannot be made penal in India under the present law nor indeed any words even though they advocate murder. I do not think that

the framers of the Act either intended such a thing or have achieved this extraordinary state of affairs. In America where the First Amendment is without any restrictions the Supreme Court has upheld the constitutionality of the Espionage Act and I do not see how we can reasonably hold that Section 4 (1) (h), Press (Emergency Powers) Act is wholly unconstitutional or a social restraint on the freedom of speech and "press. Every case will have to depend on its own peculiar circumstances.

48. Finally it was submitted by Mr. Kapur relying on the observations of Patanjali Sastri J. at p. 239 that control of the press is absolutely prohibited by the Constitution. The following observation was particularly emphasized:

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.

49. His observations have to be read in the light of what I have said above. It is true that there cannot be and should not be control of the press and liberty of circulation is as essential as liberty of publication, but then this must be subject to the limitations which I have indicated above. As was observed by Fazl Ali J. in *Brij Bhushan and Another Vs. The State of Delhi*, "Liberty is not to be confused with licence." Even in the United States it has been held that publications dangerous to the conduct of military operations in war time may be restricted; see *Ex parte Vallandigham* (1863) 1 wall. 243, and "Willis on Constitutional Law, p. 493; Propagation of ideas is not prohibited. No statute can penalise the utterances or publications of abstract doctrines or academic discussions having no quality of incitement to any concrete action, nor can under the Indian Constitution a statute be aimed against mere historical or philosophical essays, but restraint on the advocacy or teaching of weakening, subverting or tending to overthrow or overthrowing the State by unlawful means is prohibited. In my judgment Section 4(1)(h) does not cover cases of mere academic discussion. Propagation of ideas as ideas is not prohibited but what is prohibited is what comes within the purview of the rule that I have indicated above. Inciting hatred or enmity between the different classes of citizens of India is not mere propagation of abstract doctrines but is definite act which invest undermine the State. I am, therefore, unable to accept this argument of Mr. Kapur and am of the opinion that Section 4 (1)(h) of the impugned Act is not hit by the Constitution. I have ventured to differ from two of my learned brethren as to the constitutionality of this section impugned before us and I do so in all humility because I feel that an extended interpretation which Mr. Kapur seeks to put on the wording of the Supreme Court judgment could not have been meant by their Lordships and would almost lead to chaos.

50. The result is that I agree with the conclusion of my learned brethren that this appeal must succeed though I am unable to agree with the reasons thereof.