

(1988) 12 BOM CK 0018

In the Bombay High Court

Case No : Criminal Writ Petition No. 1224 of 1988

Buddhikota Subbarao

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 09-12-1988

Acts Referred:

Evidence Act, 1872 — Section 54

Citation : (1988) 12 BOM CK 0018

Hon'ble Judges : M.B. Ghodeswar, J; Dharmadhikari, J

Bench : Division Bench

Judgement

Dharmadhikari, J.—The petitioner in this case Buddhikota Subbarao is being prosecuted for the offences punishable under S. 3(1)(c), 3(1)(c) read with S. 9, 6(2)(a), 6(2)(b) of the Official Secrets Act, 1923. He is also being prosecuted for the offences punishable under S. 24(1)(d) read with S. 18(2) and S. 24(2)(d) read with S. 19(b) of the Atomic Energy Act, 1962. The said trial is pending in the Court of Additional Sessions Judge for Greater Bombay.

2. In this petition the petitioner has challenged Sections 3, 4, 5, 6, 9 and 14 of the Official Secrets Act, 1923, being violative of Arts. 14, 19(1)(a), (g), 20(1) and 21 of the Constitution. According to the petitioner in the absence of definitions of the various expressions used in the Act, the conviction under S. 3 of the said Act will necessarily rest upon unwarranted subjective and arbitrary notion. The expression "interest of the State" as used in S. 3 can throw open wide doors to arbitrariness and unreasonableness. Similarly, absence of definitions of other terms and expressions, such as "secret official code or pass word", enemy, foreign agent, or foreign power, etc. leaves vagueness in the whole enactment which is bound to result in arbitrariness and, therefore, these provisions are violative of Art. 14 of the Constitution. It is also contended that S. 3(2) and 4(2) which deal with the raising of a presumption is also arbitrary. Though the ingredients of S. 5 are substantially akin to those of S. 3 of the Act, it provides for a different punishment which is also violative of Art. 14 of the

Constitution. Initially petitioner had also challenged S. 14 of the Act but the said challenge was given up during the course of arguments.

3. Shri Pradhan, learned counsel appearing for the petitioner contended that since various terms and phrases are not defined in the Act, no definite meaning could be assigned, to them. This results in vagueness and arbitrariness. The provisions dealing with the presumption or burden of proof are also onerous as it practically denies any defence to the accused. It also runs counter or contrary to S. 54 of the Evidence Act. In substance therefore, it is contended by him that the procedure prescribed is not just, fair and reasonable therefore, could safely be termed as arbitrary, and hence violative of Arts. 14 and 21 of the Constitution.

4. On the other hand it is contended by the learned Advocate General that only because certain terms, words, and phrases are not defined, it cannot be held that they are vague or uncertain. In the very nature of things it is not possible to define them though they are conceptively well known. The words and expressions used in the Act will have to be construed and understood in the context they are used. S. 3(2) or 4 which deals with the presumption of a guilt only lays down a rule of evidence. It only deals with the factors which are relevant for deciding the guilt of the accused. Presumption contemplated is rebuttable presumption and, therefore, it will not be correct to say that the whole defence of the accused is shut out. It is also contended by him that the trial is yet to begin and at this stage in the absence of concrete data, the challenge raised is wholly academic and, therefore, this court should refuse to entertain such a challenge at this stage.

5. From the arguments advanced before us, it appears that the main thrust of the argument of Shri Pradhan is based on the absence of definitions of the various words and phrases used in the enactment. Therefore, it will have to be considered as to whether only because certain words and phrases are not defined in the Act, it will result in vagueness or arbitrariness. The normal object of definition is to avoid necessity of requent repetition in describing the subject matter to which the word or expression so defined is intended to apply. The definition of a word in the definition section may be restrictive or extensive of its ordinary meaning. But only because it is not defined it will not necessarily mean that the word or expression is vague or uncertain. It is by now well settled that such words take colour from the Context. While interpreting the words or statutory provisions, it becomes necessary to have regard to the subject matter of the statute and the object which is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the word occurs, the object of the statute in which the provision is included and the policy underlying the statute, assume relevance and become material, the words will have to be construed and understood in the light of their context. If so understood, the connotation, the area and the meaning to be attached to them, gets crystalised and cannot be termed as vague. It is no doubt true that we are dealing with the provisions

which are penal in nature. At the same time it cannot be forgotten that the trial contemplated by the Act is judicial in nature. S. 13 of the Act lays down certain restrictions on trial of offences. Framing of charge is a must to give proper notice to the accused about the allegations made against him. It is a regular criminal trial.

6. The Statement of Objects and Reasons to the Amending Act 24 of 1967 reads as under :

"The protection of official secrets is regulated by the Indian Official Secrets Act, 1923. Except for a few minor amendments made in 1951, the Act has remained unmodified since it was enacted more than forty years ago. In view of the changed circumstances after the attainment of independence and the wide variety of unscrupulous methods which anti-national elements have of late been adopting to secure their ends, it has become necessary to amend the Act suitably to remove certain shortcomings and to make it more effective.

2. The following are the main features of the Bill :

(1) It is proposed to widen the scope of Sections 3 and 5 of the Act by bringing within their ambit cases of secret official codes, etc. the disclosure of which is likely to affect the sovereignty and integrity of India, security of the State and friendly relations with foreign States.

(2) In a prosecution for an offence, of spying under S. 3 of the Act, it is necessary to prove that the accused acted for a purpose prejudicial to the safety or interests of the State. In certain cases of spying, however, where the offence is punishable with imprisonment for a term which may extend to fourteen years, it has been provided that it would not be necessary to prove that the accused was guilty of any particular act tending to show such a purpose, if from the circumstances of the case or the conduct of the accused or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State. It is considered that this special rule of evidence should be made applicable to all offences of spying punishable under the section and it is proposed to amend the section suitably for this purpose.

(3) In the context of problems of internal and external security which the country faces at present, it is necessary to make offences under the Act cognizable and non-bailable and to enhance the maximum penalties prescribed for certain offences. It is, therefore, proposed to enhance the punishments for the offences suitably while ensuring, at the same time, that all offences under the Act become cognizable and non-bailable.

(4) Considerable difficulty is experienced in proving offence under the Act, as very often direct evidence is not available unless one of the participants in the transaction comes forward to give such evidence. Accordingly, it is proposed to make the provisions of S. 337 of the Cr.P.C., 1898 (Tender of pardon to accomplice) applicable to offences under Sections 3, 5 and 7 of the Act as also to

attempte and abetments of such offences".

Therefore the words and expressions used in the Act will have to be interpreted to achieve and not to defeat the object of the enactment.

7. According to Shri Pradhan, learned counsel appearing for the petitioner, the word used in Section 3 i.e. "enemy" is not defined in the Act and is, therefore, vague. This vagueness might result in arbitrariness. According to him it is also not clear as to whether it will include in its import potential enemy. In our view the word "enemy" as used in the enactment gets its colour from the other provisions of the Act. S. 3, which could be termed as a charging section, deals with the penalties for spying. The said section reads as under :-

"3(1) If any person for any purpose prejudicial to the safety or interests of the State -

(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly, useful to any enemy : or

(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy (or which related to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States);

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force established or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years.

(2) On a prosecution for an offence punishable under this section it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the States; and if any sketch, plan model, article, note, document or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or pass word is made, obtained, collected, recorded, published or communicated by any persons other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as provided it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan,

Model, article, note, document (information, code or pass word shall be presumed to have been made), obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State".

Penalties are provided for an act which is prejudicial to the safety or interests of the State. In sub-section (c) of S. 3, in the bracketed portion, which came to be inserted by Act No. 24 of 1967, the words and expressions used are "or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States". The meaning assigned to the words "enemy" in the dictionaries is "a person who hates one and eagerly seeks one's defeat, opponent, member of hostile army or nation, or any unfriendly State". If the said word is read in its context and the object sought to be achieved by the Act, then it must take in its import even a potential enemy or a nation which is unfriendly. Similar view is taken by the Rajasthan High Court in *Kutbuddin and Others Vs. State of Rajasthan*, . While construing the word "enemy" in S. 3 of the Act, this is what the Rajasthan High Court has observed :

"5. On the question of the construction of the word "enemy" in S. 3 of the Act the argument is that Pakistan was not enemy of India at the material point of time when the information was collected and, therefore, S. 3 was not attracted. In my opinion, the argument is untenable. If the argument was accepted it would come to this :

That the active spies may collect valuable information and pass to a foreign State before the actual hostilities at the pain of a small punishment to the great prejudice of the State without falling within the mischief of offence under S. 3 punishable with 14 years" rigorous imprisonment. This could not have been the intention of legislature.

In my opinion, the term "enemy" in S. 3 includes any unfriendly State. Under the Official Secrets Act, 1911, of Great Britain on the pattern of which our Act of 1923 has been apparently drafted, the word "enemy" came to be interpreted in the case of *R. V. Parrott* (1913) 8 Cri. App. Rep. 186 by Phillimore, J. The learned Judge observed as follows :

"When the statute uses the word "enemy" it does not mean necessarily some one with whom this country is at war, but a potential enemy with whom we might some day be at war".

Parrott has collected and was going to collect information for Germany in 1912 when he was apprehended. His case was decided on 28-2-1913 when there were no hostilities between Great Britain and Germany the World War I having broken out on 4-8-1914 and yet Parrott's conviction was maintained on the ground that he obtained and was about to obtain information regarding defence for an enemy. I am in respectful agreement with this view".

Similar view is taken by the Calcutta High Court in (1973) 77 CWN 1061 *Sunil*

Ranjandas v. State. However, as rightly contended by the learned Advocate General, ultimately as to whether a particular State or nation is an enemy or not, must depend upon the facts and circumstances of each case and no general rule could be laid down in that behalf.

8. It is equally true that other expressions such as "secret official code or pass word" etc. are also not defined. However, in our view in the very nature of things it is difficult to define the expression "secret" which will govern all cases. The learned Advocate General has brought to our notice a manual of Departmental Security Instructions published by the Ministry of Home Affairs, which to some extent classifies documents as secret and/or otherwise. This classification may not be conclusive. The Act deals with the offences in respect of official secrets. These secrets should be of the nature, divulgence of which will be prejudicial to the safety or interests of the State. Therefore ultimately as to whether a particular thing or document is secret or not, must also depend upon the facts and circumstances of each case.

9. A complaint was made by Shri Pradhan that the expression "interests of the State" is also not defined and, therefore, it is not possible to visualise as to what could be termed as a purpose prejudicial to the safety or interests of the State. It is also not possible for us to accept this contention. As already observed, this expression will have to be understood having regard to the subject matter of the statute and the object which it intended to achieve. In S. 3(1)(c) by Act No. 24 of 1967 certain expressions came to be inserted which clearly provide guidelines as to what could be considered as prejudicial to the interests of the State. These guidelines may not be exhaustive. The expressions "interests of the State" is more comprehensive and will take in its import the matters or acts which could be termed as prejudicial to the general interests of the State. In this context our attention was drawn to a decision in (1962) 3 All ER 142, Chandler v. Director of Public Prosecutions, wherein similar expression used in the Official Secrets Act, 1911 came to be construed. We do not feel that the said expression is vague or results in uncertainty or arbitrariness.

10. So far as S. 3(2) of the Act is concerned, as held by the Supreme Court in Izhar Ahmad Khan Vs. Union of India (UOI), and Mahant Dharam Das and Others Vs. The State of Punjab and Others, it only lays down a rule of evidence. From the words and expression used in this section, it is quite obvious that a presumption contemplated is a rebuttable presumption. An objective inference has to be drawn by the court from the proved facts and circumstances of the case. The conduct of a person or his past known character is also relevant for drawing an objective judicial inference. However, whether in a given case, such an inference could be drawn or not, must again depend upon the facts and circumstances of each case. We do not find that acts or omissions referred to in the said section are either not relevant or run counter to S. 54 of the Evidence Act. Further S. 54 of the Evidence Act cannot control S. 3(2) of the Official Secrets Act, 1923. It is well known that special provision must prevail over the

general provision. Ultimately the presumption contemplated by S. 3(2) is a rebuttable presumption and, therefore, we do not feel that the said section completely shuts out the defence of the accused as contended by the learned Counsel.

11. Similar is the position with S. 4 of the said Act. It also deals with the rule of evidence. Here also the presumption contemplated is a rebuttable presumption. It also deals with the facts which are relevant. The expression "foreign agent" is specifically defined by the said section. It cannot be forgotten that spying is not done openly but all these activities are carried out in secrecy. Certain facts are normally within the special knowledge of the person concerned. In these circumstances it cannot be said that S. 3(2) and/or S. 4 of the said Act are violative of Arts. 14 or 21 of the Constitution or lay down a procedure which is unjust or unfair.

12. At the cost of repetition we might make it very clear that on the basis of evidence and material placed before it, a court of law has to draw certain inferences and record a reasoned finding. Such a finding cannot be based on the subjective satisfaction but on the objective appraisal of the evidence and material placed before the judge concerned. Further remedies in the nature of an appeal or revision are also available to the person aggrieved to challenge the findings recorded by the trial court. Therefore, more than sufficient safeguards are provided by the enactment itself. Hence it is not possible for us to hold that the procedure prescribed is in any way unfair, unjust or unreasonable.

13. So far as the contention regarding the nature of an offence covered by Sections 3 and 5 is concerned, it is also not possible for us to accept the said contention. The area and the field covered by S. 3 and S. 5 are distinct and separate. The nature of offences contemplated by these two sections are also distinct and separate. As to whether in a given set of facts the offence is covered under S. 3 or S. 5, must ultimately depend upon the facts and circumstances of each case, and no general rule can be laid down.

In the result, therefore, the petition fails and is dismissed.

14. Petition dismissed.