
(1955) 01 MAD CK 0018

In the Madras High Court

Case No : Civil Miscellaneous Petition No. 4655 of 1954

Shanker and Co. and Another

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 28-01-1955

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(2), 19(6)
Press (Objectionable Matter) Act, 1951 — Section 11, 24, 3

Citation : AIR 1955 Mad 498 : (1956) ILR (Mad) 161 : (1955) 68 LW 426

Hon'ble Judges : Rajamannar, C.J.; Rajagopala Ayyangar, J

Bench : Division Bench

Advocate : R. Mathrubhutham, for the Appellant; A.G. and Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C.J.—This is a petition u/s 24 of the Press (Objectionable Matter) Act, 1951, which will hereinafter be referred to as the Act,

to set aside an order of the Government of Madras, G. O. Ms. 329 Public (General-B) dated 6-3-1954, published in the Fort St. George Gazette

dated 10-3-1954, declaring the Book ""Kalavikkalai"" in Tamil, printed at Hajan Electric Press and published by the petitioner company, forfeit to

the Government u/s 11 of the Act. The notification in question runs thus:

Whereas the Tamil book entitled ""Kalavik-kalai"" purporting to be a translation of an Arabic work written by Sheikum Nafsawi, translated by Sri

Rule P. M. Ghani, printed at Rajan Electric Press, Madras, and published by Shankar and Co., Madras, contains objectionable matter within the

meaning of Clause (vi) of Section 3 of the Press (Objectionable Matter) Act 1951, (Central Act LVI of 1951).

And whereas the Advocate General, Madras, has granted a certificate u/s 11 of the said Act that the said book contains objectionable matter

within the meaning of Section 3 of the said Act;

Now, therefore, in exercise of the powers conferred by Section 11 of the said Act the Governor of Madras hereby declares that all copies

wherever found, of the aforesaid book and all other documents containing copies, reprints translations of, or extracts from the same issue, shall be

forfeited to the Government on the ground specified in the first paragraph of this notification;

2. The petitioner is a firm carrying on the business of publishing and printing books under the name of Shankar and Co. According to the affidavit

of D. K. Swami, one of its proprietors, the main business of the firm consists in the publication and sale of books on the scientific aspects of sex.

The above book was published by them in April 1953 and purports to be a translation and adaptation of an original work in Arabic by one Rule P.

M. Ghani. 3250 copies were printed in the first edition. The book is available in two different editions, one with illustrations at Rs. 6 a copy, and

the other without illustrations at Rs. 4 a copy. In the affidavit, it is stated that the book is sold only to bona fide customers who are adults and who

are in need of the book genuinely for their personal use only, and it is not exhibited in book-stalls nor sold openly. The petitioner complains that on

10-3-1954 the police came and seized all the copies of the book remaining undisposed of, in pursuance of the order above mentioned.

3. Certain general objections were taken to the validity of the order of the Government in question, namely, that the grounds on which the State

Government considered the book to contain objectionable matter were not specified, that the petitioner was not given any opportunity to show

cause against the order, that the certificate purported to have been issued by the Advocate General was not disclosed, that the said order is

contrary to and in excess of the statute, and that the action of the State Government is opposed to Article 19(1)(a) and (g) of the Constitution. In

addition to these objections, the affidavit also deals with the merits and asserts that the book does not contain any objectionable matter, that it is a

scientific work on a special branch of knowledge, i. e., sex, and that its circulation is strictly limited. It was further alleged that the matter contained

in the book contained in several publications which have already been published and which are in circulation without any action being taken by the

Government, and therefore the Government were not justified in treating this book alone as objectionable.

On behalf of the State, a counter-affidavit was filed by the Deputy Secretary to Government, Public (General), controverting the main allegations of

fact and law contained in the affidavit filed on behalf of the petitioner. It was stated that the notification cannot be challenged on the ground of

vagueness or in definiteness, as it specifically refers to Section 3 (vi) of the Act, that the order of the Government is not illegal or in excess of the

statute that it is not opposed to Article 19(1) (a) and (g) of the Constitution and that after the certificate had been granted by the learned Advocate

General the petitioner, was not entitled to contend that the book does not contain any objectionable matter. It was further denied that the book

was a scientific work. It was also pleaded that the fact that there might be other books which are obscene and vulgar against which action has not

been taken is not relevant, so far as the present application was concerned.

4. The Press (Objectionable Matter) Act, 1951, is an Act intended to provide against the printing and publication of incitement to crime and other

objectionable matter. Section 3 defines the expression "objectionable matter" for the purposes of the Act, as meaning "inter alia" any words, signs

or visible representations which are "grossly indecent or are scurrilous or obscene or intended for blackmail" (Clause vi). Explanation II to the

section says:

In judging whether any matter is objectionable matter under this Act, the effect of the words, signs or visible representations, and not the intention

of the keeper of the press or the publisher of the newspaper or news-sheet, as the case may be, shall be taken into account.

Section II, under which the notification in question has been published runs thus:

11. "Power of Government to declare certain publications forfeited": The State Government may, on the certificate of the Advocate General or

the principal law officer, as the case may be, of the State or of the Attorney General of India that any issue of a newspaper or news-sheet or any

book or Other document, wherever made, contains any objectionable matter, by notification in the Official Gazette, stating the grounds for the

order, declare that every copy of such issue of the newspaper or news-sheet or of such book or document shall be forfeited to the Government.

Section 24 enables any person aggrieved by an order of forfeiture passed by the State Government u/s 11 of the Act to apply to the High Court to

set aside such order, within 60 days of the date of such order. It is under this section that the present petition has been filed.

5. When the petition first came on for hearing, we pointed out to the learned Advocate General who appeared on behalf of the State that, having

regard to the fact that Section 3 (vi) of the Act contained more than one ground on which the book could be deemed to contain objectionable

matter and also having regard to the language of Section 11, namely, that it makes it incumbent on the State Government to state the grounds for the

order of forfeiture, the notification as it stands was defective, in that it simply says that the book contains objectionable matter within the meaning of

Clause (vi) of Section 3 of the Act. The learned Advocate General very properly agreed but submitted that in the present case no injustice had

resulted from this omission, as the petitioner was well aware of the grounds on which the order was passed.

He also intimated that in future the Government would take care to specify the grounds in notifications issued u/s 11 of the Act. At the next hearing

of the petition, a supplemental affidavit was filed on behalf of the State, in which there is a detailed analysis of the contents of the book and an

indication of the grounds on which the book could be characterised as grossly indecent and obscene. To this supplemental affidavit, was appended

an English translation of certain passages in the book as illustrative of the general tenor of the book, which it was stated, was to have a tendency to

create lustful and indecent ideas in the minds of persons into whose hands it may fall. Particular mention was also made of the illustrations depicting

various coital postures, It was once more denied that the book was a scientific treatise.

6 We agree with the learned Advocate General that though the notification may be said to be defective in that it does not specify the nature of the

objectionable matter contained in the book, the petitioner has not been taken by surprise, as he was obviously aware On what ground the

Government had declared that it contained objectionable matter. We also agree with him that the objection that no notice was given to the

petitioner before the notification was published is without force, in view of the ample safeguard provided by Section 24 of the Act to canvass the

correctness and propriety of the action of the Government by applying to this Court, which is given the power to examine the case on the merits:

Shantilal Vadilal Shah and Another Vs. State of Bombay, We are also clearly of opinion that the petitioner was, and is not entitled to a copy of

certificate given by the Advocate General, as that is only required as a condition precedent to the taking of action by the Government. Of course,

in a particular case, if it is alleged that no certificate of the Advocate General had been obtained by the Government, then it is for the Government

to prove that such a certificate was given.

7. Learned counsel for the petitioner put forward what we consider as a novel construction of Clause (vi) of Section 3, namely, -that that clause

does not cover matter which may ordinarily be held to fall within the categories mentioned therein, namely, indecent, obscene etc., but that the

clause refers only to one particular type of objectionable matter which concerns, and is directed against, persons in public life, especially holding

responsible positions in the Government. The only foundation for this argument is the statement of objects, and reasons for the Bill. It was said that

this provision, was intended to enable the Government to deal with abuse of persons in authority, which it was intended to put down and that the

only action which could be taken against other instances of indecent or obscene publications would be a criminal prosecution u/s 292, I. P. C.

In our opinion, the argument is founded on a patent fallacy. No doubt certain immediate circumstances might furnish the reason for a particular

piece of legislation. But on that ground, it is wrong to construe the actual language used in the enactment in a restricted manner so as to confine it to

those special circumstances. It is not permissible to construe a statute so as to confine its operation to incidents and circumstances which the

Legislature is supposed to have contemplated that the statute would apply to.

8. An attempt was made by learned counsel for the petitioner to found an argument on the repetition of the word "are" in Clause (vi). The

argument, so far as we are able to follow it, was that Clause (vi) refers to two classes of objectionable matter. (1) matter which is grossly indecent,

and (2) matter which is scurrilous or obscene or intended for blackmail. This

argument practically leads to the result of substituting "and" for "or" in the second part of the clause. The use of the word "are" once again is easily explained. The word "grossly" qualifies only "indecent" and not the later words "scurrilous" or "obscene". We see no substance in this argument of the petitioner.

9. We can briefly dispose of the contention based on Article 19(1) (a) and (g) of the Constitution, Article 19(2) expressly empowers the State to make a law imposing reasonable restrictions on the exercise of the right conferred by Clause (a) in the interest of decency or morality and in relation to defamation. Likewise, Article 19(6) gives power to the State to make a law imposing in the interest of the general public reasonable restrictions on the exercise of the right conferred by Clause (g). It cannot be seriously argued that the material provisions of the Act with which we are concerned are not in the interests of decency or morality nor can it be said that they are not reasonable restrictions in the interests of the general public (Vide -- "Krishna Sharma v. State of Saurashtra", AIR 1954 Sau 28 (B); and -- "Gopaldas v. State of Assam AIR 1954 GUA 103 (C)).

10. The main and only question of substance in this case is whether the book contains words or visible representations which are grossly indecent or obscene. Having regard to the nature of the book, we think it is sufficient to confine ourselves to the expression "obscene". In one sense there is a certain amount of overlapping in the qualities described as indecent and obscene. But it is possible to give instances of words or representations which are indecent without being obscene. The term "obscene" is not defined in the Act. Section 292 I. P. C., provides for the punishment of sale, distribution etc., of obscene books and representations, but there is no definition of "obscene" in that Code. The classic definition of obscenity is that given by Cockburn C. J., in the -- "Queen v. Hickinbotham", (1868) 3 QB 360 (D), who said:

.... and I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

Dealing with the work which was the subject-matter of the prosecution, the

learned Chief Justice observed:

Now, with regard to this work it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced

years, thoughts of a most impure and libidinous character

There is no reason why that definition which has been accepted to this day in England should not be accepted by us. It is quite true that, as

remarked by Stable J., in -- "R v. Martin Seeker War-burg Ltd.", (1954) 2 All ER 683 (E), it is necessary to decide whether the book in question

satisfies the test today and not whether it would have satisfied that test in 1868, when (1868) 3 QB 350 (D)", was decided. In deciding the

question, we are not concerned with the motive of the petitioner in printing and publishing a work. If the book has got the effect of inciting

libidinous or, lustful thoughts, the test would be satisfied, though the author or publisher of the book might not have intended this effect.

11. We are clearly of opinion that the book does fall within the definition of "obscene" as given by Cockburn C. J., even fudging from the moral

standards of today Learned counsel for the petitioner contended that the book was a scientific treatise on sex. If we were convinced that it was

so," we would have without any hesitation held that it is not obscene. But it is impossible to agree with learned counsel for the petitioner that the

book only deals with certain aspect of sex in a scientific manner. Facts about sex are not by themselves indecent or obscene. Indeed, a mere

account of such facts can be as dull as any narration of facts in biology or geology. A purely scientific description of sexual phenomena is not likely

in the least to excite sexual desire. But the book before us is certainly not calculated to give mere dry-as-dust information about sexual matters.

There are descriptions which are obviously intended to excite the reader and not merely intended to give information. The passage, for instance, at

p. 29, a translation of which is given in the appendix to the supplemental affidavit, has nothing scientific about it : Nor is the passage at p. 67. It is

not necessary to say whether there cannot be a treatise on coital technique which does not have the effect of suggesting thoughts of a libidinous

character to the minds of the reader. But we have no doubt whatever that this is not such a work. Throughout the book, there is matter which

certainly has a tendency to deprave and corrupt the minds of readers who are

likely to yield to sexual excitement. In this, we do not make a distinction between young and old. It appears to us to be equally irrelevant whether the readers are married or unmarried. We do not think that marriage by itself ensures morality. An unmarried person may lead a chaste life, whereas a married man may indulge in extreme lust.

12. Learned counsel for the petitioner cited certain decisions, to which we shall briefly refer. 1954 2 All ER 683 (K)", has no bearing whatever

on the question before us. That dealt with a novel depicting a phase of contemporary American life. The learned Judge in his charge to the Jury said:

It is at least a book. It is the creation of a human mind and it depicts people created by the author in the environment in which that portion or

portions of their lives with which the book deals were spent. You may agree or you may not - I do not know that it is not mere pornographic

literature, the filthy, bawdy much that is just filth for filth's sake.

He told them that the fact that the subject-matter of the work was largely the relationship of the two sexes would not render the book obscene. In

effect the direction of the learned Judge to the jury was that the book was literature and should be judged as such.

13. The decision in -- Sreeram Saksena Vs. Emperor, , dealt with the publication of reproduction of photographs which were chosen from books

entitled ""Perfect womanhood"", ""Sun bathers"" etc. The photographs were of women in the nude. It was held that the picture of a woman in the nude

is not "per se" obscene, and it was not disputed by the prosecution that there was nothing in the pictures which would shock or offend the taste of

any ordinary or decent-minded person. We agree with what Akram J., said,

Unless therefore the pictures are an incentive to sensuality and excite impure thoughts in the minds of ordinary persons of normal temperament

who may happen to look at them, they cannot be regarded as obscene within the meaning of Section 292, I. P. C.

It is far cry from the photographs dealt with in that case to the pictures in the book now before us, which clearly would excite libidinous thoughts.

The decision of the Lahore High Court in -- "Emperor v. Harnamdas", AIR 1947 Lah 383 (G), does not help the petitioner. It related to an Urdu

book, in which certain passages were objected to as being obscene. The learned Judges, applying the test of obscenity laid down by Cockburn C.

J., in (1863) 3 QB 300 (D)", held that the passages were not obscene. In the opinion of the learned Judges, the book was a serious work intended

to give advice to married people, and particularly husbands, on how to regulate the sexual side of their lives to the best advantage, that is to say,

with a view to promoting their health and mutual happiness. There was no language "calculated to inflame the passions". We take a different view

as regards the book now before us.

14. A book very similar to the present book was the subject of decision in *In Re: D. Pandurangan and Another*, . It contained pictures of various

postures of sexual intercourse with an explanatory note on the opposite page. Somasunda-ram J., After referring to the ordinary meaning of the

term "obscene" as given in the dictionaries, held that the book fell within the meaning of that word. We are in entire agreement with this decision.

We hold therefore, that the book does contain words and representations which are obscene, and therefore the State Government were justified in

issuing the notification u/s 11 of the Act.

15. Counsel for the petitioner contended that other publications of a very similar nature are in circulation without any action "being taken by the

State Government under the Act and that they furnish evidence as to the nature of the present book, namely, that it does not come within the

category of Section 3 (vi) of the Act. We cannot agree with this contention. It is not a good defence to a charge of theft that other people who

have committed thefts have not been prosecuted. We follow, with respect, the decision in -- "*R v. Reiter*", 1954 1 All ER 741 (I), in which it was

held that in prosecutions for the sale of indecent literature, the character of the books which are the subject of the prosecution is to be ascertained

by the examination of the books themselves, as they provide the best evidence of their own indecency or obscenity, and that evidence designed to

show that other books not materially different in character from those alleged to be indecent or obscene are in circulation should not be

considered, since the character of such books is a collateral issue and" therefore irrelevant.

16. On the finding that the book contains objectionable matter as defined in Section 3 (vi) of the Act, this application is dismissed.