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Court : Allahabad

Decided On : May-06-1948

Reported in : AIR1948All369

Appellant : itwari

Respondent : Rex.

Judgement :

Mootham, J.

1. This is an application in revision which raises the questions of the validity of Section 10 and of the effect of Section 18, U.P. Communal Disturbances Prevention Ordinance, 1947, (U.P. Ordinance No. 3 of 1947).

2. The applicant pleaded guilty of being in possession of a sword for which he possessed no licence; and, as the offence was committed in an area which had been declared under the Ordinance in question to be a communally disturbed area, he was convicted by a Magistrate of the first class of an offence punishable under Section 19(f), Arms Act, and Section 10 of the Ordinance, and under the latter section sentenced to imprisonment for the term of three years. In imposing a sentence for a term exceeding that which he was empowered to pass under Section 82, Criminal P.C., the learned Magistrate acted in exercise of powers he believed to have been conferred upon him by Section 18 of the Ordinance. An appeal to the learned Sessions Judge of Agra was dismissed.

3. Now Section 10 of the Ordinance is in these terms:

10. If, after any area has been declared as a communally disturbed area any unlicensed arms are found in the custody of, or in the premises occupied by, any person in such area, he shall, notwithstanding anything contained in the Arms Act, 1878, be punished with imprisonment for a term of not less than three years and not more than five years and also with tine in the discretion of the Court.

Section 18 provides that

18. Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a Magistrate of First Class shall be deemed to have been invested with powers to try as a Magistrate all offences under this Ordinance or any offence committed in connection with or in the course of or due to any communal disturbance, except those punishable with death, and to impose a sentence of fine even exceeding one thousand rupees.

4. This Ordinance, which has since been re-placed by the U.P. Communal Disturbances Prevention Act, 1947, (U.P. Act No. 24 of 1947), was promulgated by the Governor of the U.P. under Section 89, Government of India Act, 1935, and it is not in dispute that for the purposes of this present application the Governor's powers of legislation are (subject to the provisions of Sub-section (4) of that section) co-extensive with those of the-Provincial 'Legislature.

5. The first argument on behalf of the applicant in this Court is that Section 10 is invalid, its enactment being beyond the powers of the Legislature, and therefore of the Governor of the United Provinces. The argument was put in two ways. It was said, first, that Section 10 of the Ordinance is a law with respect to arms; that arms are one of the matters enumerated in item 29 of List 1 in Schedule 7, Government of India Act, 1935, and that by virtue of the provisions of Sub-section (1) of Section 100 of that Act the Federal Legislature has, but the Provincial Legislature has not, power to make laws with respect thereto. Even, therefore, if it be assumed that the remaining provisions of the Ordinance are intra vires, the Governor in promulgating Section 10 has invaded the field reserved exclusively for the Federal Legislature and the section is, for that reason, ultra vires and invalid.

6. This however is no longer an argument open to the applicant, for it is now well settled that an Act of a Provincial Legislature with regard to a matter which lies within its own legislative field is not ultra vires in whole or in part because it may incidentally encroach upon the field reserved for the Federal Legislature. Any doubts about the matter were set at rest by the decision of the Privy Council in Prafulla Kumar v. Bank of Commerce Ltd. 34 A.I.R. 1947 P.C. 60. In that case the Board had to consider the validity of the Bengal Money-lenders' Act, 1940, an Act of the Bengal Provincial Legislature which, it was argued, was ultra vires in whole or at any rate where in any place it affected the law regulating negotiable instruments, a matter exclusively within the domain of the Federal Legislature. Their Lordships adopted a passage in the judgment of Gwyer. C.J. in Subrahmanyan Chettiar v. Kuppuswami Goundan in which the learned Chief Justice said:

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character,' for the purpose of determining whether it is legislation with respect to matters in this list or in that.

Their Lordships' own conclusion was in these words:

Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, land in what list is its true nature and character to be found. If these questions could not be asked, much 'beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with.

7. The second way in which the argument was put was this. The validity of an impugned section cannot be tested by the 'pith and sub-stance' rule unless the section in question is an integral part of the Act or, in other words, if the subject-

matter of the impugned section is something wholly distinct from the subject matter of the rest of the enactment, then there is in reality not one legislative act, but two legislative acts in the form of one, and consequently the validity or otherwise of the one act is irrelevant in determining the validity of the other. In the case before us, it is said, the pro-visions of Section 10 have no connection with the subject-matter of the rest of the Ordinance-the prevention of communal disturbances-and the fact therefore, that the remaining sections of the Ordinance may be within the powers of the Governor is wholly immaterial, for the validity of Section 10 must be determined as though it were a, separate enactment.

8. It is I think clear that the argument that a section of an Act is ultra vires cannot be dismissed solely on the ground that the impugned section finds a place in an enactment the other provisions of which are within the powers of the legislature concerned. It is a well known principle that legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field, and, in my opinion, it becomes necessary, when the question is raised, to examine the enactment as a whole for the purpose of ascertaining whether the provisions of the impugned section constitute, in substance and not merely in form, part of the enactment. It is only when the impugned section is in substance part of the enactment that it is possible to contend, that the former is intra vires because the invasion of the forbidden field is incidental.

9. It is convenient at this stage to turn to the Ordinance and examine it for the two-fold purpose of ascertaining whether Section 10 is in substance part of the Ordinance, and if the answer to that enquiry is in the affirmative, to ascertain, what is the true nature and character, the pith and substance, of the Ordinance as a whole.

10. The Preamble to the Ordinance recites that an emergency has arisen which makes it necessary to provide for the prevention of communal disturbances in the United Provinces, and the Ordinance itself is divided into five chapters, the first of which deals with certain preliminary matters which need not be examined in detail. Chapter 2, which is entitled 'Precautionary Measures,' contains three sections. Section 3 empowers a District Magistrate if he has reason to apprehend a

communal disturbance or if such disturbance has already occurred, to impose a curfew. Section 4 empowers a police officer aot below the rank of $ Sub-Inspector to use such force as necessary, even to the extent of causing death, if in his opinion he cannot stop the commission, of certain offences during a communal disturbance, and Section 5 enables the Provincial Government to declare an area to be a 'communally disturbed area,' and thereupon a police officer has certain additional powers of search.

11. Chapter 3 deals with offences and punishments, and it is in this chapter that Section 10 is to be found. It begins with Section 6 which increases the maximum punishment and prescribes a minimum punishment for certain offences under the Penal Code, specified either in the section or in the schedule to the Ordinance, when committed 'in the course of or arising out of or due , to any communal disturbance'. Sections 7 and 8 create two new offences, namely forcible conversion and forcible marriage and Sub-section (2) of Section 8 provides that any forcible marriage within the meaning of Sub-section (l) of that section shall be void. Section 9 gives power to the Provincial Government to declare forfeited to His Majesty any collection of arms, brickbats or missiles which it is satisfied have been collected for the purpose, inter alia, of creating any communal disturbance, and also to impose a fine on the occupier of the premises. Then comes Section 10 the terms of which have already been set out. Section 11 makes it an offence to be found in a communally disturbed area carrying, in a public place, arms or chemicals, and Section 12 forbids the importation of arms into any area otherwise than for a lawful object. Section 13 enhances tho sentence which may be imposed for the con. travention in a communally disturbed area of an order promulgated under Section 144, Criminal P. C. Section 14 makes it an offence to harbour any person who has committed or is about to commit an offence under the Ordinance, and Section 15 makes it an offence for any person in a communally disturbed area to shout slogans calculated to create panic or communal hatred or to collect or throw brickbats or other missiles in furtherance of any communal activity. Section 16 makes it an offence for a public servant to misconduct himself, or negligently to perform his duties in a communally disturbed area, while Section 17 provides that any person who attempts to commit or abets the commission of an offence under the Ordinance shall be deemed to have committed that offence.

12. Chapter 4 deals with the powers of Courts and procedure, and contains four sections, the first of which, Section 18, has already been set out in extenso. Section 19 provides that an appealfrom a conviction by a Magistrate shall, in certain cases, lie to the High Court, Section 20 enlarges the power of the Court to take evidence on commission, while Section 21 places certain restrictions upon the power of a Court to release on bail a person accused or convicted of an offence under the Ordinance or of an offence committed in connection with a communal disturbance.

13. Chapter 5 contains provisions of a mis-cellaneous nature to which it is not necessary to refer in detail.

14. Before proceeding further, it is desirable to refer to a suggestion made during the course of argument that Sub-section (2) of Section 8, if not the whole section, dealt with a matter that had no connection with the declared purpose of the Ordinance, the prevention of communal disturbances. Sub-section (l) of Section 8 makes it an offence to marry, or perform, conduct or direct the marriage of any woman seized, kidnapped, abducted or held in wrongful restraint or wrongful confinement "in the course of or due to' a communal disturbance or communal activity, and Sub-section (2) declares that any such marriage shall be void. I find the suggestion one difficult to accept so far as Sub-section (1) is concerned but the question whether the declaration in Sub-section (2) that all such marriages shall be void has any connection with the prevention of communal disorder is one which may legitimately be raised. The matter was not however argued before us, and I do not consider it necessary to express an opinion on it, for, in my view the provisions of Sub-section (2) are, so far as the Ordinance as a whole is concerned relatively of such minor importance as not to affect the character of the remainder of the enactment. I should perhaps make it clear that no question was raised before us as to the validity of the provisions of Sub-section (2) of Section 8.

15. Now the Ordinance excluding Section 8 (2) and Section 10 made provision for the taking of precautionary measures, the creation of new offences directly related to communal disturbances, the enhancement of sentences in respect of existing offences when their commission had a direct connection with such disturbances,

and the speedy trial of alleged offenders. In my opinion, and indeed it was not disputed in the course of argument, all these provisions had one main purpose, the prevention of communal disturbances. Now what of Section 10 In so far as its ambit was wider than that of Section 19 (f), Arms Act, it created a new offence; otherwise, its effect was to enhance the sentence for an offence under that section when committed in an area which had been declared to be communally disturbed. The Court cannot ignore matters which, were of public general knowledge at the time the Ordinance was promulgated, and it is entitledto take such matters into consideration : Alberta v. A.G. for Canada 26 A.I.R. 1939 P.C. 53. It was well-known that many persons were in possession of arms for which no license had been obtained under the Arms Act, and that arms of various kinds were used when a disturbance occurred and added to the gravity of the situation. In such circumstances, it appears to me that the purpose of Section 10 was further to discourage the possession of unlicensed arms in communally disturbed areas with the object of preventing the outbreak of communal disturbances, or if a disturbance did occur of reducing the seriousness of its consequences. I am unable effectively to distinguish Section 10 from those other sections of the Ordinance which provide an enhanced punishment for offences connected with communal disorders, and, in my opinion, Section 10 is in substance part of the Ordinance.

16. I am further of opinion that the pith and substance of the Ordinance is the prevention of communal disturbances, a matter which falls within item 1 - Public Order - in List II in Schedule 7, Government of India Act, 1935, and within the legislative field of the Provincial Legislature and therefore of the Governor. The tact, therefore, that such legislation incidentally touches, in Section 10 upon a subject which lies within the federal field is not material, and I hold Section 10 to be intra vires of the Governor and valid.

17. Then arises the question whether the learned Magistrate who tried this case had any power to pass a sentence of imprisonment for a term of three years. He was, as I have said earlier, a Magistrate of the first class, and he had, therefore, under Section 32, Criminal P.C., power to pass a sentence of imprisonment for a term not exceeding two years, a sentence of fine not exceeding one thousand

rupees and a sentence of whipping. Under Section 18 of the Ordinance, a Magistrate of the first class is invested (the section says 'deemed to have been invested') first, with power to try certain offences which he would not otherwise have had the power to try, namely all offences under the Ordinance and any offence committed in connection with or in the course of or due to any communal disturbance except such as are punishable with death; and, secondly, power to impose a sentence of fine exceeding one thousand rupees. To that extent-and to that extent alone-is his power to award a sentence enhanced by this section. But it is said that Section 19, of the Ordinance, which provides that whenever a Magistrate trying a case under Section 18, 'passes a sentence of imprisonment for a term exceeding four years or a sentence of fine with or without imprisonment exceeding five thousand rupees', an appeal shall lie to the High Court, makes it clear by implication that a Magistrate has, in such cases, power to pass a I sentence of imprisonment for a term in excess of; four years, and that consequently the sentence imposed on the applicant in this case is valid.

18. Now it is true that Section 19 does imply that a Magistrate had power to pass a sentence of imprisonment for a term exceeding four years, but it gives no indication of the maximum sentence of imprisonment which he might pass. Had he power to pass a sentence for transportation for life-the enhanced sentence for kidnapping-or a sentence of imprisonment for ten years, which is the minimum sentence under the Ordinance for culpable homicide not amounting to murder? The section gives no answer to these questions. The argument derived from the terms of Section 19 would, in my opinion, be entitled to a great deal more weight if Section 18, omitted all provision for the enhancement of the Magistrate's powers. That section does, however, in terms enhance the Magistrate's power to impose a fine, and by so doing it does, in my opinion, also give rise to the implication that his power to impose a sentence of imprisonment has not been altered.

19. There can I think be no doubt that it is of the first importance that the provisions of any enactment which purports to empower a Court to deprive a person of his liberty, and the limits of that power should be expressed in clear and unambiguous terms. There is admittedly in this case no specific enhancement of the powers of a Magistrate of the first class to pass a sentence of imprisonment for

a term exceeding two years : the implication that a Magistrate can pass a sentence for a longer period than this which is implied by 8. 19, is balanced by the implication in Section 18, that his power in this respect has not been enhanced. In these circumstances I am of the opinion that this Court must hold that a Magistrate's power to pass a sentence of imprisonment for a term not exceeding two years has not been enhanced, and that, therefore, the learned Magistrate who in this case passed a sentence of imprisonment for three years had no power to do so.

20. Imprisonment for the term of three years was however the minimum sentence which a Court could pass for an offence under Section 10, and as this was a sentence beyond the powers of the learned Magistrate it fallows that he had no jurisdiction to try an offence under that section and ought, in the present case, to have committed the applicant to the Sessions Court.

21. It remains to consider whether this Court should now order the commitment of the applicant. The sword was found in the applicant's possession on the night of 14-10-1947, and he has been in custody since that date. Both the applicant whose age is 65, and the. sword are advanced in years, and it appears that the learned Sessions Judge affirmed the sentence only with reluctance. In the circumstance I would reverse the finding and sentence and discharge the applicant.

Raghubar Dayal, J.

22. I agree with the order proposed and reasons given therefor by my brother Mootham J.

23. The main question for decision in this revision is whether Section 10, United Provinces Communal Disturbances Prevention Ordinance, 1947, (U.P. Ordinance III of 1947) is intra vires of the Provincial Legislature. The Ordinance was made and promulgated by the Governor of the United Provinces in the exercise of powers conferred by Sub-section (1) of Section 89, Government of India Act, 1935. Such provisions of the Ordinance made by the Governor would be valid as could be enacted in an Act of the Provincial Legislature. The powers of legislation of the Provincial Legislature and the Federal Legislature are given in Section 100,

and Schedule 7, Government of India Act. According to these provisions it is the Federal Legislature which alone can enact law with respect to arms, firearms and ammunition which are mentioned in item 29, List I Schedule 7. The Provincial Government cannot legislate about them. The Provincial Legislature can legislate with respect to public order and with respect to preventive detention for reasons connected with the maintenance of public order, subjects which are mentioned in item I, List II, Schedule 7, Government of India Act.

24. List III, Schedule 7, Government of India Act, mentions items with respect to which both the Federal Legislature and the Provincial Legislature can legislate. It, however, does not mention arms as one of such subjects.

25. It is therefore clear that the Provincial Government is not empowered to enact with respect to arms, firearms and ammunition.

26. This, however, does not dispose of the contention raised in this ease with respect to the powers of the Governor to enact Section 10, in this Ordinance. To decide this question two points have to be determined. One is whether the provisions of Section 10 of the Ordinance are such which if considered necessary have to find a place in an enactment made with the object to prevent communal disturbances. If they are such, it would follow that with respect to this matter there is overlapping in the jurisdiction of the two Legislatures. If it was not necessary to have such provisions in this Ordinance, the mere fact that the Ordinance enacts Section 10, will not make those provisions valid. On this point I am of opinion that it was necessary for the achievement of the object behind the Ordinance that it should deal with matters concerning arms. Powers to make laws in respect of public order and maintenance of communal harmony must include power to legislate about the conduct of the people in various spheres and one of such spheres should include their power to possess and use certain articles. Their general right to possess and use articles which can be used as weapon of attack in the time of communal disturbances will have to be curtailed by legislation if any legislation with the object of maintaining public order and communal harmony was to succeed in its purpose. It cannot be denied that arms should be the first thing whose possession and use by the people at large should be brought under control

on such occasions. If the Provincial Legislature cannot enact about possession and use of arms during disturbed conditions, it is bound to be severely handicapped in making proper legislation for effectively dealing with disturbed situation. If its powers would exclude legislation with respect to arms, arms would be more common in use than and would be preferred as means of attack, on account of their greater effectiveness, to other weapons of attack and about which the law might have been made stringent by the Provincial Legislature. I am therefore of opinion that it was well within the object of the Ordinance, that is within the object of preventing communal disturbances that the Ordinance should deal with matters connected with arms, firearms and ammunition. It follows therefore that there is overlapping in the jurisdiction' of Federal and Provincial Legislatures to enact laws with respect to arms.

27. The next question then is that when there is overlapping in the subjects within the jurisdiction of the Provincial Legislature and the Federal Legislature to legislate, how should the validity of an enactment or a portion of an enactment is to be determined? The law is now clear and is to be found in the decision of the Privy Council in Prafulla Kumar v. Bank of Commerce Ltd. 34 A.I.R. 1947 P.C. 60. It is held that the validity of an enactment depends on what the enactment in substance is or what is the pith and substance of the enactment. If according to its real nature and substance or its pith and substance the enactment falls within the jurisdiction of the Legislature making it, the enactment would be valid irrespective of the fact that its various provisions affect certain subjects over which it has no legislative jurisdiction. The extent of encroachment does not affect the question of the validity except in so far that the extent of the encroachment case be a factor to determine the real pith and substance of the enactment. Once it is determined according to pith and substance of an enactment as to which, list the enactment belongs, it is an easy matter to determine its validity. It would be valid if made by the Legislature in whose legislative list it falls in view of its pith and substance. Their Lordships observed at p. 48:

Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found.

and again

Thirdly, the extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

and again at page 44:

Does not priority of the Federal Legislature prevent the provincial Legislature from dealing with any matter which may incidentally affect any item in its list, or in each case has one to consider what the substance of an Act is and. whatever, its ancillary effect, attribute it to the appropriate list according to its true character.

In their Lordships opinion the latter is the true view.

28. There can be no doubt that the pith and substance of this U.P. Ordinance 3 of 1947 is the prevention of communal disturbance in the United Provinces. The Ordinance deals with the precautionary measures to be taken. It deals with the possession of explosive substances, chemicals and even such articles which are ordinarily innocent, namely, brickbats, but which have proved quite often to be the cause of much of the trouble in disturbed situation. It deals with matters of forcible conversion and marriages which might have been thought to be a potential inducement to people who could be easily tempted to take part on such occasion. It deals with enhanced punishment for various contraventions of its provisions.

29. I am therefore of opinion that it is within the jurisdiction of the Provincial Legislature to have enacted Section 10 of Ordinance 3 of 1947 which was made in

order to prevent communal disturbances in the United Provinces and that therefore Section 10 of the Ordinance promulgated by the Governor is valid.

30. In the absence of any specific provision in the Prdinance enhancing the jurisdiction of the Magistrates to sentence people to more than two years' imprisonment, it cannot be held on the basis of implication from the provisions of Sections 18 and 19 of the Ordinance that the learned Magistrate who tried this ease was empowered to pass a sentence of imprisonment for a term exceeding two years. The offence under Section 10 of the Ordinance is punishable with the minimum punishment of three years' rigorous imprisonment and it is therefore clear that the learned Magistrate could not have passed an adequate sentence in this case and that though he was empowered to try this offence he ought to have committed the case to the Court of Session.

31. In the circumstances of the case I do not consider a retrial of the accused applicant to be desirable. He had been undergoing imprisonment for the last Several months. I therefore agree with the order proposed that the applicant be discharged.

Wanchoo, J.

32. I agree with the order proposed and reasons given therefor by my brothers, Mootham and Dayal, JJ. and would only add a few words.

33. It is admitted on all bands that it is one of the primary duties of the Provincial Government to maintain public order; in order to enable it to perform that duty the Government of India Act gives the Provincial legislature full powers to legislate on the subject of public order. Now if the Provincial Government feel that maintenance of public order in any particular area in their charge requires the imposition of restrictions on possession of weapons of offence and of penalties for illegal possession of such weapons, they have to ask the Provincial Legislature to legislate therefor. Arms, fire-arms and ammunition are such weapons and it seems to me, therefore, that for the purpose of maintenance of public order the Provincial Legislature has power to legislate about the possession of such weapons and to impose penalties for their illegal possession. Even if Section 19(f), Arms Act were

not in existence and everybody had the right to possess firearms and ammunition with-out licence, the Provincial Legislature could, in exercise of its power of legislation relating to public order, 'regulate the possession of such weapons by the public of any particular area and to prescribe penalties for illegal possession thereof. If that is so, the existence of a Section like 19(f), Arms Act, would not, in my opinion, take away its power of regulation and of imposition of penalties for illegal possession for this limited purpose. The prescription of a minimum sentence or of a sentence higher than that provided for in Section 19(f), Arms Act, would, therefore, be entirely within its competence. There is no doubt, reading this ordinance as a whole, that it has been enacted for the limited purpose of maintenance of public order. The Governor has the same powers as the Provincial Legislature when enacting an ordinance. The provision. therefore of a minimum penalty for unlawful possession of arms, fire-arms and ammunition in Section 10 of U.P. Ordinance, 3 of 1947 is intra vires.

34. The next question is whether a Magistrate of the first class can impose a sentence of more than two years imprisonment under Section 18. Such Magistrate has power under the Code of Criminal Procedure to impose a sentence of not more than two years imprisonment; such power cannot be enhanced by mere implication, as has been urged on the basis of certain words in Section 19 of the Ordinance. Such enhancement has to be in clear and specific terms. As there is no such clear and specific provision in the Ordinance, the power remains what it was and a Magistrate of the first class has no jurisdiction to impose a sentence of imprisonment exceeding two years.

35. I do not think it is worth while having a retrial in this case as the weapon recovered was an old sword. I, therefore, agree that the order of the Court below be set aside and the applicant be discharged.

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