

In Re: A.S. Krishna and ors.

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Court : Chennai

Decided On : May-07-1954

Reported in : AIR1954Mad993

Judge : Rajamannar, C.J. and ;Umamaheswaram, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 1, 1(2), 5, 5(2), 96, 98, 253, 253(1) and 432; Madras Prohibition Act, 1937 - Sections 4(2), 28 to 32 and 53; [Evidence Act, 1872](#) - Sections 4, 101 to 103 and 106; [Government of India Act, 1935](#) - Sections 107; [Constitution of India](#) - Articles 14, 19(1), 21, 246 and 254

Appeal No. : Criminal Revn. Case Nos. 57 to 60 of 1954 (Case referred Nos. 2 to 5 of 1954)

Appellant : In Re: A.S. Krishna and ors.

Advocate for Def. : Adv. General, Madras, ssisted by Public Prosecutor, Madras and ;Asst. Public Prosecutor

Advocate for Pet/Ap. : V.L. Ethiraj, ;A.S. Sivakamaninathan, ;M. Narayanamurti, ;S. Venkatakrishnan and ;K.S. Jayarama Aiyar, Advs.

Judgement :

ORDER

1. This is a reference under Section 432, Criminal P. C. by the Third Presidency Magistrate, Saidapet, Madras, in a batch of four cases before-him, all relating to

offences under the Madras Prohibition Act.

In C. C. No. 5388 of 1953, there are two accused, of whom the first accused is charged with offences punishable under Sections 4 (1) (a), 4 (1) (j) and 24 of the Madras Prohibition Act (which shall hereinafter be referred to as the Act). The second accused is alleged to have committed offences punishable under Sections 4 (1) (k) and 12 of the Act.

In C. C. No. 5389 of 1953, the first accused is alleged to have committed offences punishable under Sections 4 (1) (a) and 4 (1) (j) of the Act, while the second accused is alleged to have committed offences punishable under Section 4 (1) GO and Section 12 of the Act.

Similarly, in C. C. No. 5390 of 1953, the offences alleged against the first accused are offences, under Sections 4 CD (a) and 4 (l) (j). Those against, the second accused are under Section 4 (1) (k) and Section 12 of the Act.

In C. C. No. 5391 Of 1953, the second accused in the other three cases is the sole accused and he is charged with offences punishable under Section 4 (1) (a) and Section 24 of the Act.

The following provisions indicate the nature of the offences of which the several accused have been charged:

'4 (1) Whoever

(a) imports, exports, transports or possesses-IJquor or any intoxicating drug; or.....

(j) consumes or buys liquor or any intoxicating drug; or

(k) allows any of the acts aforesaid upon premises in his immediate possession, shall be punished---

12. Where any offence against this Act is committed in any area to which it has been extended, whoever commits, or attempts to commit or abets the commission of, any of the acts making up the offence shall be liable to be punished therefor,

whether such commission, attempt or abetment takes place within or outside such area.

24. In the event of any breach by the holder of such licence or permit or by his servants or by any one acting with his express or implied permission on his behalf, of any of the terms or conditions of such licence or permit, such holder shall, in addition to the cancellation or suspension of the licence or permit granted to him, be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both, unless he shall establish that all due and reasonable precautions were exercised by him to prevent any such breach.

Any person who commits any such breach shall, whether he acts with or without the permission of the holder of the licence or permit, be liable to the same punishment.'

2. When the four cases were taken up for trial on 26-12-1953, counsel for the accused filed a petition under Section 432, Criminal P. C. praying that the Magistrate may state a case on the points raised in their petition. Arguments were heard, and eventually, the learned Magistrate referred for decision of this Court under Section 432, Criminal P. C, the following questions of law:

'1. Whether Section 4 (2) creating presumption of law is void due to (a) since, it is repugnant to the provisions of "existing Indian law", to wit, the Indian Evidence Act, which places the burden of proof on the prosecution, (b) due to Article 14 since the presumption which is made obligatory in the trial of the offence by the Magistrate under the Criminal Procedure Code denies equality before the law and equal protection of laws, (c) due to Article 31 of the Constitution by reason of the accused being presumed to be guilty contrary to the procedure established by law, namely, the Criminal Procedure Code, the Evidence Act and well-established laws of the land and Article 11 of the Charter of Human Rights which under Arts. 37 and 51 of the Constitution is made part of the fundamental rights and (d) by reason of offending Article 20(3) of the Indian Constitution.

(2) Whether Section 25 of the Prohibition Act authorising the appointment of any person as a Prohibition Officer, paid or honorary, and authorising the delegation to or by such a person of any power under the Act is 'ultra vires'.

3. Whether Sections 28, 29, 30, 31 and 32 of the Prohibition Act, in so far as they clothe the power to make searches either with or without obtaining a search warrant from a Magistrate are void as offending Section 107 of the Government of India Act, and Article 254 of the Constitution and whether the said sections are rendered void by Article 13(2)(a) of the [Constitution of India](#).

4. Whether Section 53-A giving immunity to Prohibition Officer from disclosing the first information regarding the offence is repugnant to provisions of the existing Indian law, viz., the Criminal P. C. and Evidence Act.

5. Whether the powers' conferred upon Prohibition Officers, paid or honorary, or to any other person to whom powers are delegated to hold an enquiry under Section 38 and to grant or withhold bail are void as repugnant to the existing Indian law, viz., Criminal P. C.

6. Whether the provisions of the Prohibition Act empowering the Collector or Prohibition Officer to arrest any person found in any of the places searched as laid down in Sections 32 and 33 of the Madras Prohibition Act are repugnant to the provisions of the Criminal P. C. and to the well established laws as laid down in Article 9 of the Charter of Human Rights and Articles 21, 19 and 14 of the [Constitution of India](#).

7. Whether Section 48 of the Prohibition Act is void under Section 107 of the Government of India Act and Article 254 of the Constitution and as offending Articles 14 and 21 of the [Constitution of India](#).'

3. Section 432, Criminal P. C., consists of two sub-sections. But it is obvious that the reference is under Sub-section (2), because before the Magistrate can make a reference under Sub-section (1) he should be of opinion that any Act, Ordinance or Regulation or provision contained therein is invalid or inoperative.

4. Mr. K.S. Jayarama Aiyar, learned counsel who addressed us the main argument on behalf of the accused, did not deal with every one of the questions of law above mentioned. He confined himself mainly to an attack on Section 4 (2) and the group of sections from Section 28 to Section 32 of the Act.

5. At the outset, we must observe that the reference by the Magistrate should not have been of an omnibus nature, without any reference to the facts of the cases before him. It is not the province of this Court to answer hypothetical questions of law, however interesting and important they may be. - The learned Magistrate has referred the validity of Sections 28 to 32 of the Act without ascertaining if all or which of the sections are really material in the particular cases before him.

6. Mr. Jayarama Aiyar first impugned Section 4 (2) of the Act. It runs thus:

'4 (2). It shall be presumed until the contrary is shown-

(a) that a person accused of any offence under Clauses (a) to (j) of Sub-section (1) has committed such offence in respect of any liquor or intoxicating drug or any still, utensil, implement or apparatus whatsoever, for the tapping of toddy or the manufacture of liquor or any intoxicating drug, or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug, for the possession of which he is unable to account satisfactorily; and

(b) that a person accused of any offence under Clause (k) of Sub-section (1) has committed such offence if an offence is proved to have been committed in premises in his immediate possession in respect of any liquor or intoxicating drug or any still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor, or any intoxicating drug, or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug.'

7. The argument of the learned Counsel was that this provision was invalid on several grounds. The first ground was that it was repugnant to the sections Of the Evidence Act relating to burden of proof.

The relevant sections of the Evidence Act to which reference was made by counsel are the following:

'101. Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

106, When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.'

8. Learned counsel also referred to Section 4 of that Act which defines the meaning of the expressions 'may presume' and 'shall presume'.

9. The contention of Mr. Jayarama Aiyar in brief was that in a criminal case the burden is on the prosecution to prove the commission of the offence, and that principle is laid down by Section 101 and other sections of the Evidence Act. But Section 4 (2) of the Madras Prohibition Act, on the other hand, casts the burden of proving innocence of the accused and, therefore, Section 4 (2) of the Act is repugnant to the provisions of the Evidence Act, which is a Central Act. Hence, it is invalid, under Section 107 of the Government of India Act of 1935. Section 4 (2), he said, raises a presumption of guilt and makes it obligatory on the Magistrate to convict unless the accused is able to establish his innocence.

In our opinion, this contention is neither sound nor well-founded. It is not correct to say that Section 4 (2) of the Act completely absolves the prosecution from doing anything more than filing a charge-sheet. It is not as if once a person is accused of

an offence under the Prohibition Act it is for the accused to prove that he has not committed the offence. What Section 4 (2) does lay down is that in certain cases, if the prosecution proves possession of liquor or intoxicating drug or other articles or materials, it shall not be necessary for the prosecution to prove anything more. The proof of one fact is taken as proof of the offence. The accused, however, is given every opportunity of showing that a contrary conclusion must be arrived at, that is, a conclusion contrary to the conclusion sought to be drawn by the prosecution.

10. What facts should be established affirmatively before the Court can be called upon to hold that an accused is guilty of any offence will depend upon the nature of the particular offence. In some cases, the establishment of one fact necessarily leads to the inference of other facts. We see no reason why a statute should not prescribe the ingredients which have to be established by the prosecution before the prosecution can obtain a verdict of guilty of the offence with which an accused is charged. Such a provision would not conflict with the general rules of burden of proof laid down in the Evidence Act.

11. Mr. Jayarama Aiyar cited to us the case in 'Bailey V. Alabama', (1910) 55 Law Ed 191 (A). The decision in that case was expressly based on the 13th Amendment of the Constitution of the United States. But that very case contains the following observations of Hughes J. who delivered the opinion of the Court, which appear to us to be apposite to the present case: 'This Court has frequently recognised the general power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the Courts of its own Government.in the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue: and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law, or a denial of the equal protection of the law.'

12. In another case, -- 'Mobile, J. & K. C. R. Co. v. Tuvnipseed', (1910) 55 Law Ed 78 (B), the Supreme Court of the United States affirmed the same principle:

'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'

13. As an illustration of this principle, we may refer to the decision in -- 'Adams v. New York', (1903) 48 Law Ed 575 (C). That case related to the offence of having in one's possession knowingly, certain gambling paraphernalia used in the game commonly known as policy' in violation of Section 344-a of the Penal Code of the State of New York. 'Inter alia', that section provided that a person who shall have in his possession any writing, paper, or document, representing or being a record of any chance, share, or interest in numbers sold, drawn, or to be drawn, or in what is commonly called 'policy', etc., is a common gambler punishable by imprisonment for not more than two years, and in the discretion of the Court, by a fine not exceeding 1000, or both.

Section 344-b ran thus:

'Section 344-b. Possession of policy slip, etc.,--Presumptive evidence -- The possession, by any person other than a public officer, of any writing, paper, or document, representing or being a record of any chance, share or interest in numbers sold, drawn, or to be drawn or in what is commonly called 'policy', or in the nature of a bet, wager, or insurance upon drawing or drawn numbers of any public or private lottery or any paper, print, writing, numbers or device, policy slip,

or article of any kind, such as is commonly used in carrying on, promoting, or playing the game commonly called 'policy' is presumptive evidence of possession thereof knowingly and in violation of the provisions of Section 344a.'

It was contended that Section 344-b was a violation of the 14th amendment in that it deprives a citizen of his liberty and property without due process of law. But the contention was rejected thus (at page 531):

'We fail to perceive any force in this argument. The policy slips are property of an unusual character, and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the Courts of its own Government.'

14. The learned Advocate General drew our attention to another American case which is equally instructive. In -- 'Hawes v. State of Georgia', (1921) 66 Law Ed 431 (D), the charge against the accused was that he had knowingly permitted certain persons to locate and have on his premises apparatus for distilling and manufacturing prohibited liquors and beverages, which was an offence under an Act of the State of Georgia.

Section 22 of that Act provided that when any apparatus used for such purposes is found or discovered upon the premises, the same shall be 'prima facie' evidence that the person in actual possession had knowledge of the existence of the same, and on conviction thereof, was punishable as prescribed, the burden of proof in all cases being upon the person in actual possession to show the want of knowledge of the existence of such apparatus on his premises.

The Court, in its charge to the jury, said that all that the State had to show was that the apparatus was on the premises, and when the State showed that, the accused should be found guilty, unless he showed that the apparatus was there without his consent and knowledge. The contention before the Supreme Court of the United States challenging the conviction was that Section 22 created a presumption of guilt and that was in violation of the 14th Amendment of the Constitution. The contention was repelled.

After referring to the decisions in -- '(1903) 48 Law Ed 575 (C)'; -- '(1930) 55 Law Ed 191 (A)' and -- (1910) 55 Law Ed 78 (B), McKenna, J. proceeded to apply the general principles laid down in those decisions to the facts of the case in the following way: (at page 432):

'Distilling spirits is not an ordinary incident of a farm, and, in a prohibition State, has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. Of the contrary, it may be presumed that one on such a farm, or one who occupies it, will know what there is upon it. It is not arbitrary for the State to act upon the presumption and erect it into evidence of knowledge; not peremptory of course, but subject to explanation, and affording the means of explanation.' Wilioughby in his Constitution of the United States, Vol. 3, page 1722, states the principle thus: 'It is established that, without denying due process of law, certain facts or circumstances may be declared by statute to have a presumptive probative value, provided there is a reasonable logical relation between them and the facts they are declared to evidence.'

15. Mr. Jayarama Aiyar relied upon two decisions of the Privy Council in -- 'Shiva Narain Jafa v. Judges of the High Court, Allahabad' and -- 'Stephen Seneviratne v. The King', AIR 1936 PC 289 (P), in support of his proposition that the general rule casting the burden on the prosecution to prove the guilt of the accused beyond reasonable doubt is not affected by Section 106 of the Evidence Act, which casts the burden of proving a fact specially within the knowledge of any person on that person. This is true. But we fail to see how there is any scope for the application of that proposition 'in the present case.

Nor do we think that Section 4 (2) of the Prohibition Act is inconsistent with the law as stated by the Lord Chancellor in the well known case of --'Woolmington v. Director of Public Prosecutions', 1935 AC 462 (G), thus:

'Throughout the web of the English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to matters as to defence of insanity & subject also to any statutory exception.'

It may be noticed that this statement is itself qualified by the recognition of statutory exceptions to the general rule. Instances of such exceptions are to be found in certain statutes in England, like 24 and 25 Vie. C. 96, Sections 58 and 24 and 25 Vict. C. 99, Section 24. Section 58 of the former (The Larceny Act) provides, 'inter alia', that if any one is found by night having in his possession 'without lawful excuse (the proof of which excuse shall lie on such person)' any picklock key, or other implement of house breaking, he shall be guilty of a misdemeanour.

Section 25 of the latter Act (Coinage Offences Act) provides that whosoever 'without lawful authority or excuse (the proof whereof shall lie on the party accused)' shall knowingly convey out of Her Majesty's mint any stamp die,, pattern or other tool, instruments, etc., used or employed in the coining of coin shall be guilty of felony. It will be seen that in both cases, the proof of establishing the excuse is laid on the accused.

It will be sufficient in these cases for the prosecution to merely prove that a person was found by night having in his possession instruments of house-breaking or by proving that a person had removed instruments employed in coining. Likewise, in some of the offences under the Prohibition Act, it is sufficient for the prosecution to prove possession of liquor or instruments and apparatus employed in tapping or for distilling and manufacturing of liquor. This is all the effect of Section 4 (2) of the Prohibition Act.

16. If there are circumstances proved which 'prima facie' incriminate the accused, the burden of proof will be on the accused to establish his innocence. Suppose a number of persons are arrested at about midnight secretly carrying arms: their

conduct itself would throw the burden of proof that their intention was not criminal on the accused (vide -- 'Queen Empress v. Bholu', 23 All 124 (H)).

'Though the general presumption of law is in favour of the innocence, yet, as men seldom do unlawful acts with innocent intentions, the law presumes that every act, which in itself is unlawful, has been wrongfully intended, till the contrary appears.' (Sarkar's Law of Evidence, 8th Edn. at page 911).

In our opinion, Section 4 (2) of the Prohibition Act is based on this principle. For instance, possession of liquor is an offence under Section 4 (1) (a) of the Act. So, if a person is found in possession of liquor which he is unable to account satisfactorily, he is presumed to have committed the offence under Section 4 (1) (a). Likewise, if a person is found in possession of implements or apparatus for the tapping of toddy or the manufacture of liquor, and is unable to account satisfactorily for such possession, Section 4 (2) (a) enacts that such person shall be presumed, until the contrary is shown, that he has committed an offence under Section 4 (1) (g). which makes it unlawful to have in one's possession any such implements or apparatus. The prosecution need not do anything further than to prove the fact of possession. That is all that Section 4 (2) lays down. Opportunity, however, is given to the accused to establish that no offence has been committed, for some reason or other.

17. Mr. Jayarama Aiyar also argued that the presumption laid down in Section 4 (2) of the Prohibition Act is repugnant to the Evidence Act, because it adds a presumption to the presumptions contained in the Evidence Act. That Act gives instances where the court 'may' presume certain things and instances where the Court 'shall' presume certain things. But it has never been understood that the presumptions contained in the Evidence Act are exhaustive and no other statute can lay down other presumptions.

The decision in--'Stewart v. Erojendra Kishore' : AIR1939 Cal628 , and the observations of Narasinga Rao J. relied upon by Mr. Jayarama Aiyar do not help him, because the test of repugnancy depends upon the intention of the paramount Legislature to express by its enactment completely, exhaustively, or exclusively what shall be the law governing the particular conduct or matter. We, therefore,

hold that Section 4 (2) of the Prohibition Act is not repugnant to any provision of the Evidence Act.

18. It was next contended that Section 4 (2) of the Prohibition Act contravened Article 21 of the Constitution, which declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. We have not been able to appreciate the argument of Mr. Jayarama Aiyar on this point. Indeed, we found it difficult even to follow it.

So far as we understand it, it is this: Procedure established by law means the procedure laid down in the Code of Criminal Procedure. Section 4(2) of the Act is inconsistent with the procedure laid down in the Code, because it does not empower the Magistrate to act in accordance with the provisions of Section 253 (1) of the Code, if the Magistrate finds that no case against the accused has been made out, which if unrebutted, would warrant his conviction.

This argument is based upon an assumption which is not well-founded. Section 4 (2), in our opinion does not prevent a Magistrate in a proper case to discharge the accused if he finds that the prosecution have not established what they have to establish under the provisions relating to the offence with which the accused has been charged.

It may be pointed out that Section 53 of the Prohibition Act says:

'Nothing contained in this Act shall affect the operation of the Code of Criminal Procedure.'

Even if, for any reason, it is possible to hold that the Prohibition Act prescribes a procedure slightly different from the procedure laid down in the Code of Criminal Procedure such procedure would not be, on that account, invalid. Section 1 (2), Criminal P. C. provides that nothing contained in the Code shall affect any special form of procedure prescribed by any other law for the time being in force. Section 5 (2) of that Code provides:

'All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any

enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.'

We see no substance, therefore, in the argument based on Article 31 of the Constitution.

19. The contention based upon Article 14 of the Constitution is equally untenable. The contention was that an accused charged with an offence under S, 4 of the Prohibition Act was placed under a special disability from which persons accused of other offences were free; and offenders under the Prohibition Act do not form a well-defined class.

Reference was made to the decisions of the Supreme Court in -- 'Charanjit Lal v. Union of India' : [1950]1SCR869 . 'The State of West Bengal v. Anwar Ali Sarbar' : 1952 CriLJ510 and -- 'V.G. Row v. State of Madras' : AIR1951 Mad147 .

20. The fact that certain actions are made offences and are visited with penal consequences, while other actions are not, has never been understood to contravene the rule of equal protection of the laws. It is also obvious that the same procedure cannot be made applicable for every offence. We are unable to see any discrimination made against persons accused of offences under the Prohibition Act. There is no difference in procedure, as we have pointed out, because the procedure as laid down under the Code of Criminal Procedure will apply to the trial of offences under the Prohibition Act. The enactment of a, special presumption under Section 4 (2) of the Act in. certain circumstances does not offend, in our opinion, Article 14 of the Constitution in any man-ner. Of course, it has not been suggested that there is any discrimination made among persons accused of offences under the Prohibition Act. We are therefore of opinion that Section 4 (2) of the Prohibition Act is neither invalid nor unconstitutional on any ground.

21. We next come to the group of Sections 28 to 32, which are impugned as being invalid and inconsistent with the provisions of the Constitution. They run as follows:

'28. If any Collector, Prohibition Officer or Magistrate upon information obtained and after . such inquiry as he thinks necessary, has reason to believe that an offence under Sub-section (1) of Section 4 has been committed he may issue a warrant for the search for any liquor, intoxicating drug, materials, still, utensil, implement or apparatus in respect of which the alleged offence has been committed.. Any person who has been entrusted with the execution of such a warrant may detain and search, and if he thinks proper, arrest any person found in the place searched, if he has reason to believe such person to be guilty of any offence under this Act:

Provided that every person arrested under this section shall be admitted to bail by the person arresting, if sufficient bail be tendered for his appearance either before a Magistrate or before a Police or Prohibition Officer, as the case may be.

Before issuing such warrant, the Collector, Prohibition Officer or Magistrate shall examine the informant on oath and the examination shall be reduced into writing in a summary manner and be signed by the informant, and also by the Collector, Prohibition Officer or Magistrate.

29. Whenever a Collector, any Prohibition Officer not below such rank as the State Government may determine, any Police Officer not below the rank of sub-inspector,' any officer in charge of a police station, or any other paid or honorary officer authorised by the State Government in this behalf has reason to believe that an offence under Sub-section (I) of Section 4 has been committed and that the delay occasioned by obtaining a search warrant under Section 28 wilt prevent the execution thereof, he may, after recording his reasons and the grounds of his belief, at any time by day or night enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Act; and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason to believe to be guilty of any offence under this Act:

Provided that every person arrested under this section shall be admitted to ball by such officer as aforesaid if sufficient bail be tendered for his appearance either before a Magistrate or before a Police or Prohibition Officer, as the case may be.

30. The Collector, any Prohibition Officer not below such rank as the State Government may determine or any police or other paid or honorary officer authorised by the State Government in this behalf, may enter and inspect, at any time by day or by night, any place in which it is reasonably suspected-

(a) that any toddy is drawn, of the manufacture of any other liquor or of any intoxicating drug is carried on, or

(b) that any liquor or intoxicating drug is kept for sale or stored, or

(c) that an offence under Section 4-A or Section 5 has been, or is being, committed; and may examine, test, measure, or weigh any material, still, utensil, implement, apparatus, liquor or intoxicating drug found in such place.

31. If any officer empowered to make an entry under Sections 28, 29 or 30 cannot otherwise make such entry it shall be lawful for him to break open any outer or inner door or window and to remove any other obstacles to his entry into any such place.

32. Any Prohibition Officer, any officer of the Police or Land Revenue departments, and any other person authorised in that behalf-

(a) may arrest without warrant any person found committing an offence punishable under Section 4, Sub-section (1), Section 4-A or Section 5;

(b) may seize and detain any liquor, drug or other article which he has reason to believe to be liable to confiscation under this Act; and

(c) may search any person, vessel, vehicle, animal, package, receptacle or covering, upon whom, or in or upon which, he may have reasonable cause to suspect any such liquor, drug or other article to be, or to be concealed;

Provided that if the officer or person making the arrest under this section be not empowered under Section 27 to admit to bail, the person arrested shall be forthwith forwarded to an officer so empowered, if such an officer is known to be within a distance of five miles from the place where such arrest took place. And it shall be the duty of such officer empowered as aforesaid to admit such a person to

bail if sufficient bail 'be tendered for his appearance before a Police or Prohibition Officer or Magistrate having jurisdiction to enquire into the case.'

22. We have already pointed out at the beginning of this judgment, that an omnibus reference, such as has been made to us, was misconceived and unwarranted. It is admitted, for instance, that no action whatever was taken under Section 31, that is, no officer broke open any doors or windows. It is unfortunate that the Magistrate has not even adverted to the events which happened in this case to find out exactly under which particular section any action was taken by the Prohibition Officers.

We find among the papers a mahazarnama from which we have gathered the following facts: The Prohibition Officer, Madras City, and the Deputy Commissioner of Police made a search of the premises No. 28, Thanikachala Chetty Street, T. Nagar, Madras, the residence of the sole accused in C. C. No. 5391 of 1953 and the 2nd accused in the other cases, at about 8-30 p.m. on 18-11-1953, and seized certain articles, namely, bottles of liquor, glass tumblers containing whiskey mixed with soda, etc., and arrested the persons against whom subsequently charge-sheets have been filed.

The learned Advocate General mentioned to us that action was taken under Section 28 of the Act and that the District Prohibition Officer issued a search warrant and entrusted the Assistant Prohibition Officer with its execution. We accept his statement because no objection was taken to it by the counsel for the accused.

23. The main contention of Mr. Jayarama Aiyar, learned counsel for the accused, as regards the above sections was that these sections were repugnant to an existing Indian law, namely, the Code of Criminal Procedure, and were therefore void under Section 107 of the Government of India Act, 1935, as no assent of the Governor General was obtained before the introduction of these provisions.

The repugnancy is said to be this: Under Sections 96 and 98 of the Code of Criminal Procedure, a Court or a Magistrate can issue a search warrant in certain

contingencies. It follows that no one other than a Court or a Magistrate can issue a search warrant in any other circumstance. The impugned sections of the Prohibition Act empower persons' other than a Court or a Magistrate to issue search warrants. Therefore such provisions are repugnant to the Code of Criminal Procedure.

The constitutional way of putting the argument is this: Criminal law and criminal procedure are items in the Concurrent Legislative List. The existing Indian law, viz., the Code of Criminal Procedure has occupied the field in the matter of the issue of search warrants by indicating that only certain persons have power to issue such warrants. It is therefore not permissible for any Provincial legislation to entrench on that occupied field. So the argument of Mr. Jayarama Aiyar ran.

24. In support of his argument, he relied upon certain general principles well-established in the construction of statutes.

For example, that language 'prima facie' permissive, i.e., permitting certain things to be done in a particular way may be understood as prohibiting that particular thing from being done in any other way. Reliance was placed on the following dictum of Jessel M. R. in -- 'Taylor v. Taylor', cited in Craies on Statute Law, 5th Edn. at page 265:

'When a statutory power is conferred for the first time upon a Court and the mode of exercising it is pointed out, it means that no other mode is to be adopted.'

Learned counsel developed his argument by tracing the history of the provisions conferring power on the Court and the Magistrate to issue search warrants, how sections of the Police Act V of 1861 conferred limited power on certain officers to enter premises without warrant, how the Criminal Procedure Code of 1861 provided for the first time for the issue of search warrants and the subsequent Codes of 1872 and 1882 enacted similar provisions.

The maxim 'Expressio unius est exclusio alterius' was also invoked by Mr. Jayarama Aiyar.

25. The argument of Mr. Jayarama Aiyar rests entirely on the assumption that the Code of Criminal Procedure has completely occupied the field of criminal procedure in the matter of search warrants. In other words, Mr. Jayarama Aiyar wants us to imply a provision in the Code of Criminal Procedure to the effect that no such warrants shall be issued by any one except under Sections 96 and S8 of that Code. Indeed, if there had been such a provision, there might have been room for the contention that in the face of such express prohibition no Provincial Legislature could provide for the issue of search warrants in a manner other than that provided by the Criminal Procedure Code.

Actually, however, there is no such prohibition in the Code, nor are we compelled to imply such a prohibition. As isaacs J. pointed out in --'Clyde Engineering Co. v. Cowburn', (1926) 37 CLR 466 (M) it is only if a competent Legislature has expressly or impliedly evinced its intention to cover the whole field that it is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field. Both Central and Provincial Legislation may stand together in the same field, provided that there is no intention of one to cover exclusively the same ground as the other (vide Street on the Doctrine of 'Ultra Vires', pages 471-472).

In our opinion, this point is concluded by the decision of the Federal Court in --'Lakshinara-yandas v. Province of Bihar', AIR 1950 PC 59 (N). Section 21 of the Bihar Maintenance of Public Order Ordinance, 1949, was impugned on the ground that it was repugnant to Section 54 of the Criminal P. C., because it provided for arrest without warrant by a police officer of persons suspected of committing offences under the Ordinance and was therefore repugnant to Section 54 of the Code, which provided for the arrest by a police officer without a warrant in certain cases. The Federal Court rejected the contention.

26. Mukherjea J. who delivered the judgment of the Court observed thus: 'The Concurrent List is not a forbidden field to the Provincial Legislature and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent list is not enough to attract the mischief of Section 107 of the Government of India Act. There must be repugnancy between such legislation and an existing law, and

then and then only would the existing law prevail unless the procedure laid down in Sub-section (2) of Section 107 was followed. In our opinion, there is no repugnancy between the provisions of the impugned Ordinance and those of the Criminal P. C. Section 54 of the Criminal P. C. does not purport to be exhaustive or unqualified and various provisions for arrest without warrant are to be found in other Acts, e.g., Police Act, Arms Act, Explosives Act, Indian Railways Act, etc., and Section 1 (2), Criminal P.-,C. expressly lays down that the provisions of the Code would not affect any special form of procedure prescribed by any law for the time being in force. The provision of Section 21 of the Ordinance cannot be said therefore to be repugnant to Section 54 of the Criminal P. C-' (27) The learned Advocate General met the contention as to repugnancy in another way. He argued that really the impugned provisions (including Section 4 (2) of the Prohibition Act) in pith and substance did not fall under Items 1, 2 and 6 of the Concurrent Legislative List, namely, Criminal law, Criminal Procedure Code and Evidence. They really fall well within the scope of other entries in the Provincial Legislative List, namely, entry 31:

'Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating, liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.'

Along with this item should be taken the following items also, namely, item 37 -- offences against laws in respect of any of the matters in this List, and item 2-- Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List. We agree with the learned Advocate General's contention which, in our opinion, is amply supported by the decision of the Federal Court already referred to, namely, -- 'AIR 1950 FC 59 (N)'.

28. In that case, the contention was that the-impugned Ordinance, namely, the Bihar Maintenance of Public Order Ordinance, 1949, was in conflict with the provisions of the Criminal Procedure Code and that it created new offences for the first time, and they were clearly included in. items 1 and 2 of the Concurrent Legislative List. In order to succeed in this contention, it was necessary to

establish that the provisions of the-impugned Ordinance and those of an existing, law, namely, the Criminal Procedure Code, must be in respect of the same subject-matter and that subject-matter must be covered by one of the items in the Concurrent Legislative List.

Then, their Lordships proceeded to enquire first of all whether the impugned Ordinance was in respect to-matters enumerated in the Provincial Legislative List or in the Concurrent Legislative List. It was held that the matters dealt with by the impugned Ordinance really fell within items 1 and 2 of the Provincial Legislative List, namely, 1 Public order..... administration of Justice; constitution and organisation of all Courts....; preventive detention..... 2. Jurisdiction, and powers of all Courts except the Federal Court, with respect to any of the matters in this List.

29. Therefore, there had been no legislation on any of the items in the Concurrent Legislative List. After referring to the provisions of the Ordinance' Mukherjea J. observed:

'Thus ail the provisions of the Ordinance relate to or are concerned primarily with the maintenance of public order in the Province of Bihar and provide for preventive detention and similar other measures in connection with the same. It is true that violation of the provisions of the Ordinance or of orders passed under it have been made criminal offences but offences against laws with respect to matters specified in List II would come within item 37 of List II itself, and have been expressly excluded from item 1 of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the conferring of jurisdiction on certain Courts for that purpose would be covered completely by item 2 of List II and it is not necessary for the Provincial Legislature to invoke the powers under item 2 of the Concurrent List.'

In the present case it is clear that all the provisions of the Prohibition Act deal primarily with Provincial subjects, namely, intoxicating liquors and narcotic drugs. It is true that violations of the provisions of the Act have been made criminal offences. But such offences would certainly be covered by item 37 of List II, and they have been expressly excluded from item 1 of the Concurrent List. The

ancillary matters laying down the procedure for trial of such offences and the enactment of certain presumptions which would apply in the course of such trial would be covered completely by item 2 of List II. We, therefore, hold that none of the impugned provisions, including Section 4 12) of the Prohibition Act, is invalid on the ground that they are repugnant to the provisions of an existing Indian law in respect of a subject covered by the Concurrent List.

30. Mr. Jayarama Aiyar again repeated his argument based upon Article 14 and Article 21 in respect of Sections 28 to 32 also. We think it unnecessary to deal with this argument over again.

31. Finally, Mr. Jayarama Aiyar urged that Sections 28 to 32 infringed the fundamental right guaranteed by Article 19(1)(f) of the Constitution, that is, to acquire, hold and dispose of property. His contention was that search and seizure would amount to undue interference with the right to hold property. Though he was willing to concede that search and seizure in pursuance of a search warrant by a Court or Magistrate may be a reasonable restriction in the interests of the general public, it would not be so if the warrants were to be issued by persons other than Magistrates. It may be officers of the Prohibition Department, or even any person authorise in this behalf or, to use the language of counsel, any Tom, Dick and Harry..

On this point, we do not think it necessary to do anything more than cite the following observations of the Supreme Court in the recent case of -- 'M.P. Sharma v. District Magistrate, Delhi' : 1978(2)ELT287(SC) .

'A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it into a totally different fundamental right, by some process of strained construction.'

If a search warrant can be issued by a Magistrate, and in limited cases, even a police officer will be entitled to search and seize under Section 165 of the Criminal P. c., we fail to see why other public officers like Prohibition Officers should not be given like powers.

32. Though before the Magistrate another point was taken, namely, that these sections were opposed to Article 20(3) of the Constitution, Mr. Javarama Aiyar very properly did not press that point before us in view of the recent decision of the Supreme Court above referred to, namely, --'M.P. Sharma v. District Magistrate, Delhi (O)'.

33. In the result, we hold that none of the provisions of the Prohibition Act is invalid or unconstitutional on any of the grounds alleged by the accused. We may add that no other point was argued before us.

34. We cannot, however, conclude without expressing our view that some of the provisions contained in Sections 28 to 32 are really very drastic in nature. We are free to confess that we would have been happy to have struck them down if there was good ground to do so. But Mr. Jayarama Aiyar was unable to convince us that any such ground is available. We snail, therefore, content ourselves with the following quotation from-one of the leading text-books on Constitutional Law, namely, Cooley's Constitutional Limitations, 7th Edn., p. 429:

'A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime might possibly not be void on constitutional grounds in some other cases, but the power of the Legislature to authorise a resort to this process is one which can properly be exercised only in extreme cases, and it is better often times that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity and to the misconstructions of ignorant 'and suspicious persons and all this under, the direction of a mere-ministerial officer, who brings with him such assistants as he pleases and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the

side of safety.'

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