

The State Vs. Keshab Chandra Naskar

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Court : Kolkata

Decided On : Jan-12-1962

Reported in : AIR1962Cal338

Judge : P.B. Mukharji and ;N.K. Sen, JJ.

Acts : [Constitution of India](#) - Articles 13, 14, 245, 246 and 254; ;Arms Act, 1878 - Section 29; ;[Code of Criminal Procedure \(CrPC\) 1898](#) - Section 432

Appeal No. : Ref. U.S. 432 and Cri. P.C. No. 3 of 1961

Appellant : The State

Respondent : Keshab Chandra Naskar

Advocate for Def. : Jyotirmoyee Nag, ;Rajkumari Singh and ;Monjuli Sen Gupta, Adv.

Advocate for Pet/Ap. : Anil Kumar Sen, Adv.

Judgement :

P.B. Mukharji, J.

1. This is a Reference under Section 432 of the Code of Criminal Procedure by the Additional Sessions Judge, Third Special Court, Alipore. It arises out of a case under Section 19 (f) of the Indian Arms Act. It raises certain important principles

and considerations, on the Constitution the Criminal Procedure Code and the Indian Arms Act.

2. In the letter of reference the learned Judge says that the appeal before him has given rise to the question of constitutional validity of Section 29 of the Indian Arms Act. In his opinion he considers it to be necessary that the question should be referred to this Court for decision under Section 432, Criminal Procedure Code.

3. The facts lie within a short compass. Keshab Naskar, the accused appellant was charged under Section 19 (f), Indian Arms Act, for having possessed without licence one dozen 12 bore live cartridges. On the 13th October, 1955 at Diamond Harbour river side, Keshab Naskar with several other persons, was caught by a police party in plain clothes. On search of the person of Keshab Naskar as many as 12 live cartridges were found. There was no license for the ammunitions. This led to the prosecution of Keshab Naskar under Section 19(f) of the Indian Arms Act. The prosecution in fact was started after obtaining necessary sanction from the Additional District Magistrate, 24 Parganas under Section 29 of the Indian Arms Act.

4. The defence was that there was no proper sanction as contemplated in Section 29 of the Indian Arms Act. The learned Assistant Sessions Judge found that proper sanction under Section 29 of the Indian Arms Act had in fact been obtained in this case. He, however, held further on the authority of the Full Bench case of the Allahabad High Court in *Bhai Singh v. The State* : AIR1960 All369 , that Section 29 of the Indian Arms Act was wholly unconstitutional and void. He further proceeded to observe that he was bound by the decision of the Allahabad High Court and as such even if he found that there was no proper sanction the prosecution would not have failed on that ground.

5. The accused appellant made a grievance against the finding on this point. He contended that the learned Judge should not have decided that question himself but should have made a reference to the High Court under Section 432 of the Code of Criminal Procedure for decision on the point whether Section 29 of the Indian Arms Act was constitutional or not. The lower appellate Court expressed the view that the learned Assistant Sessions Judge should have made a reference

under Section 432 of the Code of Criminal Procedure when he was of the opinion that Section 29 of the Indian Arms Act was unconstitutional. The lower appellate court also came to the view that being a court of appeal it had the same right as the trial court to make a Reference under Section 432 of the Code of Criminal Procedure. It came to the conclusion that it was necessary for the disposal of the case and the appeal before him, to determine the constitutional validity or otherwise of Section 29, Indian Arms Act. He expressed the view that it was necessary for the proper decision of the appeal now pending before him. Therefore he has made this Reference on the following point:

'The point for decision is whether Sec, 29, Indian Arms Act is unconstitutional and invalid for making territorial discrimination of one and the same kind of offence.'

6. Before proceeding to discuss the question raised on the Reference, it will be proper to emphasise at the out set the conditions required for such a Reference under Section 432 of the Code of Criminal procedure for some of them do not appear to have been observed. The governing words in that section are:

(1) "Where any court is satisfied that a case pending before it involves a question as to the validity of any Act.'

That is the first condition. In other words, a court has to be satisfied that the question of the validity of an Act is raised in a case pending before it. The second fact which constitutes another condition for Reference under Section 432 of the Code of Criminal Procedure is that the court has to be 'satisfied' that 'the determination of that point is necessary for the disposal of the case'. In other words, whenever and wherever the validity of an Act is raised, it does not necessarily follow that a Reference must be made. It must be such a point that its determination is 'necessary' or essential for the 'disposal' of the case. The third and the last major condition in this section for a Reference is that the Court must be of the "opinion" that such Act is invalid or inoperative but has not been so declared by the High Court to which that court is subordinate or by the Supreme Court. When these three major conditions are satisfied then of course it is the duty of the court to send the case setting out its opinion and the reasons therefor and refer the same for the decision, of the High Court.

7. We cannot help observing in this case that the second major condition does not seem to have been properly regarded by the lower appellate court in making this Reference. The trial court came to an actual finding of fact by holding, to use the language of the Assistant Sessions Judge:

'From that point of view I find that sanction as contemplated in Section 29 of the Indian Arms Act was duly obtained and the sessions case, therefore does not suffer from any such defect for want of sanction'.

8. On that finding it was no longer "necessary" for the Assistant Sessions Judge to determine the constitutional question for the 'disposal of the case' before him. It was not therefore required of him to embark upon the question, that if he was wrong on that finding, then what would be the constitutional validity or otherwise of Section 29 of the Indian Arms Act. If he were wrong in that finding he would naturally be corrected on that question by his higher appellate court. In any event, when the Assistant Sessions Judge embarked on the constitutional discussion then he should have observed the provisions of Section 432 of the Code of Criminal Procedure and the express language used in that section to make a Reference to this High Court to which he is subordinate and not himself make the decision, and follow the decision of any other High Court to which he was not subordinate in disregard of the mandatory provisions of Section 432. But anyhow that stage is now over. Rightly or wrongly, we think wrongly, he did decide this question of constitutional validity of Section 29 of the Indian Arms Act.

9. Although he did not make the Reference under Section 432 of the Code of Criminal Procedure which we think he should have, the question now again is whether in those circumstances it was an appropriate stage for the lower appellate court before whom the whole appeal is actually pending, to make this Reference under Section 432 of the Code of Criminal Procedure. While it is possible, on the view that an appeal is a continuation of the original proceeding, to interpret the expression 'where any court is satisfied that the case pending before it' in Section 432, to include the lower appellate court, in addition to the original trial court it may still be considerably debatable where the trial court has already disposed of the whole case without thinking it 'necessary', if the lower appellate court before whom

the whole appeal is pending, can make this Reference on the ground that 'it is necessary for the disposal of the case' within the meaning of Section 432. It only becomes necessary for the disposal of the case if the first appellate court after hearing the appeal comes to a finding that the trial court's finding about a valid sanction already existing in; the facts of this case was wrong. It is then only that the question of the validity of Section 29 of the Indian Arms Act under the Constitution could arise and a decision thereon will then become 'necessary' for the disposal of the case within the meaning of Section 432 -of the Criminal procedure Code. But what the lower appellate court has done in this case is that he has kept the whole appeal pending before him. He has not decided the question of fact, and has not expressed his decision whether he upholds the Assistant Sessions Judge's finding that the sanction was in fact valid in this case; and yet he has said that the question on constitutional validity was necessary for the disposal of the case. We do not think that he should have adopted this course. The proper course in any event should have been for him to have decided first this question of fact and if he was against the finding of the Assistant Sessions Judge on the question of the fact of sanction, then he could have referred this point under Section 432 of the Code of Criminal Procedure. It is not for us however now at this stage to say whether the decision of the Assistant Sessions Judge on the fact of sanction was right or wrong, for it is pending appeal before the lower appellate court whose duty it is to decide that question in the first instance. We, therefore, refrain from expressing any opinion on that point and we shall proceed to determine the question referred to us with the observation that References in future under Section 432 of the Code of Criminal Procedure should more appropriately be made observing the conditions laid down in that section.

10. On behalf of the State the learned Advocate Mr. Sen contends that Section 29 of the Indian Arms Act is unconstitutional on the ground that it violates Article 14 of the Constitution. This point was raised also on behalf of the State before the trial Court, It was at the instance of the State prosecution that the trial court decided it and expressed the opinion that Section 29 of the Indian Arms Act was void on the ground of being unconstitutional being in violation of Article 14 of the Constitution. Both the prosecution before the trial court and the trial court itself relied on the decision of the Allahabad Full Bench in : AIR1960 All369 where Mootham C. J. at

page 371 observed:

'In our opinion the correct view is that Section 29 is invalid and that consequently the sanction of the District Magistrate to the instituting of proceedings under Section 19 (f) is no longer necessary'.

The Allahabad Full Bench also expressed the view that the previous decision of the Allahabad Division Bench in *Mehar Chand v. State* : AIR1959 All660 was not correct. Mootham, C. J. at page 370 expressed the Full Bench view in the following terms :

'The Court in *Mehar Chand's* case : AIR1959 All660 in declaring sanction to be necessary in all cases of a prosecution under Section 19 Clause (f) has in our opinion, altered the law and thereby encroached on the legislative power.'

11. Before proceeding to discuss these authorities, a preliminary point has been urged by Mrs. Nag, learned Advocate for the accused that the State cannot take the objection that Section 29 of the Indian, Arms Act is void on the ground that it is unconstitutional. This point raises very important considerations. The substance of this objection is that the State cannot denounce its own Acts and laws. It cannot ask the Court to declare its own statutes void and unconstitutional. No case has been placed before us to suggest that any of the States in India so far has done it or that any Court has permitted it.

12. The reasons for not allowing the State to plead before the courts the unconstitutionality of its own statutes are formidable. In the first place if any court has declared a statute or any section of it as unconstitutional, a State can always repeal, modify or amend it so as to make it conform, to the mandates and provisions of the Constitution. That is a duty cast upon the State and its legislature. To prevent public confusion and with a view to conform to the Constitution, it should not keep unconstitutional Acts on its statute book after they have been declared invalid by Courts. If it does not accept the decision of any State High Court then in that case, it should have the final verdict of the Supreme Court, as the guardian of the Constitution deciding the constitutional issue. Apparently on the particular point before us other States are not accepting the

Allahabad High Court decision declaring Section 29 of the Indian Arms Act unconstitutional and void. It has been stated to us that in spite of this Allahabad decision, the State of West Bengal as well as many other States in India have continued to treat Section 29 of the Indian Arms Act as constitutional and valid and are continuing to take sanction for prosecution as required thereunder.

13. Secondly if a constitutional presumption in favour of the constitutional validity of a statute is to be made then the State cannot in the next breath contend that it disclaims constitutional validity for its statutes. Otherwise little meaning will be left for continuing to make that presumption. Thirdly the language of Article 14 of the Constitution opens with the words; 'The State shall not deny to any person.....' The State, therefore, cannot in the same breath, say that 'I have passed a statute but I do not propose to abide by it.' Article 14 of the Constitution is a fundamental right and is a protection in favour of a person as against the State, It is not a fundamental right for the State to denounce and disclaim its own Acts and statutes but is a fundamental right for the person who is aggrieved by the inequality or unequal protection of the laws made by the State. It will be a very dangerous course to allow States in India the right to urge in Courts, that their own laws and Acts are unconstitutional and invalid. To do so will be to permit the State by the backdoor to debunk the primary authority of Parliament and State Legislature to make, repeal and amend Acts and statutes. The situation may arise in two different classes of cases--(1) where the question has arisen in a case on which some High Court or other has already condemned the particular statute or any section thereof as unconstitutional or (2) it may arise in a case where no such judicial pronouncement has been made. In the second case it will be odd indeed that if the State with the aid of its legal advisers and legislative ministries and departments having passed a statute after full enquiry and debate in Parliament and State Legislature, is to be permitted to contend before the courts of law that such statutes are unconstitutional and in violation of the fundamental rights and therefore should not be given effect to by the courts. If that be so and if that is the view of the State then they should have either not passed that law or even if they had passed it, they should have amended, repealed or modified it to conform to the Constitution. In the first class of cases where there is some Judicial pronouncement or another condemning any of its sections, even then it is for the

State to take steps to respect that decision of the Court, unless of course it is otherwise challenged or upset by the Supreme Court, and to modify its statutes by repeal or amendment to meet the judicial pronouncement. But the State cannot have the best of both the worlds, of invading the fundamental rights in one place and declaring its own statutes had on the other. That will be recognising a new fundamental right for the State, but part III of the Indian Constitution of fundamental rights is, primarily, a bill of rights for the aggrieved persons and subjects, and should not be used as a convenient platform from which the State can be allowed to fire its own statutes and Acts.

14. I am not however to be understood as saying that in a Constitution like that of India there may not arise conflict between Indian laws and State laws. It is quite conceivable, legal and constitutionally permissible in the Indian Court for a State in an appropriate case to contest that an Indian (Central) Act invades the State's legislative powers and therefore, the State can contend that the Indian Act is violative of the Constitution. For instance if an Indian law was made by Indian Parliament discriminating against one State or another then the State affected thereby may in an appropriate case contend that such a law does not give either equality before the law or the equal protection of laws within the territory of India under Article 14 of the Constitution. But the present reference raises no such question or conflict between Federal and State laws. In this case, however no such question arises because this is a prosecution under the Indian Arms Act and under the Criminal Procedure Code. Both being parliamentary (Central Indian) Acts, no question of conflict between State law versus the Indian Central law arises here.

15. Lastly, this submission of Mrs. Nagcan also be supported for the reason that it is a wholesome principle of Constitutional law that a constitutional point should not be decided on the complaint of one who fails to show that he is injured or aggrieved by its operation and at the instance of one who has availed of its benefits. These two principles are well settled on the point as to the right to take a constitutional objection before a Court. These were two of the principles and inhibitions which the American Supreme Court laid down through the celebrated observations of Brandeis J in *Ashwander v. Tennessee Valley Authority*. (1935) 297 U. S. 288 at

pages 346-48.

16. We, therefore, accept Mrs, Nag's contention on this point. But the acceptance of this contention, does not help the accused in this case to throw the State out from the contention. The situation here is peculiar. The point is not arising now before us at the instance of the State. It is now a point which the lower appellate court has stated in his letter of reference before us for our decision. Therefore even when we hold that the State has not the right to take this objection we: cannot avoid deciding the constitutional validity of Section 29 of the Indian Arms Act on the ground that this is not an objection at this stage by the State but a point for determination on a reference by a court to us.

17. We now proceed to analyse, interpret and construe Section 29 of the Indian Arms Act to find out whether it is wholly unconstitutional and void on the ground that it violates Article 14 of the Indian Constitution. In order to violate Article 14 of the Indian Constitution it has to be established before us that Section 29 of the Indian Arms Act makes an unconstitutional discrimination and that such portion which does make that unconstitutional discrimination cannot be severed from the constitutional part of this section.

18. We shall take up first the interpretation of Section 29 of the Indian Arms Act. Before doing so, a little more detailed reference to the two Allahabad decisions will be necessary. In : AIR1959 All660 , Srivastava J, at pages 662-63 expresses the view that Section 29 of the Arms Act divides persons who may commit an offence under Section 19 (f) of the Arms Act in two distinct classes: (1) Persons who commit the offence within that area of the country in which Section 32, Clause 2 of Act XXI of 1860 was in force at the time when the Indian Arms Act came into force and (2) persons committing the same kind of offence in. the rest of the country. Therefore, he was of the view that in the case of the persons falling under the former class the protection of previous sanction for prosecution was given only for the first three months after the coming into force of the Arms Act and was not to be available after the expiry of that period; whereas in respect of the offenders falling in the latter class the protection was to be available at all times without any limitation. On this ground the learned Judge was of the opinion that among the

offenders of the same kind one rule of law was to apply to some and another rule of law was to apply to others, the basis of the distinction being a geographical one namely, the place where the offence was committed. It was, therefore, held that this part of the classification was unconstitutional and violated Article 14 of the Constitution. The Division Bench of the Allahabad High Court in that case at page 664 observed :

'The discrimination made in Section 29 of the Arms Act between two classes of offenders therefore contravenes Article 14 of the Constitution. The protection of prior sanction, if it was to be available at all must have, been available, at least after the coming into force of the Constitution to all persons without any distinction on territorial basis. That part of Section 29 therefore which debars one part of the State from claiming the advantage must consequently be held to have become void after the enforcement of the Constitution under Article 13 of it.

Irrespective of the area in which Mehar Chand and Sarupa committed the offences which they were alleged to have committed, they could not have been prosecuted without prior sanction being taken and if no sanction was obtained in their cases their prosecutions stood vitiated.'

19. This decision came up for criticism in the Full Bench of the Allahabad High Court in : AIR1960 All369 (FB), and the Full Bench came to the decision that the above observations of the Division Bench were not correct and that the whole of the Section 29 of the Indian Arms Act and all the provisions requiring sanction were unconstitutional and void. The result of the Allahabad Full Bench decision therefore, is that no sanction whatever is required for any prosecution under Section 29 of the Indian Arms Act.

20. On a careful consideration of the language and the history of Section 29 of the Indian Arms Act we have come to the conclusion that in the first place Section 29 is not discriminatory at all. Section 29 of the Indian Arms Act reads as follows :

'Section 29. Sanction required to certain proceedings under Section 19, clause (f)-- Where an offence punishable under Section 19, clause (f), has been committed within three months from the date on which this Act comes into force in any State,

district or place to which Section 32, Clause 2, of Act XXXI of 1860 applies at such date or where such an offence has been committed in any part of India not being such a district, State or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or in a presidency town, of the Commissioner of Police.'

21. The structure of the Section makes it plain that what is intended to be done is that prosecution for offence under Section 19(f) of the Arms Act should not be instituted without the previous sanction mentioned there. In other words the main governing words of the section expressing the purpose of it are :

'Where the offence punishable under Section 19, clause (f) has been committed no proceedings shall be instituted against any person in respect of such offence without the previous sanction.....'.

22. The purpose or object of the Section, therefore, is that no proceeding shall be instituted against any person in respect of offence punishable under Section 19 (f) of the Arms Act without the previous sanction. The plain object is to prevent frivolous or harassing prosecution. A good deal of confusion naturally arises because of the intervening words and expressions. The source of the confusion is the description of the State, district or place in which the offence is supposed to be committed. It is said that this distinction in respect of the State, district or place creates a mere geographical division which does not proceed on any rational classification and intelligible differentia with any relevant and rational nexus so as to satisfy the test laid down for Article 14 of the Constitution. This, in our view, is really begging the question. Does the mention of State, district or place in Section 29 of the Arms Act make it a purely geographical classification with no rational justification? On an anxious consideration of this aspect of the construction we have come to the conclusion that it does not. We shall briefly state our reasons. Three different conditions appear from the express language of Section 29 of this point. Two of the conditions are spatial. The other is temporal relating to time. With regard to the spatial conditions two areas for the crime are indicated. One is the State, district Or place, where an order of disarmament had been made under Section 32 of Act XXXI of 1860. The other is the State, district or place in which an

order for a general search for arms had been issued and was still in operation under Act XXXVIII of 1857. Now Section 29 of the Indian Arms Act with which we are concerned came into operation on the 18th October, 1873 under the Indian Arms Act, 1878. These were the two spatial conditions mentioned in Section 29. The other temporal condition relating to time is the express mention of three months.

23. The source of confusion with regard to the meaning of Section 29 of the Indian Arms Act on this point of its constitutional validity springs from the interpretation of these conditions. One way of interpreting the conditions would be to make them an irrational classification and therefore to make them unconstitutional; the other way of interpreting them would lie to make them rational and so constitutional. On this point again one of the wholesome principles of construction in constitutional law laid down by Brandeis J., in the case already mentioned in (1935) 297 U. S. 288 is that the Court should first ascertain whether the construction of a particular statute is fairly possible in consonance with the Constitution and if so that construction should be preferred.

24. It appears to us that all these intervening words dealing with State, district or place and the time in which the offence is committed are merely descriptive. The description should be read not in an unreasonable way but in a reasonable way. The words 'three months' are distinctive and significant. At the time when the Act was coming into force on the 18th October 1878 offences and penalties for arms were or had been regulated first by Act XXVIII of 1857 and then by Act XXI of 1860.

25. Act XXVIII of 1857 was passed by the Legislative Council of India and received the assent of the Governor General on the 11th September, 1857. The preamble of that Act said 'An Act relating to the importation, manufacture, and sale of Arms and Ammunition, and for regulating (the right to keep or use 'the same'. It was an Act of 36 sections. The first section dealt with the places to which the section extended and the necessity for a written notice of the possession of Arms to be given to the Magistrate. The second section provided for penalty for wilful neglect to give notice. The third section required a Register to be prepared and certificates to be

granted on request. The fourth section dealt with the seizure and detention of Arms and Ammunition by the Magistrate. The fifth section provided for disarming persons in certain cases and in certain places and the persons who were authorised to disarm. The next material section of this 1857 Act is Section 17 providing for apprehension of persons conveying Arms, Ammunition., etc., under suspicious circumstances without warrant. Then Section 22 of this Act goes on to provide for penalty for wilful neglect to give notice of possession of Ammunition of military stores. Section 23 provides for the power to enter and search houses where there was reasonable cause for suspecting Arms and Ammunitions.

26. Section 24 of the 1857 Act is material for this case as it expressly provided for general search for Arms, Ammunitions or Sulphur to be made in any district or place specified. The language of this Section 24 of the 1857 Act is as follows :-

'The Governor General of India in Council, or the Executive Government of any Presidency or place or the Chief Commissioners of the Punjab and Oude respectively, or the Commissioners of Nagpore and Scince respectively, or any other persons authorized by Government, may order a general search for Arms, Ammunitions, or Sulphur to be made, by any Officers or persons named in such order, in any District or place specified therein. The persons authorized by such order, and all persons acting under their authority, shall have the like powers of entry, search, and seizure as are conferred by the last preceding Section'.

The Statute then proceeded to provide for penalties for breach of these sections. Significantly enough by Section 35 of the 1857 Act the Act was only to continue in force for two years.

27. The other statute with which we are concerned is Act XXXI of 1860 which also was passed by the Legislative Council of India and which received the assent of the Governor General on the 17th of July, 1860. The preamble of this statute of 1860 says -

'An Act relating to the manufacture, Importation, and sale of Arms and Ammunition, and for regulating the right to keep and use the same, and to give power of disarming in certain cases,"

Section 1 of this Act continued the old Act of 1857 until the 1st October, 1860.

28. Section 3 of this Act of 1860 provided for penalty for possession of a cannon, howitzer, or mortar without permission. The Act thereupon proceeds to make provisions for licence for manufacturing arms and ammunitions with which we are not concerned. The point which is relevant for our purpose is possession of arms and not their manufacture. Section 22 of the Act of 1860 provided power for the Government to prohibit transport of arms and ammunitions and Section 23 for penalty for the prohibited transport.

29. The most relevant section with which the interpretation of Section 29 of the Indian Arms Act 1860 is concerned is Section 32 of this Act of 1860 and particularly Clause 2 thereof. That clause 2 of Section 32 of 1860 Act reads as follows:-

'In every such Province, District, or place as well as in any Province, District, or place in which an order for a general search for arms has been issued and is still in operation under Act XXVIII of 1857, it shall not be lawful for any person to have in his possession any arms of the description mentioned in Section 6 of this Act, or any percussion caps sulphur, gun-powder, or other ammunition without a license'.

The first part of clause 2 referring to such province etc., means the places mentioned in clause 1 of Section 32 of the Act of 1860. Clause 1 of the Act, therefore will be necessary for our purpose. It reads as follows:-

'It shall be lawful for the Governor-General of India in Council or for the Executive Government of any Presidency or for any Lieutenant Governor or with the sanction of the Governor-General in Council for the Chief Commissioner or Commissioner of any Province, District, or place subject to their administration respectively, whenever it shall appear necessary for the public safety to order that any Province, District, or place shall be disarmed'.

It therefore follows from this that two conditions marked out different places in India under these Acts. One is the disarmed area under Clause 1 of Section 32 of the Act of 1860--the other is the area where an order for general search for arms

has been issued under Act XXXVII of 1857. These two places are introduced in Section 29 of the Indian Arms Act of 1878 as inter alia, the places where offence under section 19 (f) of the Arms Act of 1878 has been committed. In other words three separate classified areas appear from a proper interpretation of Section 29 of the Indian Arms Act of 1878. The first is the disarmed area under the 1860 Act. The second is the general search of arms area under the 1857 Act. The third is the rest of India not coming within the first two places.

30. The clue to the interpretation, in our view, is the words 'three months'. This expression 'three months' is contended on behalf of the State to be applicable only to the first part of Section 29 of the Arms Act of 1878. viz., (1) in the disarmed area and (2) in the general search of arms area. But it is contended that these three months do not qualify the third area being the rest of India, Therefore, it is said that there is discrimination between different areas. We are unable to accept this argument. To accept that argument is to create a conflict between the Constitution and the section. It is possible, in our view, to adopt a construction which does not conflict with Article 14 of the Constitution. That construction is that the expression 'three months' applies to all the three areas namely, (1) where there is an order for disarmament, (2) where there is an order for general search of arms, and (3) the rest of India. We shall briefly state the reasons why this construction is more appropriate and sound in our view.

31. The first is that the three months' time is the period of grace given to all the areas because Section 29 of the 1878 Act was introducing a new provision for sanction for prosecution which was not existing prior thereto. There is therefore no reason to hold why the period of three months should not give the benefit to all the three areas. Secondly, to hold that the period of three months only qualified the places mentioned in Section 32 (2) of the Act XXXI of 1860 would be entirely illogical, because there would be no rational justification to provide that where there was already an offence in those two areas the proceedings could not be commenced without sanction whereas in other areas where it was not an offence at all the proceeding could be started immediately. On the other hand, we consider it to be more sensible view to hold that three months period was the period of grace applicable to all the three areas because of the innovation of the Section 29

of the Indian Arms Act of 1878 introducing and requiring a previous sanction for every prosecution. Thirdly in any event the descriptive parenthesis in Section 29 of Indian Arms' Act of 1878 providing for the places and the time within which the offence had to be committed in order to attract the need for previous sanction, is no longer relevant in the light of the main purpose of the section which as we have indicated at the outset is to require the previous sanction of the Magistrate for prosecution under Section 19 (F) of the Indian Arms Act of 1878. Both the time and the place have today become a dead leaf of the section. Even if the interpretation that the State wanted to put upon them that limited time of three months qualified only a portion of the areas mentioned in Section 29 were right, it can be ignored in the sense that it no longer is a live issue to raise any conflict with the Constitution because of the simple reason that that three months from the date of coming into operation of the Arms Act of 1878, have long since expired. Fourthly Section 29 of the Indian Arms Act deals with sanction for offence under Section 19 (F) of the Indian Arms Act of 1878. A reference to section 19 (F) is necessary to appreciate this reason. Section 19 (F) provides as follows:—

'Whoever commits any of the following offences namely--(f) has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of Section 14 or Section 15, shall be punished with imprisonment for a term which may extend to three years, or with fine or with both-'

Section 14 and Section 15 at once make it clear how the Act of 1860 came into play in Section 29 of the 1878 Act. Section 14 of the Arms Act of 1878 provides that no person shall have in his possession or under his control any cannon or fire-arms, or any ammunition or military stores except under a licence and in the manner and to the extent permitted thereby. But Section 15 of the Indian Arms Act of 1878 provides that in any place to which Section 32 clause 2 of Act XXXI of 1860 applies at the time when this Act (Act 1878) comes into force or to which the Central Government - may by notification in the official gazette specially extend this section, no person shall have in his possession any arms of any description except under a license and in the manner and to the extent permitted thereby, Now therefore section 15 introduces this old Act of 81 of 1860 because Section 29 of the Arms Act of 1878 deals with Section 19 (F) of the same Act which in its turn

deals with two Sections 14 and 15 of the same Act and because Section 15 refers only to the Act of 1860, that was why in providing that sanction was necessary for prosecution in cases under Section 19 (F) of the Act, reference had to be made to the Act XXXI of 1860. It therefore cannot follow that the expression 'three months' in Section 29 only qualifies what comes under Section 15 and not what comes under Section 14 of the Indian Arms Act of 1878.

32. Our view of interpretation of Section 29 of the Indian Arms Act of 1878 is that this section must be construed as a whole. When construed as a whole it makes no discrimination at all on the ground of geography only. It requires sanction in this view of the interpretation in every prosecution for an offence under section 19 (F) of the Indian Arms Act of 1878 in every area and the period three months was a period of grace and a period of getting ready to meet the new situation and this period was applicable to every area without discrimination. To deny this construction will be to take away a wholesome protection from frivolous or harassing prosecution under Section 19 (F) of the Indian Arms Act of 1878 and will be really going against the very old history of the section. The whole purpose of its object and its introduction was to protect citizens against frivolous, irresponsible or harassing prosecutions under Section 19 (F) of the Indian Arms Act of 1878.

33. Even were we convinced that part of this Section 29 of Indian Arms Act, 1878 was unconstitutional in the manner alleged by the State we would have no hesitation to hold that not only the impugned part is merely descriptive and that not only the impugned part is a dead leaf and already worn out but also it is severable, so that the essential object and purpose of Section 29 requiring previous sanction in case of every prosecution under Section 19(F) of the Indian Arms Act is maintained. This conclusion on the severability of this part is supported by the tests laid down by the Privy Council and the Supreme Court in the following decisions--(1) Attorney-General for Alberta v. Attorney-General for Canada, 1947 AC 503 at p. 518, (2) R. M. D. Chamarbaghwalla v. Union of India, : [1957]1SCR930 and (3) State of Bombay v. Balsara, 195Z SCR 682 : (AIR 1951 SC 318).

34. Before we conclude, a reference to the notification under the Act of 1857 may not be out of place because, we think, that notification was the source of some confusion in, some of the authorities mentioned above. The notification is set out by Daniels, J., in *Amir Ahmad v. Emperor* : AIR1926 All143 . There the learned Judge says that the Government gazette of the North-Western provinces for the year 1858 contains a notification issued by the Governor General No. 5336, dated the 21st of December, 1858, extending the provisions of Sections 1, 2 and 5 of the Act of 1857 to the whole of the North-Western Provinces, and at the same time authorising a general search and seizure of arms in those parts of the provinces which lie to the north of the rivers Jamuna and Ganges. The text of the notification quoted by the learned Judge is as follows:

'21st December 1958.--No. 5336. The right Hon'ble the 'Governor General has been pleased to extend the provisions of Sections 1, 2 and 5, Act XXVIII, 1857, to the North-Western Provinces of the Bengal Presidency.

His Lordship having resolved on disarming such parts of those Provinces as lie to the north of the rivers Jamuna and Ganges, has further been pleased, under Section 24, Act XXVIII, 1857, to authorize a general search and seizure of Arms by the Magistrates and Collectors within the tract above specified. The Magistrate and Collector may delegate the name and authority to any officer of his establishment of rank not lower than Jamadar'.

This was the notification which was taken to be basis of the unconstitutional division in the later Allahabad decisions. In the view that we have taken of the interpretation of Section 29 of the Indian Arms Act of 1878, this notification is no longer very material for the purpose of our decision. But we are constrained to say that this notification also is not clear in many ways to justify any wide conclusion. We have already referred to Sections 1, 2 and 5 of the Act of 1857. These sections have nothing to do with the sanction to prosecute under Section 29 of the Arms Act of 1878 but only refer to places where written notice of possession of arms shall be given to the Magistrate, the penalty therefor and the provision for disarming person in certain areas. Extension or exposition of the provisions of Sections 1, 2 and 5 of the Act, therefore does not help in solving the point of

decision before us. Then again Section 24 of the Act of 1857 which we have quoted elsewhere in this judgment only provides for the general search of arms and ammunitions' to be made by officers or persons named in the order. Whether in fact the Magistrate and the Collector acted thereunder by virtue of the authority conferred upon them remains either a forgotten chapter or has not been brought to our notice. Thirdly both the Act of 1857 as well as the Act of 1860 have been repealed and whether notifications passed thereon can still be effective when their foundation has disappeared is debatable. Fourthly, the whole geographical basis on which the Acts of 1857 and 1860 were based namely on 'North-Western Provinces of the Bengal Presidency' which practically covered then the whole of Northern India can no longer, hold good because of the constitutional and legal formations of States that have followed since then. It was finally argued by the learned Advocate for the State that although the Acts and the notification have all gone, disappeared and are dead yet somehow or other Section 29 of the Arms Act of 1878 has mummified their ghosts in 'the shape of preserving the old defunct areas Where the offence was supposed to have been committed. We are not impressed by this view of the notification today. It is not necessary for us to say anything more. We only may add that every state today has its own Arms Rules and there are penal notifications which both, the counsel for the accused and for the state have mentioned before us.

35. It may not be out of place also to add that adaptation and legislative attention have been made and paid to this Section 29 of the Indian Arms Act even after the coming of the Constitution into force. Such post-constitution adaptation or legislative attention did not consider Section 29 of the Arms Act to have become unconstitutional after the constitution.

36. We therefore, decide the questions stated above in the Letter of Reference by holding that Section 29 of the Indian Arms Act of 1878 is not unconstitutional and invalid and does not violate Article 14 of the Constitution on the ground of territorial discrimination of one and the same offence in different areas, and it certainly does not do so in West Bengal State.

37. Let the records be sent down to the referring Judge for dealing with the matter in accordance with the law laid down here and disposing of the case and the appeal pending before him.

N.K. Sen, J.

38. I entirely agree. The argument of Mrs. Nag for the accused and Mr. Sen for the State have been sufficiently and elaborately dealt with in the judgment of My Lord and with the reasons given therein, and the conclusions arrived at I respectfully agree. I do not consider that it would serve any useful purpose by repeating what My Lord has observed in the judgment and therefore I do not propose to add anything beyond the general expression of concurrence with the said reasons.

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