

Amir Khan vs State on 31 January, 1950

Equivalent citations: AIR1950ALL423, AIR 1950 ALLAHABAD 423

JUDGMENT

Agarwala, J.

1. This is an application in revision against an order of the Sessions Judge of Mirzapur dismissing an appeal of the applicant against an order of the Judicial Officer of Mirzapur convicting the applicant Under Section 19(f), Arms Act and sentencing him to undergo three months' rigorous imprisonment.

2. The prosecution case was that on 25th November 1947, at about 2 P. M. on a search of the house of the applicant in the city of Mirzapur, a spearhead was recovered from his possession. Admittedly the applicant had no licence for possessing the spearhead. He was, therefore, prosecuted Under Section 19(f), Arms Act. The only defence raised by him was that the spearhead, Ex. 1, which was recovered from his possession was not an arm within the meaning of Section 4, Arms Act. The Magistrate considered that it was an arm within the meaning of the Act and convicted him as aforesaid. In appeal several other points were raised, All his contentions were, however, overruled and the order of the Magistrate was confirmed.

3. The position under the Indian Arms Act read with the Indian Arms Rules, 1924, as made by the Central Government, and for the time being without considering the notification of the U. P. Government of 1946, is as follows:

4. Section 13, Arms Act prohibits persons going armed without licence. Section 14 prohibits the possession of fire-arms without licence. Section 15 (with which we are really concerned) prohibits the possession of arms of any description other than fire-arms without licence. It reads as follows:

Section 15 -- "In any place to which Section 32, Clause 2 of Act No. XXXI [31] of 1860 applies at the time this Act comes into force or to which the Local Government . . . may, by notification in the official Gazette, specially extend this section, no person shall have in his possession any arm of any description, except under a licence and in the manner and to the extent permitted thereby."

Section 15, therefore, prohibits the possession of arms in any place (a) to which Section 32(2) of Act XXXI [31] of 1860 was applicable on the date on which the Arms Act came into force, or (b) to which the Central Government has extended this section. Now Clause (1) of Section 32 of Act XXXI [31] of 1860 deals with the disarming of certain areas and Clause (2) prohibits the possession of arms in such areas as also in areas in which a general search for arms had been ordered Under

Section 24 of Act XXVII [28] of 1857. It, therefore, follows that Section 15, will apply to places where, (a) there has been an order for a general search for arms Under Section 24 of Act XXVIII [28] of 1857, or (b) there has been an order for disarming under Clause (l) of Section 32 of Act XXXI [31] of 1860, or (c) there has been an order Under Section 15 of the present Arms Act.

5. Section 27, Arms Act, as it originally stood, however empowered "the Governor General in Council" from time to time by notification, published in the "Gazette of India,"

"to exempt any person by name or any class of persons or to exclude any description of arms or ammunition, or to withdraw any part of British India, from the operation of any prohibition or direction contained in the Act, or to cancel any such notification, and again subject the persons or things or the part of British India comprised, therein to the operation of such prohibition or direction."

The words "Governor-General in Council" and "Gazette of India" were changed into the "Central Government," and the "Official Gazette" in 1938 after the passing of the Government of India Act, 1936. The Governor-General in Council under the powers conferred upon him Under Section 27, Arms Act framed certain rules which are known as the Indian Arms Rules, 1924. Rule 3 of these Rules provides :

"Persons and classes of persons, the arms and ammunition, and the parts of British India specified or described in Schedules I to IV, ate respectively, excepted excluded and withdrawn to the extent and subject to the conditions therein specified from the operation of prohibitions and directions contained in the Act."

In Schedule II entry 1, "all arms" except certain fire arms, with which we are not concerned, were exempted from the prohibitions contained in the Act, including the prohibitions contained in Section 15 of the Act in the whole of British India, except the Punjab and the Delhi provinces. There was, however, a proviso which provided that the Local Government may by notification in the local official Gazette retain all or any of the prohibitions contained in the Act in respect of any arms or in the case of any class of persons in specified areas. In 1938, the Words 'Local Government' were changed into Central Government and the words "Local Official Gazette" were changed into "Official Gazetta."

6. The net result of these provisions was that in the United Provinces all arms including a spearhead, (except certain arms which were mentioned in column 2 of item 1 of Schedule 2 of these Rules, and which did not include a spearhead), were exempt from the restrictions about their possession contained in Section 15 of the Act. The applicant could not have been convicted if matters had stood at that.

7. In 1946, however, the U. P. Government' issued a Notification No. 2185 Z/VIII-347-40 dated 1st October 1946, which was published in the U. P. Gazette and not in the India Gazette, in the following terms :

"In exercise of the power conferred by the provision contained in entry 1 of Schedule 2, Arms Rules, 1924, read, with the Government of India, Home Department Notification Nos. 21/50/37 Police, dated June 20, 1938, and 21/32/43 Police, dated June 19, 1943, the Governor is pleased to direct that in supersession of all previous notifications on the subject, the exclusion from the operation of all the prohibitions and directions contained in the Indian Arms Act 1878, (Act XI [11] of 1878) is hereby cancelled throughout the United Provinces in respect of all swords, sword-sticks, spears, spearheads, ballams, Kantas, karaulis daggers, pharsas, bhujalis, bayonets, knives with pointed blades exceeding 4" in length other than those primarily intended for industrial, agricultural or domestic purposes and gandasas other than gandasas of the type ordinarily used for domestic purposes in the possession of all persons ..."

The result of this notification was that the exemption from the restrictions contained in Section 15, Arms Act, which was made by entry 1 of Schedule 2, Arms Act Rules 1924, was withdrawn in respect of the arms specified in the notification. This notification was issued by the Governor of the United Provinces under the powers conferred on him as stated in the notification itself by the Central Government's notification of 1938 read with another notification of 1943. These two notifications were supposed to have been issued by the Central Government under the powers conferred upon it by Sub-section (1) of Section 124, Government of India Act, 1935. The first notification of 1938 empowered the Provincial Governments to exercise the functions of the Central Government for a period of five years, under the provisions of the Indian Arms Act 1878, and of the Indian Arms Rules, 1924, specified in Col. I of the Schedule attached to the notification. Column I of the Schedule included entry No. 1, Schedule 2, Arms Rules of 1924. The second notification of 1943 merely extended the first notification for another period of five years; 8. The contentions raised by the applicant are (1) that it has not been established that Clause (2) of Section 32 of Act XXXI [31] of 1860 was made applicable to the city of Mirzapur by any notification issued Under Section 15 of the present Arms Act; (2) that Under Section 124(I), Government of India Act, the Central Government could delegate only the executive functions and not its power of sub-ordinate legislation conferred upon it by Section 27. Arms Act, and therefore, its notifications of 1938 and 1943 were ultra vires, and the notification of the Provincial Government was of no legal effect; (3) that in any event, even if the Central Government had the power to delegate the function conferred upon it Under Section 27, Arms Act to the Provincial Government, the execution of that function, which was directed to be by a publication in the official Gazette, meaning the Gazette of India, should have been complied with by the Provincial Government when it issued the notification of 1916; and lastly that the spearhead recovered does not possess a blade more than 4" in length and is therefore, not an arm within the meaning of the notification of 1916.

9. We take up the first point first. It was conceded before us that no notification has, so far, been issued by the Central Government Under Section 15 of the present Arms Act. Mr. Uniyal on behalf of the Government has strenuously urged that by various notifications all the territories of the United Provinces barring the territory on the right bank of the river Sone, were disarmed or a general order for search was made so that Section 15, Arms Act, is applicable to the city of Mirzapur which lies to the left bank of river Sone. The notification covering the area north of the rivers Ganga and Jamna,

whereby a general order for search was made Under Section 24 of Act XXVIII [28] of 1857, is no doubt in existence. But no notification applicable to the area south of the river Ganga (and the city of Mirzapur lies to the south of river Ganga) has been produced before us. Mr. Uniyal stated that the Government has not been able to lay its hands upon the notification in question and it has been lost but that it was issued can be inferred from the statement made in para. 92 of the Orders and Rules under the Arms Act issued under the authority of the U. P. Government. Paragraph 92 runs as follows:

"All parts of the United Provinces except that portion of the Mirzapur district lying to the south of the Sone have been disarmed. Consequently any one not coming under any exemptions, who has in his possession or under his control arms of any description, ammunition or military stores, except under a licence and in the manner and to the "extent permitted thereby, is punishable Under Section 19 (f), Act XI [11] of 1878, with imprisonment for a term which may extend to three years, or with fine, or with both."

10. The question is whether this paragraph can be relied upon by the prosecution in support of its contention that an order of disarmament was passed. We think that when the original notification or order is not traceable and has been lost, the above statement in the Orders and Rules published under the authority of the U. P. Government, being a record made by a public servant in the discharge of his official duty, can be admitted in evidence and relied upon. This paragraph has been referred to in several cases of this Court in support of the contention of the prosecution: *Amir Ahmad v. Emperor*, 24 A. I. J. 30 : (A. I. R. (13) 1926 ALL. 148 : 27 Cr. L. J. 15); *Emperor v. Abdul Ghaffur*, A.I.R. (16) 1929 ALL. 68 : (30 Cr. L. J. 566) and *Emperor v. Angad*, A. I. R. (16) 1929 ALL. 69 : (30 Cr. L. J. 856).

11. In *Pukhai v. King-Emperor*, 23 Luck. 53 : (A. I. R. (35) 1948 Oudh 187 : 49 Cr. L. J. 295), a Bench of the Oudh Chief Court, as it then was, held that though the statement made in para. 92 quoted above regarding the disarmament was true, Oudh was disarmed neither under Act XXVIII [28] of 1857, which did not apply to Oudh, nor under Act XXXI [31] of 1860, but by various orders passed during the process of "re-conquest" of the province after the mutiny of 1857, when the Civil Government had ceased to function and the Army was engaged in bringing the province under subjugation. We are not concerned with the area of this province which was formerly the province of Oudh and the ruling aforesaid, therefore, does apply to the present case. We are, therefore, of opinion that Section 15 applied to the city of Mirzapur.

12. The next contention of learned counsel is that Section 124, Government of India Act does-not empower the Central Government to delegate the powers conferred upon it by Section 27, Arms Act. The argument runs as follows:

13. The power conferred by Section 27 by the Central Government is not an executive power or an executive function of the Central Government at all. Section 27 confers upon the Central Government a legislative power or, at any rate, a power analogous to legislation. Section 124 refers to the delegation of executive functions and not to other powers or functions which cannot be

strictly called executive. It was, therefore, incompetent for the Central Government to confer its powers Under Section 27 to the Provincial Government.

14. Section 124, Government of India Act runs as follows :

Section 124(1) "Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation, extends."

15. Now it is true that where power is delegated to a definite individual or body, the delegatee is not entitled (subject to well-known exceptions) to further delegate that power unless he was so authorised in the act of delegation itself. Section 27 confers an authority on the Central Government and does not in so many words authorise the Central Government to delegate the powers so conferred upon it. Unless, therefore, Section 124 covers the function or the power exercisable by the Central Government Under Section 27, Arms Act, the delegation by it to the Provincial Government would be invalid.

16 It is also true that the functions conferred upon the Central Government by Section 27, Arms Act are not executive functions. Section 27 is an example of conditional legislation which is now a well-recognised mode of legislation and is fully within the competence of the Legislature of the country. The matter has been dealt with in several well-known cases by the Privy Council and by other Courts.

17. In *Empress v. Burah*, 4 Cal. 172: 5 I. A. 178, it was observed by their Lordships of the Privy Council:

'Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally. Legislation, condition on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and, it cannot be supposed that the the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred."

In that particular case, by Act XXII [22] of 1369, power was conferred upon Lieutenant-Governor of Bengal to fix a date for the commencement of the Act and also to determine the area to which it may be applied. With regard to this power their Lordships observed :

"Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may, with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem a fortiori, to be an act of legislation to bring the law originally into operation by fixing the time for its commencement."

18. The power to supply the details or to fulfil the conditions which have been entrusted to another body by a piece of conditional legislation is usually termed 'the power of subordinate legislation'. In Craies on the Statute Law, at pp. 259 and 260 it is stated that "the law of the land, besides the common law and statute law, includes a great deal of what may be termed subordinate, or delegated legislation Few statutes form "complete code in themselves as to all the details relating to the subject with which they deal, and the increasing complexity of modern administration and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, have led to an increase in the practice of delegating legislative power to executive authorities. Orders in Council, rules, regulations or by laws made under statutory powers are most compendiously described by the term subordinate legislation."

19. It is true that in *Russel V. Reg.* (1882) 7 A. C. 829 : (51 L. J. P. C. 77), their Lordships of the Privy Council observed that a similar entrustment of power to the majority of the electorates of a certain country was not a delegation of any legislative power. What their Lordships meant was that by the provisions of the Act referred to therein, the legislature did not divest itself of its own powers of legislation and thus create another legislative authority.

20. Whether or not the exercise of the powers conferred upon another body under an Act of Parliament can be called the exercise of subordinate legislation, it cannot be called an executive power. The executive power is the power to execute or to carry into effect the law. Under conditional legislation the law itself is not complete unless the condition is fulfilled. The law becomes complete or absolute when the condition has been fulfilled. The fulfilment of the condition, even though done by the executive authorities of the State, cannot be said to be the exercise of an executive function. It may, therefore, be assumed that the functions assigned to the Central Government Under Section 27 Arms Act are not executive functions.

21. But the question is : "Does Section 124(1) refer to the executive functions of the Central Government alone or does it cover functions other than executive functions, e.g., the power of subordinate legislation ?" We think that Section 124(1) is not confined to the executive functions of the Central Government, It will be noticed that the word 'functions' is not qualified by the word 'executive'. The words 'to which the executive authority of the Federation extends' relate, not to the word 'function', but to the word 'matter'. They define the limits of the 'matter' in relation to which the Central Government has to exercise certain functions. What are the 'matters' to which the executive authority of the Central Government extends? Section 313(2) Government of India Act provides the answer.

Section 313(2) -- "Subject to the provisions of this Act, for the time being in force, the "said executive authority extends--

(a) to the matters with respect to which the Indian Legislature has, under the said provisions, power to make laws."

The Indian Legislature has power to make laws in respect of List I of Schedule 7. Item 29 of that list deals with arms, fire-arms and ammunition. Therefore, the subject of 'arms' was a matter to which the executive authority of the Central Government extended. Section 27 conferred a function upon the Central Government in relation to that matter. Consequently that function fell within the purview of Section 124(1), Government of India Act. Under that section, the Central Government could delegate its functions to the Provincial Government with the consent of that Government. The notifications, therefore, issued in 1938 and 1943 were perfectly intra vires and consequently the notification issued by the Provincial Government in 1916 was duly authorised and valid.

22. It has next been urged that even though the Central Government may be empowered Under Section 124, Government of India Act to entrust its powers to the Provincial Government, nevertheless the mode of the exercise of those powers, as laid down in Section 27 of the Arms Act, should have been followed by the Provincial Government. Under Section 27, the Central Government is directed to exercise the powers conferred upon it thereunder "by notification published in the official Gazette." The Official Gazette in connection with the Central Government means the Gazette of India. With reference to the Provincial Government, it means, Under Section 3(37)(a), General Clauses Act, the Provincial Gazette. If the Central Government is empowered to delegate its power, we can very well substitute Under Section 27 the Provincial Government in place of the Central Government and by such substitution the words 'official Gazette' would then refer to the Provincial Gazette. The publication of the notification by the Provincial Government in the Provincial Gazette was, therefore, perfectly justified.

23. Lastly, it has been urged that the notification refers to arms the blades of which are not more than 4 inches in length. In our opinion, this contention has no force. The words 'knives with pointed blades exceeding 4 inches in length' qualify the word 'knives' and not the other arms mentioned before the word 'knives'. This would be apparent from what follows :

"other than those primarily intended for industrial, agricultural or domestic purposes."

Sword-sticks, spears, spearheads ballams, etc. cannot be said to be articles intended for industrial, agricultural or domestic purposes. Knives are used for those purposes and it was, therefore, necessary to exclude knives with pointed blades not exceeding 4 inches in length, ordinarily kept by persons with them, and also knives with pointed blades exceeding 4 inches in length which were primarily intended for industrial, agricultural or domestic purposes. In our opinion, the words 'pointed blades exceeding 4 inches in length' refer to knives alone and not to another arms mentioned in the notification.

24. As regards the sentence, we are of opinion that the conviction of the applicant is merely a technical one, The spearhead recovered is a very small one about 3 inches in length and about 3/4 of an inch in breadth. No person having a sense of proportion would have launched a prosecution on account of the possession of such an instrument by the applicant. The sentence is, therefore, reduced to that already undergone.

25. The result, therefore, is that this application is dismissed with this modification that the sentence of the applicant is reduced to that already undergone.

26. The applicant is on bail. He need not surrender to his bail.