CHAPTER V

THE SUPREME COURT SPEAKS

1. CONSTITUTIONALITY OF SECTION 124-A

In *Superintendent Central Prison* v. *Dr. R.M. Lohia*,[1] the Supreme Court held that section 3 of the Uttar Pradesh Special Powers Act, 1932, was void as being opposed to Art. 19(1) (a) of the Constitution. The section reads:

> "Whoever, by words either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months or with fine, Rs. 250, or with both."

Under the section, any appeal or any instigation not to pay or defer payment of any dues to the Government, authority or a landholder is an offence. Even an appeal not to pay contractual dues is covered by the section. The Supreme Court held that there is no relation between public order and an instigation which is made penal. Such a nexus or relation between them should not be too remote or problematical. The Court said :

> There is a striking similarity between the wording of the section declared to be void in the above case and the section 124-A. Nevertheless there are distinguishable features. In the event of the section 124-A being declared as opposed to Art. 19(1)(a), it could not be wholly void. The Penal Code is a central legislation. The Central Legislature had and now has the competence to prescribe exclusively the conduct of aliens or

1. [1960] S.C.J. 567.

the conduct of citizens resident abroad. Provincial or State Legislature has no such competence. Therefore, Section 124-A of the Penal Code, though inapplicable to citizens on account of its repugnancy to a provision in the fundamental rights, can still remain valid. But a similar provincial or state legislation may be void in its entirety.

In *Babulal Parate* v. *State of Maharashtra*[2], the Supreme Court held that section 144 of the Criminal Procedure Code in its application to freedom of speech is not unconstitutional. That section enables a Magistrate to impose restriction in the public interest on any person, if that restriction the Magistrate considers necessary to be imposed for any of the purposes specified in the section. The impugned section nowhere specifies that the restrictions might be imposed in the interests of public order. Nevertheless the Supreme Court expressed that the restrictions authorised to be imposed by the section could be understood in relation to public order. Sometimes it was expressed that section 124-A was void because the expression "public order" could not be found in the body of the section[3]. The foundation for the doubt is very much shaken after the above mentioned decision of the Supreme Court.

In *Kedarnath Singh* v. *State of Bihar*[4], the Supreme Court held that section 124-A is constitutional. The report is a common judgment in appeals against the decisions of the Patna and Allahabad High Courts. One of the cases decided by the Allahabad High Court which was taken in appeal to the Supreme Court was the decision in *Rama Nandan* v. *State of Uttar Pradesh*[5]. It was reversed by the Supreme Court. The Patna High Court proceeded on the assumption that the section was constitutional and convicted the accused. The Allahabad High Court proceeded on the assumption that the section was unconstitutional and acquitted the accused. Broadly speaking, the Patna view is approved by the Supreme Court. The Allahabad cases were remanded to be dealt with according to law.

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2. A.I.R. 1961 S.C. 884.
3. In *Ram Nandan* v. *State*, Desai J. said: "As pointed out above danger to public order is not an ingredient of the offence. Consequently the restriction imposed upon the right to freedom of speech by the section cannot be said to be in the interests of public order." [1958] All. L. J. 793, 803.
4. A.I.R 1962 S.C. 955.
5. [1958] All. L.J. 793.

The Supreme Court accepted that section 124-A is capable of two interpretations, the one given by Strachey, J. in *Tilak's* case and the other given by the Federal Court in *Niharendu's* case. The Supreme Court said that "it is also clear that either view can be taken and can be supported on good reasons." In its view, the Judicial Committee has given a literal construction to the section divorced from all the antecedent background in which the law of sedition has grown in England, while the Federal Court had taken into consideration the developments in the English law in this respect. If the meaning given by the Judicial Committee is given, the section will be much beyond the permissible limits of restrictions which the State is empowered to impose under article 19(2) of the Constitution. On the other hand, the Supreme Court observed, if the meaning given to the section by the Federal Court is adopted, the section will be in accordance with the position under the English law and is also in consonance with the intention of the legislators when they enacted Act XXVII of 1870. Such construction will be in accordance also with the Constitution. When a provision of law is capable of two interpretations one of which makes it constitutional and the other unconstitutional, consonant to the previous practice, the Supreme Court held that the interpretation which makes it constitutional should be preferred.

In concluding that sedition is an offence against public order the Supreme Court referred to their own previous decisions in *Brij Bhushan* and *Romesh Thappar* cases wherein the majority expressed that sedition is not an offence against public order and Fazl Ali, J. in his dissent said that sedition in any serious sense leads to disorder and even threatening to the security of State. In the instant case, the Supreme Court held that the insertion of public order in Art. 19(2) by the Constitution First Amendment Act should be taken as an acceptance by the Constitution amending body of Fazl Ali J.'s view in preference to the majority view. This conclusion of the Supreme Court is questionable. To conclude that one obiter dictum was preferred to another obiter dictum is far fetched. Moreover the Constitution First Amendment enabled the State to impose restrictions, *inter alia*, in the interests of public order. The addition of the term public order enables state to impose restrictions in a sphere wider than is necessary for sedition. To say that to prevent a smaller evil, a wider evil is permitted to be done is not a complement to anybody.

The gist of the offence, the Supreme Court said, "is incitement to disorder or tendency or likelihood of public disorder or the

reasonable apprehension thereof." For the determination of criminality, the Court in each case has to determine whether the words in question have "the pernicious tendency" and the utterer has the "intention of creating public disorder or disturbance of law and order." Then only the penal law takes note of the utterance. The Supreme Court, in such cases, seems also to be of the view that no question of freedom of speech and expression is involved. For it said:

> "A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or Comment, so long as he does not incite people to violence. . . ."

The observation implies that when a person incites people to violence by words spoken or written, he looses the constitutional protection of freedom of speech. Freedom is different from licence.

Having thus narrowed down the literal sweep of the section, the Supreme Court brought it within the permissible limit of restrictions on the freedom, as legislation enacted in the interests of public order.

The case did not lay down that *Tilak's* case was wrongly decided. On the other hand, the Court said that the construction of section 124-A given by it is plausible and it is one of the alternative the correctness of which the Court had to consider. But the court made a parenthetical reference by saying that the legislators who enacted section 124-A in 1870 intended that the section should contain exactly the English law of seditious libel at that time. When the intention of the legislators and the view of a judge on statutory construction differ, it may be because the legislators failed to convey their intention in the language used by them or because the judge misconstrued the statutory provision. The Supreme Court seems to be of the former view. It is respectfully submitted that the Court should have overruled the decision in *Tilak's* case. *Ramanandan's* case leads to this. But for the Constitutional provision of freedom of speech and expression, *Tilak's* case would have been good law. Any way, it would now seem that *Tilak's* case lapsed into history.

One noticeable feature of the Supreme Court's decision is that it did not refer to any of the controversies raised before the High Courts. The cases decided by the High Courts were not even referred to. It is therefore difficult to lay down the extent to which their reasons are correct in the view of the Supreme Court. The Supreme Court did not even say that the view of the Patna High

Court in *Debi Soren* v. *The State*[6] is approved. All these matters are left only to the realm of interpretation

2. CONSTITUTIONALITY OF SECTION 295-A

In *Ramji Lal Modi* v. *State of U.P.*,[7] the Supreme Court held that section 295-A of the Penal Code is constitutional. The report of the judgment does not disclose the contents of the article for the publication of which the prosecution was filed. The prosecution was filed against the editor of a monthly magazine "Gaurakshak" for the publication of an article. From the heavy sentence imposed by the sessions judge,[8] it may be inferred that the contents of the article should have been grossly insulting to the religion and religious beliefs of the Muslims. The Allahabad High Court affirmed the conviction but reduced the sentence. Before the Supreme Court, the constitutionality of the section was challenged. One of the grounds of challenge was that the section is wide enough to cover trifling forms of religious insults which may not involve any question of public order. It was argued that it should be declared to be entirely void under the principle laid down by the Supreme Court in *Brij Bhushan* and *Romesh Thappar* cases. The Supreme Court held that the section does not give rise to any question of severability as it makes criminal only graver types of conduct involving insults to religion or religious beliefs. When insult to religion or religious beliefs of a class is offered with deliberate and malicious intention, the Supreme Court seems to be of the view that it cannot but lead to disorder.

The Supreme Court seems to be emphatic in saying that section 295-A is certainly a legislation in the interests of public order. In this context, a distinction is drawn between the expressions 'for the maintenance of ', and 'in the interests of, public order.' Article 19(2) of the Constitution empowers the State to impose restrictions 'in the interests of public order', which is wider, according to the Supreme Court, than 'for the maintenance of public order'. There is considerable support in the Indian judicial opinion[9] for the view

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6. A.I.R. 1954 Patna 254.

7. [1957] S.C.R. 860.

8. The Sessions Judge imposed a rigorous imprisonment of 18 months and a fine of Rs. 2,000.

9. See the observations of Das, J. in *Debi Soren* v. *The State*, A.I.R. 1954 Patna 254, 259 and observations of Gurtu, J. in *Ram Nandan* v. *State*, [1958] All. L.J. 793, 811.

that the expression 'in the interests of public order' has a wider amplitude than 'for the maintenance of public order' in enabling the State to enact restrictions. In what respect is one expression wider than the other, there is no indication. In explaining one abstract expression, another abstraction is being introduced which may possibly have some difference but is equally unclear in its connotation.

If the freedom of speech in the instant case is exercised in assertion of the right to freedom of religion, it can be seen that religious freedom under the Constitution can equally be restricted in the interests of public order.[10]

Therefore the Supreme Court held that section 295-A is a reasonable restriction on the freedom of speech as the impugned section has inherent limitations.[11]

The decision of the Supreme Court in *Veerabadran Chettiar* v. *E.V. Ramaswami Naicker*[12] turns on the question of construction of section 295 of the Indian Penal Code, but it throws light on the question of religious beliefs and their insult as matters closely related to the public order. The accused in that case after a public announcement made earlier in an open meeting broke an idol of Ganesa, which is held sacred by a particular section of the community. At the instance of a private party prosecution under section 295 proceeded against those who were responsible for the act. The Magistrate who tried the case expressed that it was certainly an offence under section 295-A, but as no sanction for prosecution by the Government was forthcoming, trial under that section could not be held. Construing section 295,[13] the Magistrate said that the section applied only if the idol was held in veneration by the community. As the mud figure of Ganesa was broken in the instant case, no offence

10. Article 25(1).

11. See A.C. Sequeira, 'Defamation of Religion or Religious Beliefs—Constituents of the Offence under Section 295-A Indian Penal Code,' [1961] II S.C.J. 43.
The author concludes that in establishing the offence the questions are (i) whether the writing has the effect of outraging the religious feelings of citizens and (ii) whether the effect can be traced to its cause.

12. [1959] S.C.J. 1.

13. Section 295 of the I.P.C. reads as follows: "Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description which may extend to two years or with fine, or with both."

was committed. In revision the High Court expressed that "the section would apply only to cases where an idol in a temple is sought to be destroyed, damaged, or defiled." The Supreme Court disapproving the view of the lower courts held that an object might be sacred in the estimation of a class of persons even though it was not consecrated or worshipped or that it was trivial and had no real value. The Supreme Court reminded the authorities charged with the task of maintaining law and order to take note of the law thus stated.

These cases sufficiently lay down, that when insult to religion or religious beliefs is alleged, objective evaluation of the worth of the beliefs is not material. The courts approach the matter only from the view point of the community complaining to have been offended. This approach is in conformity with the right to profess, propagate and practice religion. But these rights shall be so exercised that they do not come into conflict with similar rights of others.

3. CONSTITUTIONALITY OF SECTION 153-A

Act 41 of 1961 made the commission of any act prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities, *if such act disturbs or is likely to disturb* the public tranquillity, an offence.[14] This provision presents no problem of constitutionality because by the terms of the clause, public order is an ingredient of the offence. "Commits any act" read with the expression "such act distrubs or is likely to disturb the public tranquillity" make it clear that the act should have been committed within India, because an act committed abroad cannot have reference to the public tranquillity within India. Even if an Indian citizen for the time being resident abroad commits such an act, he is equally within the reach of the criminal law.[15]

Clause (a) of the section newly inserted makes promotion or attempt at promotion of feelings of hatred or enmity between racial, language, or other groups, therein specifically mentioned, an offence. This clause does not expressly say that the racial or other groups should be of the Indian citizens. Literally construed, the section makes broadcasts of the type made by Lord Haw Haw from Germany during the second world war and similar broadcasts made from Japanese stations to the United States and indeed the mass of propaganda material now flooding the world, an offence under the Penal

14. Section 153-A clause (b): emphasis added.

15. Section 3 of the I.P.C.

Code. If a broadcast is made by a Russian Station promoting hatred between the white and coloured the races of South Africa, such a transmission falls within the penal provision of the section.

If the question of construction is raised before the courts in India, they may in all probability construe the words religious, language groups or castes and communities having reference only to the Indian conditions. Thus they may read the words "Indian Citizens" as if enacted in the body of the section. But it is to be noted that the Parliament is sovereign and there are no legal limits to its power except those enacted in the part of the Constitution dealing with the Fundamental Rights. If the Parliament deliberately made an act done in a foreign country, and promoting or likely to promote feelings of hatred and enmity between communities in another foreign country an offence, the courts will have no choice but to enforce the will of the Parliament. Therefore in order to avoid all the subtleties and complications involved, if the Parliament amends the section by insertion of the words "of Indian Citizens" after the words "castes or communities" in both clauses of section 153-A, it seems to be better than to leave the section to be interpreted by the courts. Such qualification may be found mentioned in section 99-A the of Criminal Produce Code.

Promotion, whether actually done or attempted, of hatred or enmity in a real sense between the classes is subversive of public order. In the interpretation of section 124-A, so far as that section makes bringing of the Government established by law into contempt and hatred, its validity as an offence against public order was not doubted. Therefore there is no reason to doubt the constitutionality of the section 153-A. The decision of the Supreme Court in *Kedarnath Singh* v. *State of Bihar*,[16] clearly lays down that the requirement of the actual existence of the words "Public order" in the body of the section is merely technical in character. If these words can save the section from becoming void, the courts necessarily read them as implied. It seems that in 1954, the Saurashtra High Court declared that section 153-A was constitutional.[17] The alteration made by Act 41 of 1961 was to amplify the meaning of the word classes. Therefore, the newly inserted section is also constitutioinal.

The omission of the explanation saying that to point out, with-

16. A.I.R. 1962 S.C. 955.

17. Ratanlal, *The Law of Crimes*, 362 (19th ed. 1956) Here it is stated that in *Shri Krishna Sharma*, (1954) Sau. L.R. 42 that section 153-A I.P.C. was declared as constitutional. The case is not reported elsewhere. See All India Digest (1951-55), 1887.

out malice and honestly, matters which are the source of enmity and hatred between the classes with a view to remove them is not an offence cannot make any material difference as to the result. Absence of malice and good faith combined is an exemption from criminality except in rare instances.

In *Beauharnais* v. *Illinois*,[18] the American Supreme Court sustained the constitutionality of a section of the Illinois Penal Code making group libel an offence. Under the section exposing any "class of citizens of any race, colour, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ." is an offence. The reasons given by the Court are:

(1) Under the Common law, libel is a crime. Truth or good faith is not a defence. The statute in question made libel against a group an offence. In substance, there can be no difference between them.

(2) Libellous words are not part of freedom of speech.

(3) The State of Illinois has the power to punish conduct unless restrained by the Federal Constitution.

The Indian provision penalises the conduct only in the interests of public order. Hence its constitutionality does not seem to admit of doubt. The result also follows from the analogous provisions of sections 124-A and 295-A being constitutional.

18. 343 U.S. 250 (1951).