CHAPTER IX

ORDERS OF FORFEITURE AND THEIR REASONABLENESS

1. CONSTITUTIONAL REQUIREMENT OF REASONABLENESS OF THE ORDERS

An order made by a State Government forfeiting a publication comes under the definition of law in Art. 13 of the Constitution.[1] State may impose reasonable restrictions on the freedom of speech and expression of a citizen.[2] When a governmental order purports to be a restriction on the freedom of expression, it is not sufficient if it is shown that it is made pursuant to a statute which is reasonable. To be in accordance with the Constitution, therefore, a governmental order making forfeiture of a publication must be first, in accordance with the statutory provision and secondly, satisfy the constitutional requirement of reasonableness.[3] The position of an order under a statute is thus analogous to that of a bye-law passed by a company under the English law.[4] In consequence, there should be a re-appraisal of the positions under law as laid down before the Constitution.

2. POSITION OF THE STATE AND CENTRAL GOVERNMENTS

Under the Criminal Procedure Code,[5] the Post Office Act,[6] and the Sea Customs Act,[7] the State Government may order forfeiture of publications. Under the Criminal Law Amendment Act, 1961, the powers are exercisable by the State as well as by the Central governments.[8] It was under the Orders of the Central Government that the issues of "China Today" were confiscated.

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1. Article 13(3)(a) defines law as including "any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."
2. Article 19(2).
3. *K.C. Venkata Chalamayya* v. *Madras State*, A.I.R. 1958 A.P. 173, Per Viswanatha Sastri, J.
4. *Maxwell's Interpretation of Statutes*, 303 (10th ed. 1953).
5. Section 99-A.
6. Section 99-A.
7. Section 181-A.
8. Section 4(1) and 4(2) of the Act.

In respect of the other provisions under which it is expressed that the State governments possess the powers of forfeiture, the Central Government is in the position of a State Government in the Union Territories.[9] Therefore it may exercise the power in respect of them.

3. AREA OF OPERATION OF THE ORDERS

The powers under the enactments exercisable by the governments are executive in character. Therefore, the area of operation of the order is co-extenisve with the territorial extent of the power. Matters covered by the Criminal Procedure Code are listed as concurrent for legislative purpose.[10] Executive and legislative powers of the States and the Centre are also concurrent.[11] But under the Constitution, by legislation passed by the Parliament, executive power in respect of a concurrent subject, may be reserved to the Central Government.[12] No such express reservation is made under section 99-A of the Criminal Procedure Code.

What is the effect of the amendment made in 1951 substituting "India" for the States? It is not the concern here to go into the question of its effect on the other provisions of the Code. But in this section, the alteration cannot have any change in the effect. On a notification containing the order of forfeiture being published in the State Gazette, provision before the amendment stated that any police officer of the rank specified, upon the authority of a warrant issued by a Magistrate, might search and seize the publication ordered wherever found in the "States". After the amendment, it looks as if it may be done anywhere in India. If the change is deliberate, the provision may be *ultra vires* for three reasons. First, an officer in one State cannot act at the direction of the Government in another State, when the Government of that State has an independent power over the matter to do or not to do the same. Secondly, such a result has the effect of placing each of the State governments in the position of the Central Government. This the Constitution does not permit. Thirdly, it is an unreasonable restriction on the fundamental rights of expression and property to affect the rights of a citizen in one State by an order published in the Official Gazette

9. See *In re Abul Kalam Azad*, 16 Cr. L.J. 698 (1915).Under the Press Act, 1910, Local Government might order forfeiture. It was held that the Central Government was local Government for that purpose.

10. Schedule VII List III Entry 2.

11. Article 73(1).

12. Article 73(2).

of another State. Therefore, the word India which is newly inserted in the section has to be understood as that part of India over which the notifying State's executive power extends.

4. CONTENTS OF THE GOVERNMENT NOTIFICATION

(i) *It must sufficiently describe the publication notified to be forfeited*

It is the concerned Government, which should notify that the matter is objectionable. Therefore, someone for the Government must have read the matter. If it can be shown that no one for the government has read it and yet made a notification it has no existence in the eye of law.[13] But it is almost an impossibility to prove that no one for the Government has read the matter. There is also a presumption that all official acts are lawfully done.[14] Thus there is a presumption that the matter was read and found to be objectionable.[15] But in order to give raise to the presumption, the notification should clearly describe at least the form of the matter objected to.

In *Veerabrahmam* v. *State*,[16] the High Court of Andhra Pradesh sustained the Government's order forfeiting a Telugu publication entitled "Bible Bandaram." The notification made by the Government of Andhra Pradesh did not disclose[17] that the publication ordered to be forfeited consisted of two volumes. Even at the time of the argument, the counsel appearing for the Government was not aware that the publication ran into two volumes. The applicant's advocate drew the attention of the Court to the existence of two volumes so that any order might not subject both volumes to forfeiture. Thereupon, the High Court seems to have passed an order refusing to set aside the governmental Order in regard to both volumes. The decision of the Court cannot be supported. If the Government order did not disclose that the publication ran into two volumes, and the High Court sustained the order, it means that the forfeiture was to be made under the order of the High Court. The High Court has no such power. The course adopted by the High Court is objectionable because there is no evidence to show that the Government directed its mind to the

13. *Narayanaswami Naidu* v. *Inspector of Police, Mayaram* [1948] 2 M.L.J.34. The discussion as to the fraud on power may be found in the judgment of the Chief Justice.

14. Evidence Act, 1872, sec. 114, Illustration (e).

15. *In re Mahommed Ali*, I.L.R. 41 Cal. 466.

16. A.I.R. 1959 A.P. 572.

17. Andhra Pradesh Gazette Part II-353, Home Department General C.

question of forfeiture. The facts do not warrant the inference that someone for the Government had read the matter.

(*ii*) *If there are more volumes than one subjected to forfeiture, the notification must make a clear mention of them all*

In considering whether or not there should be separate notifications in respect of different volumes in ordering forfeiture, the High Court of Andhra Pradesh in *Veerabrahmam* v. *State*[18] had incidentally considered whether the volumes of *Halsbury's Laws of England* are different books or one book in different volumes. In regard to *Halsbury's Laws*, there seems to be no doubt that they are different books because but for the title there is nothing in common among them. The case may be different when a book is split into volumes as a ruse. But in all the laws above-mentioned, definition of book as contained in the Press and Registration of Books Act, 1867, applies. Under it, book includes every volume.[19] Therefore, each volume has to be separately notified. Same notification may also contain governmental orders in regard to different books.[20]

(*iii*) *A book and a translation are to be separately considered*

A book and a translation thereof are to be separately considered for purposes of forfeiture. The *Communist International* in English was not banned but its translation in Hindi was forfeited.[21] The original in English of *Come Over Into Macedonia And Help Us* was notified to be forfeited.[22] Copies of its Urdu translation were returned to the author.[23]

But in *Veerabrahmam* v. *State of Andhra Pradesh*,[24] the notification in question in part was as follows:[25]

> "The Governor of Andhra Pradesh hereby declares that all copies, wherever found, of the aforesaid book and all other documents containing copies, reprints, translations of, or extracts from the said book, shall be forfeited to the Government."

18. A.I.R. 1959 A.P. 572.
19. Section 1.
20. *Baijnath Kedia* v. *Emperor*, A.I.R. 1925 All. 195.
21. *Gautam* v. *Emperor*, A.I.R. 1936 All. 561.
22. *In re Mahomed Ali*, I.L.R. 41 Cal. 466. This is a case under the Press Act, 1910.
23. *See* Norton's arguments at 14 Cr.L.J. 497, 498.
24. A.I.R. 1959 A.P. 572.
25. *Andhra Pradesh Gazette, Part II-353, Home Department General C.*

How the translation of the book can be affected by this order, it is difficult to see. If it is already existing, a separate notification is necessary. If it is non-existent, a future translation cannot be forfeited by the order now made.

No idea in itself can be considered as objectionable. Objection is only in regard to the mode of presentation. Therefore, the original and a translation must stand or fall on the merits of each.

(*iv*) *Extracts from a notified book incorporated in another book have to be considered in the context of the book in which they are embodied*

If a book contains unobjectionable extracts from a book forfeited, the book which contains them cannot become objectionable on that account. It is never the case that an objectionable book contains objectionable matter in every line. For instance, in some of the states in the United States, the American Declaration of Independence was banned,[26] because it is a standing call to the people to rebel against injustice. Even in these states, it does not seem to be the case that a book containing any extract from the Declaration is objectionable.

(*v*) *The notification must contain the government's grounds of opinion for ordering forfeiture*

This is a mandatory requirement. It is an essential part of the scheme of legislations and is an important safeguard against the governmental abuse of power.[27] If, in the opinion of the government, the contents of a publication are seditious, it is desirable that the notification should clearly state whether contempt, hatred or disaffection against the government established by law is excited or attempted.

If, in the opinion of the Government, hatred or enmity between different classes of Indian citizens is provoked or attempted, the notification should clearly state the classes between whom such feelings are provoked or attempted.[28] If the contents of a publication provokes hatred between Christians and Mahommedans in Europe, on account of its possible adverse effect in India, it cannot be forfeited.[29]

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26. Charles G. Bolte, *Security Through Book Burning, The Annals of the American Academy of Political Science*, 87 (July, 1955).

27. *In re Mahomed Ali*, I.L.R. 41 Cal. 466. This was a case under the Press Act, 1910. *Baijnath* v. *King Emperor*, A.I.R. 1925 All. 195.

28. *In re Mahomed Ali*, I.L.R. 41 Cal. 466. In this case, the Chief Justice pointed out that the order did not contain whether contempt or hatred was provoked.

29. *Ibid.*

In respect of publications making the person liable under section 153-A of the Penal Code and making the publications liable for forfeiture under section 99-A of the Criminal Procedure Code, two differences in the language of the two sections may be noted.

(1) Intention is not an ingredient of the offence under section 153-A. But under section 99-A of the Criminal Procedure Code, a publication becomes liable for forfeiture "if it promotes or is intended to promote feelings of enmity or hatred" between different classes.

(2) The classes between whom such feelings are promoted should be of Indian citizens according to section 99-A. That qualification is not there in section 153-A as enacted by Act 41 of 1961.

In *M.L.C. Gupta* v. *Emperor*,[30] the Allahabad High Court attempted to draw a distinction between the sections on the ground mentioned in (1) above. But there is no real difference because to establish criminality under section 153-A, intention of some sort is necessary.

In regard to the second difference mentioned above, it may be seen that it is substantial. When there is difference in the language of the statutes, the government may insist on a literal interpretation. Thus a gulf may be created between the criminal law and the law of forfeiture. To avoid this possibility, amendment of section 153-A of the Penal Code was suggested above.

If a publication is forfeited on the ground of religious insult, or on the ground of questioning of the territorial integrity or independence of India or of its adverse effect in notified areas, it is desirable to state the class or belief alleged to be insulted, how it is considered to be a threat to India, or how it is likely to produce adverse effect on the law and order situation.

Merely repeating the language of the section is not giving grounds.[31] It is only playing with words.[32]

In this sense, grounds may be understood as reasons which made the government order forfeiture of the publication. The

30. A.I.R. 1936 All. 314.

31. *In re Mahomed Ali*, I.L.R. 41 Cal. 466. *Arun R. Ghose* v. *State of West Bengal*, 59 C.W.N. 495. *Harnam Das* v. *State of U.P.*, A.I.R. 1961 S.C. 1662.

32. *In re Mahomed Ali*, I.L.R. 41 Cal. 466.

High Court of Andhra Pradesh sought to make a distinction between grounds and facts[33] probably on the basis of the distinction made between the two in Art. 22 of the Constitution.[34] They may bear some analogy. In both cases no one expects that facts detrimental to the public order or public interest should be stated. But there is a difference in that in one case, a publication which has come into being is forfeited and in the other a person is detained on a probable suspicion. The former case requires a greater scrutiny than the latter.

In referring to the objected publication, the actual passages objected to need not be cited. They may be suitably referred.[35]

The objects in stating the grounds are (1) to show that the Government applied their mind to the matter, (2) to enable the aggrieved party to present his case before the High Court and (3) to enable the High Court to form an opinion.

33. *Veerabrahmam* v. *State*, A.I.R. 1959 A.P. 572.

34. Art. 22 (6).

35. *Arun R. Ghose* v. *State of West Bengal*, 59 C.W.N. 495.