

IN THE SUPREME COURT OF INDIA
ORIGINAL/INHERENT JURISDICTION
Writ Petition (Civil) No 682 of 2021

S G Vombatkere

... Petitioner

Versus

Union of India

... Respondent

WITH

Writ Petition (Civil) Nos 552, 773, 802, 1181, 1279, 1381 of 2021

**Writ Petition (Criminal) Nos 106, 304, 307, 498, 217 and 216 of 2021
and 408 of 2022**

Contempt Petition (Civil) Nos 300 and 301 of 2021

In

Suo Motu Writ Petition (Civil) No 3 of 2021

O R D E R

- 1 There is a challenge in this batch of petitions to the constitutional validity of Section 124A of the Indian Penal Code 1860¹ on the ground that it is *ultra vires* Article 19(1)(a) and Articles 14 and 21 of the Constitution of India.
- 2 The constitutional validity of Section 124A IPC was tested on the basis of a challenge that it was *ultra vires* Article 19(1)(a) in ***Kedar Nath Singh Vs State of Bihar***².
- 3 The Constitution Bench upheld the provisions of Section 124A. The essence of

1 “IPC”

2 1962 Supp (2) SCR 769

the reasoning of the Court is contained in paragraphs 25 and 26. Paragraph 26 of the judgment is extracted below :-

“26. In view of the conflicting decisions of the Federal Court and of the Privy Council, referred to above, we have to determine whether and how far the provisions of Sections 124-A and 505 of the Indian Penal Code have to be struck down as unconstitutional. If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of clause (2) of Article 19, Sections 124-A and 505 are clearly violative of Article 19(1)(a) of the Constitution. But then we have to see how far the saving clause, namely, clause (2) of Article 19 protects the sections aforesaid. Now, as already pointed out, in terms of the amended clause (2), quoted above, the expression “in the interest of ... public order” are words of great amplitude and are much more comprehensive than the expression “for the maintenance of”, as observed by this Court in the case of *Virendra v. State of Punjab*. Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1) (a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right

of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress [vide (1) *Bengal Immunity Company Limited v. State of Bihar* and (2) *R.M.D. Chamarbaugwala v. Union of India*]. Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.”

- 4 We have heard Mr Kapil Sibal, Mr Arvind Datar, Mr Gopal Sankarnarayanan and Mr Sanjay Parikh senior counsel and Mr Kaleeswaram Raj, counsel in support of the petitioners. Mr Arun Shourie has appeared in person.
- 5 The petitioners seek a reference of the correctness of the decision in ***Kedar Nath Singh*** (supra) to a larger bench principally for the following reasons :
- (i) The provisions of Section 124A conflate the State with the Government. Article 19(2) authorises the State to impose reasonable restrictions on the right under Article 19(1)(a) of the Constitution. The State cannot be equated with the Government. Hence, a ‘disaffection’ towards Government cannot necessarily be read as seditious in character in relation to the State;
- (ii) Though the Government has introduced a legislation in Parliament for the purpose of replacing the existing Penal Code which has been referred to a

Standing Committee, the enactment of a new law will not obviate the need to adjudicate upon the constitutional validity of Section 124A for the simple reason that any new legislation of a penal character cannot have retrospective effect;

- (iii) Section 124A is a pre-constitutional enactment and does not carry the same presumption of constitutionality as a law enacted after the Constitution was adopted;
 - (iv) The provisions of Section 124A have only been tested on the anvil of Article 19(1)(a). In view of the development of law that has taken place in the six decades since the judgment of the Constitution Bench in **Kedar Nath Singh**, it would be necessary to re-evaluate the validity of Section 124A on the basis of the doctrines which have evolved in those years particularly having a bearing on the ambit of Articles 14 and 21 of the Constitution; and
 - (v) The provisions of Section 124A were made cognizable for the first time by the Code of Criminal Procedure 1973. Hence, even during colonial times, the provision was non-cognizable in nature.
- 6 Mr R Venkataramani, Attorney General for India and Mr Tushar Mehta, Solicitor General of India requested the Court to defer considering whether a reference should be made to a larger bench, since Parliament is in the process of re-enacting the provisions of the Penal Code and the Bill has been placed before a Standing Committee.
- 7 We are not inclined to accept the request for deferring the consideration of the

constitutional challenge in this batch of matters. The provisions of Section 124A of the IPC continue to remain on the statute book. Even if the new law which is proposed to be placed by the Government before the legislature results in a modification of the existing provision of Section 124A, there is a presumption that a penal statute would have prospective and not retrospective effect. Existing prosecutions under Section 124A will likely be governed by that provision.

8 Consequently, the validity of the prosecutions which have been launched or would be launched so long as Section 124A continues to remain on the statute would have to be assessed under it. The issue of the validity of the provision for the period that it continues to operate would, therefore, need to be determined.

9 The decision of the Constitution Bench in **Kedar Nath Singh** (supra) which has been referred to above read down the provision of Section 124A. The Court held that the provision of Section 124A read as a whole along with the Explanations, makes it reasonably clear that it aims at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.

10 Viewed in this light, the Court held that the provisions of Section 124A would be consistent with Article 19(1)(a). In the course of its discussion of the validity of the statutory provision, the Constitution Bench also came to the conclusion that :

“The Government established by law” has to be distinguished from the person's for the time being engaged in carrying on the administration. "Government established by law" is the visible symbol of the State. The

very existence of the State will be in jeopardy if the Government established by law is subverted.”

- 11 On this aspect, it has been submitted on behalf of the petitioners that the above observations do not make a distinction between the State which falls within the ambit of Article 19(2) of the Constitution and the Government, which does not.
- 12 At the point in time when the Constitution Bench ruled on the validity of the provision, the challenge on the ground that Section 124A violated Article 19(1) (a) of the Constitution was tested only on the anvil of that article. This must be read in the backdrop of the constitutional position as laid down by this Court at the relevant time, which was that a challenge to the validity of a statutory provision on the ground that it violated a specific article in Part III, say Article 19(1)(a), would have to be adjudged on the basis of whether the law was sustainable with reference to Article 19(2) of the Constitution. There was no challenge on the ground that Section 124A violated Article 14 nor did the Constitution Bench have occasion to consider the validity of the provision against a constitutional challenge on the basis of Article 14. The position as it has evolved in constitutional jurisprudence is that the fundamental rights do not exist *in silos*. There is, in other words, a coalescence of several of the rights protected by Part III. Article 14, which presents an overarching principle of reasonableness permeates Articles 19 and 21 as well.
- 13 The submissions which have been urged on behalf of the petitioners would warrant consideration by a Bench of at least five Judges of this Court. In our view, the appropriate course of action for a three Judge Bench of this Court would be to direct that the papers be placed before the Chief Justice of India so

that, if so considered appropriate, the batch of cases can be heard by a Bench of five or more Judges, since the decision in ***Kedar Nath Singh's*** case (supra) was rendered by a Constitution Bench.

- 14 We accordingly direct the Registry to place the papers before the Chief Justice so that an appropriate decision can be taken on the administrative side for the constitution of a larger Bench in the present case.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[J B Pardiwala]

.....J.
[Manoj Misra]

New Delhi;
September 12, 2023

GKA

ITEM NO.9

COURT NO.1

SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s). 682/2021

S.G. VOMBATKERE

Petitioner(s)

VERSUS

UNION OF INDIA

Respondent(s)

(IA No. 66937/2022 - APPROPRIATE ORDERS/DIRECTIONS IA No.69695/2022 - CLARIFICATION/DIRECTION IA No. 71538/2021 - EXEMPTION FROM FILING AFFIDAVIT IA No. 67750/2022 - INTERVENTION APPLICATION IA No.67360/2022 - PERMISSION TO FILE APPLICATION FOR DIRECTION IA No. 71746/2022 - STAY APPLICATION)

WITH

W.P.(CrI.) No. 106/2021 (X)

(IA No. 87150/2021 - EXEMPTION FROM FILING AFFIDAVIT IA No.78482/2021 - EXEMPTION FROM FILING AFFIDAVIT IA No. 27982/2021 - EXEMPTION FROM FILING AFFIDAVIT IA No. 86234/2021 - INTERVENTION APPLICATION IA No. 78477/2021 - INTERVENTION APPLICATION IA No.77708/2021 - INTERVENTION APPLICATION IA No. 77529/2021 - INTERVENTION APPLICATION IA No. 27978/2021 - PERMISSION TO FILE LENGTHY LIST OF DATES)

W.P.(C) No. 552/2021 (X)

(IA No. 62095/2021 - APPROPRIATE ORDERS/DIRECTIONS)

W.P.(C) No. 773/2021 (PIL-W)

W.P.(CrI.) No. 304/2021 (PIL-W)

(FOR APPLICATION FOR EXEMPTION FROM FILING ORIGINAL VAKALATNAMA/ OTHER DOCUMENT ON IA 84068/2021)

W.P.(CrI.) No. 307/2021 (PIL-W)

(FOR STAY APPLICATION ON IA 85946/2021 FOR EXEMPTION FROM FILING AFFIDAVIT ON IA 85962/2021)

W.P.(C) No. 802/2021 (PIL-W)

W.P.(CrI.) No. 498/2021 (PIL-W)

W.P.(C) No. 1181/2021 (PIL-W)

W.P.(C) No. 1279/2021 (PIL-W)

W.P.(C) No. 1381/2021 (PIL-W)
(FOR EXEMPTION FROM FILING AFFIDAVIT ON IA 168874/2021)

SLP(C) No. 16872/2022 (IX)
(IA No. 141941/2022 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT IA No. 141942/2022 - EXEMPTION FROM FILING O.T.)

W.P.(CrI.) No. 408/2022 (X)
(FOR EX-PARTE STAY ON IA 154155/2022 FOR EXEMPTION FROM FILING O.T. ON IA 154157/2022))

W.P.(CrI.) No. 217/2021 (X)
(FOR ADMISSION and IA No.62627/2021-EX-PARTE STAY)

W.P.(CrI.) No. 216/2021 (X)
(FOR APPROPRIATE ORDERS/DIRECTIONS ON IA 62611/2021 FOR APPLICATION FOR EXEMPTION FROM FILING ORIGINAL VAKALATNAMA/OTHER DOCUMENT ON IA 62612/2021 FOR APPLICATION FOR PERMISSION ON IA 65270/2021 FOR EXEMPTION FROM FILING AFFIDAVIT ON IA 65272/2021)

CONMT.PET.(C) No. 300/2021 in SMW(C) No. 3/2021 (PIL-W)
(FOR EXEMPTION FROM FILING AFFIDAVIT ON IA 62813/2021)

CONMT.PET.(C) No. 301/2021 in SMW(C) No. 3/2021 (PIL-W)
(FOR APPLICATION FOR EXEMPTION FROM FILING ORIGINAL VAKALATNAMA/ OTHER DOCUMENT ON IA 62909/2021 FOR PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES ON IA 65210/2021 FOR EXEMPTION FROM FILING O.T. ON IA 65211/2021)

SLP(C) No. 16111/2022 (IX)
IA No. 142345/2022 - APPLICATION FOR PERMISSION IA No. 135696/2022 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT IA No.27797/2023 - EXEMPTION FROM FILING O.T. IA No. 142347/2022 - EXEMPTION FROM FILING O.T.)

Date : 12-09-2023 These matters were called on for hearing today.

CORAM : HON'BLE THE CHIEF JUSTICE
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HON'BLE MR. JUSTICE MANOJ MISRA

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Mr. Sunny Chaudhary, AOR
Mr. Sandeep Sharma, Adv.
Mr. Sumit Arora, Adv

**UPON hearing the counsel the Court made the following
O R D E R**

1 De-tag SLP (C) Nos 16872 and 16111 of 2022 and list on 31 October 2023.

WP (C) No 682 552, 773, 802, 1181, 1279, 1381 of 2021, WP (Crl) Nos 106, 304, 307, 498, 217 and 216 of 2021 and 408 of 2022 and Contempt Petition (Civil) Nos 300 and 301 of 2021 In Suo Motu Writ Petition (Civil) No 3 of 2021

2 In terms of the signed order, we direct the Registry to place the papers before the Chief Justice so that an appropriate decision can be taken on the administrative side for the constitution of a larger Bench in the present case.”

(GULSHAN KUMAR ARORA)
AR-CUM-PS

(SAROJ KUMARI GAUR)
ASSISTANT REGISTRAR

(Signed order is placed on the file)