

H. E. Daruwalla
 v.
 Indian Airlines
 Corporation,
 Airlines House,
 New Delhi
 —————
 Shamsher
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while reserving the power to the State to compulsorily retire a permanent public servant, a rule is framed prescribing a proper age of superannuation, and another rule is added giving the power to the State to compulsorily retire a permanent public servant at the end of 10 years of his service, that cannot, we think, be treated as falling outside Article 311(2).....”

In other words, if the rule arbitrarily fixes a comparatively short period to give the authority power to retire a person, that may be hit by Article 311(2). By no stretch of imagination could it be said that the attainment of the age of 55 would be regarded as unreasonable for a person to retire. We are of the opinion, that the rule lays down a reasonable classification and cannot be attacked on ground of discrimination. In the case of D. S. Pandit, it has also been urged that the power has been exercised *mala fide* as the petitioner has been made a scapegoat in respect of a certain air crash which had occurred at Agra. This allegation has been denied on behalf of the respondent and cannot be investigated any further in these writ proceedings.

In our opinion, there is no force in these petitions which must fall and are dismissed. In the circumstances, we would make no order as to costs.

R. S.

CIVIL MISCELLANEOUS

Before S. S. Dulat Acting Chief Justice and Shamsher Bahadur, J.

MESSRS OBSERVER PUBLICATIONS PRIVATE
 LTD.,—Petitioner.

versus

RAILWAY BOARD, MINISTRY OF RAILWAYS,—Respondent.

C.W. 197-D/1965.

1965
 August, 11th

Constitution of India (1950)—Art. 14—Railways Act (IX of 1890)—S. 28—Railway Board—Whether competent to ban the sale of a news weekly at book stalls of railway stations—Indian Railway Code—Clause 742—Obscene books—Whether includes newspapers—Indian Railway Board Act (IV of 1905)—S. 2—Railway Board party to the writ petition—Union Government—whether necessary

to be made a party—Joint Stock company—Whether can maintain petition under Art. 226.

Held, that sub-clause (viii) of clause 742 of the Indian Railway Code embodies a salutary provision as to the principle of equal protection of laws envisaged in section 28 of the Railways Act. Reference in sub-clause (v) of clause 742 of the said code makes it quite clear that the qualifying phrase 'prohibited by the Government' governs only the third type mentioned in sub-clause (v), namely, 'publications'. Thus what is to be strictly banned is the sale of obscene books and pictures as also such publications which are prohibited by the Government. Before a Ban can be placed on the sale of a publication, an order by the Government prohibiting its sale is necessary to be passed. Admittedly, the 'Indian Observer' has not been prohibited by the Government, and, therefore, does not attract the ban which may be imposed under sub-clause (v). Moreover 'The Indian Observer' is a news weekly and does not fall within the classification of book or a picture and the Railway Board cannot impose a ban on it declaring it to be obscene literature and banning its sale on the bookstalls of various railway stations.

Held, that by a notification issued under section 2 of the Indian Railway Board Act of 1905, the Railway Board has been invested with all the powers of the Central Government under the Indian Railways Act, 1890. It was, therefore, not necessary to implead the Union Government as a party to the writ petition when the Railway Board has been made a party to it.

Held, that a joint stock company which complains of an infringement of Article 14 of the Constitution is entitled to maintain a petition under Article 226 thereof for the removal of the ban on the ground of discriminatory treatment as it has been hurt by the ban.

Petition under Article 226 of the Constitution of India praying that Your Lordships may in the premises be pleased to issue to the respondent such suitable directions, order or writ in the nature of mandamus or any other appropriate writ, directing the respondent not to interfere, directly or indirectly, in any manner whatsoever, with the free circulation of the newsweekly of the petitioner on the railways, railway platforms, railway stations, railway bookstalls under the administrative control and management of any of the railway administrations in India and also not to prohibit or stop in any manner whatsoever any of the news-stalls, bookstalls or vendors of newspapers or books operating on the railway platforms or bookstalls or newspaper stalls from the sale of the newsweekly of the petitioner. It is further prayed that suitable directions or orders may also be issued to the respondent not to issue in the meantime and till the final disposal of this writ petition any circular or order banning for the time being the sale and circulation of the newsweekly in the railways, railway platforms, railway bookstalls, railway newspaper stalls and railway vendors in India and it is

further prayed that in case any such circular or order or circulars or orders by or under the directions of the respondent have been issued by the respondent or under its directions by the various railways administrations, under the control of the respondent regarding the imposition of ban on the newsweekly of the petitioner on the railways, the operation of any and all of such circulars or orders may please be stayed and free circulation of the newsweekly restored till the decision of this petition.

N. C. CHATTERJEE, P. N. LEKHI AND S. BALAKRISHNA,
ADVOCATES, for the Petitioner.

S. N. SHANKER, CENTRAL GOVERNMENT COUNSEL, WITH
DALJIT SINGH, ADVOCATE, for the Respondent.

ORDER.

The following judgment of the Court was delivered by:—

Shamsher
Bahadur, J.

SHAMSHER BAHADUR, J.—This petition of M/s. Observer Publications (P) Limited, under Article 226 of the Constitution of India, seeks to question the validity of the ban imposed by the respondent Railway Board (Ministry of Railways) on the news-weekly called the 'Indian Observer' published by the petitioner and sold at the book-stalls of the various railway stations in India through the licensees of the respondent.

According to the petitioner, their publication called the 'Indian Observer' has been sold at book-stalls of railway platforms throughout India, since 1961. It may be mentioned at this stage that according to the respondent, the sale of this publication is admitted from the year 1963. Nothing really turns on this difference between the petitioner and the respondent and it would not be necessary to make mention of this again. In its issue of 11th of September, 1964 (Annexure A), the 'Indian Observer' published an article under the caption "Black Marketing in Deluxe train tickets". It was stated that tickets for the Deluxe trains could be procured by offering a bribe of Rs. 5 to Rs. 10 per ticket, ten minutes before the departure of the train. This feature started with the observation of the Railway Minister (Shri S. K. Patil), about the speed of trains in western countries which ranged between 60 to 100 miles per hour, whereas the speed in India was less than 32 miles per hour. It was suggested that the speed of corruption, however, on the Indian Railways was far

ahead of the other countries. It seems that M/s. A. H. Wheeler & Co., who are the licensees of the Railway bookstalls throughout the country, stopped the sale of this paper and a letter was written by the Manager of the Indian Observer on 19th September, 1964 (Annexure R. 1) that "unless and until any Court of law or any authority declares this paper as obscene, they cannot stop the sale of the paper". The Chief Commercial Superintendent of the Northern Railway was asked in this letter that a temporary order may be issued to M/s. A. H. Wheeler and Co., to restore the sale of this paper pending a final decision. On 26th of September, 1964, the General Manager of the Northern Railway, informed the newspaper that temporary permission had been given to A. H. Wheeler & Co., to sell this paper. A. H. Wheeler & Co., however, wrote to the petitioner to obtain the sanction of the Railway Board, direct for the sale of this paper. This is Annexure 'G' of 28th of September, 1964. What happened next was that the Western Railway asked A. H. Wheeler & Co., to stop the sale of the Indian Observer at 60 railway stations under its control. This was on 17th of November, 1964 (Annexure H). There is next a letter of the Railway Board addressed to the Manager of the Indian Observer on 23rd of November, 1964 (Annexure I) that the sale of the paper may be done "at railway bookstalls, freely as done previously". The Western Railway, however, continued with their ban and informed the petitioner to this effect in their letter of 4th of December, 1964 (Annexure J). On this a representation was made to the Railway Board by the petitioner on 18th of December, 1964, to which they received a reply on 1st of January, 1965 that the matter "is being looked into" (*vide* Annexure N).

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The petitioner in its issue of the Indian Observer published another article on railways under the caption "Corruption Reports", on 8th January, 1965. Three specific cases were mentioned of officials who had obtained promotion by corrupting the superior officers.

Yet another article was published in the issue of Indian Observer on 5th of February, 1965, in which a complaint was made of smuggling of various articles with the complicity of the Vigilance Officers of the Central Railway (Annexure C). The last article on railways was published on 12th of February, 1965 (Annexure D), and

Messrs Observer reference was made to a house of a railway official on
 Publications Thompson Road, New Delhi, which was described as a 'big
 Private Ltd. gambling den'. According to the petitioner, these articles
 v. induced the respondent, Railway Board, to introduce a
 Railway Board, general ban on the paper which is no longer being sold at
 Ministry of the book-stalls and particular attention is invited to two
 Railways communications. The first of these, is a letter issued by
 the Railway Board on 9th of March, 1965, to the General
 Shamsheer Manager, Western Railway and others expressing the
 Bahadur, J. desire of the respondent that "the bookstall contractors
 should be instructed to stop, with immediate effect, the sale
 of 'The Indian Observer', from their bookstalls on the
 platforms as also along trainside and in station premises".
 The second communication was of 16th of March, 1965
 (Annexure N), this being a letter from the Secretary of
 the Railway Board to the petitioner's manager, saying
 that:—

"Further to this office letter of even number, dated
 1st January, 1965, I am directed to state that
 the matter has been looked into and it is re-
 gretted that it has not been found possible to
 permit the sale of your weekly 'The Indian
 Observer', at railway stations."

Confronted with this situation, the petitioner has sought
 the aid of this Court in *certiorari* proceedings, mainly on
 the ground that the prohibition imposed by the res-
 pondent, Railway Board, is contrary to the provisions of
 section 28 of the Railways Act of 1890 and in violation of
 the right of equal protection enshrined in Article 14 of the
 Constitution of India. It is also the case of the petitioner
 that the respondent, Railway Board, is not competent to
 declare any publication obscene. To so declare is within
 the competence of the Government alone.

On behalf of the respondent, it has been contended
 that there is no privity of contract between it and the
 petitioner, the licensees alone can sell the publications
 with the permission of the Railway authorities. It is also
 pleaded that the petitioner being a limited company can-
 not invoke the aid of Article 14 of the Constitution and
 further that the petitioner is not competent to bring these
 proceedings without impleading the Union of India against
 the Railway Board which is not a legal entity. On merits,

it has been contended that the petitioner had been publishing "sexy and obscene literature" of "low taste" and these have been the impelling reasons to impose the ban which is not a reprisal to the attack made in the publications of the petitioner against the Railway Administration. The plea in the forefront is that the licensees who sell the publications and newspapers alone have the right to question the ban and not the petitioner.

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In his arguments Mr. Chatterjee, the learned counsel for the petitioner, has invited our attention to section 28 of the Indian Railways Act, 1890, which says that:—

"A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or railway administration, or any particular description of traffic, in any respect, whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is submitted that the restriction imposed on the licensees of the Railway bookstalls regarding the sale of the 'Indian Observer' constitutes in substance and effect an undue and unreasonable preference being given to publications other than those of the petitioner which has been subjected to "unreasonable prejudice and disadvantage". Reliance is placed on a Bench decision of Bishan Narain and Dua, JJ., in *Ranbir Singh Chadha v. Chief Commercial Superintendent* (1), in which it is observed that:—

"The principle of equal treatment laid down in section 28, Railways Act, is the same as is embodied in Article 14 of the Constitution and the only difference is that Article 14 is general in terms while section 28 of the Railways Act, 1890, is specific in its application."

Article 14 guarantees the right to equality by declaring that:—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

(1) A.I.R. 1961 Punj. 268.

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The real reason for imposing the ban, according to the respondent, is the sexy and obscene nature of the publications of the petitioner which are described to be in 'low taste'. According to the petitioner:—

"The type of printed matter on sale at the railway platforms has a very wide range of the tastes to which it caters, from the taste of a saint to a satan and from the puritanic to prurient, and there is absolutely no restriction on the sale of any paper on the railways and the respondent is statutorily prohibited from exercising undue preference by law."

According to the respondent, the Railway Administration is in-charge of keeping an equilibrium between these tastes and the ban has been imposed in the interest of public morals. Mr. Chatterjee, has sought support for his contention also on the basis of clause 742 of the Indian Railway Code, which has a mandatory force on the Administration. Sub-clause (viii) of clause 742 says that:—

"The contractors should provide equal opportunity to all the popular newspapers for sale in their stalls on the same terms. A list of popular newspapers and magazines should be drawn up by the Railway Administration in consultation with the zonal Railway Bookstall Advisory Committee."

Now, there can be no manner of doubt that this salutary provision in the Railway Code embodies the principle of equal protection of laws envisaged in section 28 of the Railways Act. It may be mentioned in passing that this provision of law was in force long before the Constitution of India was enacted. Reference may also be made to sub-clause (v) of clause 742 which says that "the sale of obscene books and pictures and publications prohibited by the Government should be strictly banned". Mr. Chatterjee submits that the phrase "prohibited by the Government" governs all the three types mentioned in the earlier portion of this sub-clause, namely, "obscene books and pictures and publications". According to the rules of construction, however, it seems that the qualifying phrase 'prohibited by the Government' governs only the third

type mentioned in sub-clause (v), namely 'publications'. Thus, what is to be strictly banned is the sale of obscene books and pictures as also such publications which are prohibited by the Government. Admittedly, the 'Indian Observer' has not been prohibited by the Government and, therefore, does not attract the ban which may be imposed under sub-clause (v). The question remains whether the publications constituted an obscene book or picture. The 'Indian Observer' is a news weekly and cannot be regarded either a book or a picture. Moreover, even if it is assumed that the 'Indian Observer' falls within the classification of a book or a picture it is extremely doubtful whether the respondent-Board can impose a ban on it declaring it to be obscene literature.

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The definition of obscenity has engaged the attention of the Courts ever since the test laid down in *The Queen v. Hicklin* (2), by Chief Justice Cockburn (2), at page 371. The learned Judge said that:—

“I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”

It is not necessary to refer to the legal vicissitudes through which this concept of obscenity has travelled in process of time and it would be sufficient for our purpose to mention the latest decision on this subject which is of their Lordships of the Supreme Court in *Ranjit D. Udeshi v. The State of Maharashtra*, (3), where the question of declaring *Lady Chatterley's Lover* by Lawrence as obscene literature arose for determination of the Bombay High Court. Mr. Justice Hidayatullah, speaking for the Court, said with regard to the test in *Hicklin's case*, at page 888 that the test should not be discarded. It makes the court the judge of obscenity in relation to an impugned book, etc., and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases”. In dealing with the application of the test, the learned Judge

(2) (1868) 3 Q.B. 360.

(3) A.I.R. 1965 S.C. 881.

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observed that "a balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way". Speaking further, His Lordship said that "obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. "It would be readily observed that the test is not easy in its application to a particular publication. In the present instance, the petitioner has cited and produced instances of publications which are freely on sale in the bookstalls of the respondent-Board to show that the material which is now sought to be excluded on ground of obscenity is hardly distinguishable from other popular magazines of foreign and Indian origin. The spirit of the provisions of clause 742 shows that a publication to attract the ban of the Railway Board must have been previously prohibited by the Government. This conforms with our view that law does not authorise the Railway Board to exclude any publication from sale on its own determination, that it is obscene. In an American case cited by Mr. Chatterjee, *Manual Enterprises, Inc., et al., v. J. Edward Day* (4), Chief Justice Warren, Douglas, J., and Brennan J., held that the Postmaster-General could not exclude any matter from the mails because in his view it was obscene. Whether the publications of the Indian Observer produced before us transcend the accepted notions of morality and decency is a matter in any event to be considered first by the Government, and the respondent cannot on its own make its determination of such a vexed question. It is, therefore, difficult to avoid the conclusion that the considerations of obscenity which have weighed with the respondent-Board are not sufficient in the present instance to justify the imposition of the ban.

Mr. Shankar, for the respondent-Board, urges that the railway platforms where the ban has been imposed are the private property of the Railway administration and no one has a right to question its decisions. Railway platforms are as much private property as any other highway in the town and this shield against the attack made by the petitioner cannot be availed of.

(4) U.S. Supreme Court Reports 8 Lawyer's Ed. 2nd 639.

The next argument of Mr. Shankar is that rules have been framed by the Railway Administration with regard to canvassing, hawking and begging and clause (1) of rule 17 provides that :—

“Except under and in conformity with the terms and provisions of a license granted by the Railway administration in this behalf, no person shall canvass for any custom or hawk or expose for sale any article whatsoever, on any train, station, platform or premises.”

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It is argued that no publication can be sold without the permission of the Railway Administration. For what it is worth, this contention is only available against the licensees who actually sell the magazines on railway platforms. It does not seem to have been disputed that the publication of the petitioner had been sold on the railway platforms since 1963. A ban has now been imposed on its sale. It cannot be acceptably urged that the petitioner should first seek the permission for the sale of its publication from the Railway Board and has no cause of grievance if the ban is imposed in absence of any permission for its sale. It has not been suggested that the respondent-Board has accorded individual sanction for the sale of every single book and publication which is vended at the bookstalls of the Railway Administration. Equally devoid of force is the argument that section 120-A of the Act justifies the respondent-Board in taking the action which it has taken. Sub-section (1) of section 120-A says that:—

“If a person canvasses for any custom or hawks or exposes for sale any article whatsoever, in any railway carriage or upon any part of a railway, except under and in accordance with the terms and conditions of a license granted by the railway administration in this behalf he shall be punishable with fine which may extend to two hundred and fifty rupees.”

It has never been the case that the petitioner had been trying to sell its publication without a license. The publication has never been sold by the petitioner. It had been hawked by the licensees who presumably do so under a

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general license which is not intended to be issued for every single item of publication. The question of competency of the petition can be disposed of briefly. The Indian Railway Board Act of 1905 has been enacted for the purpose of investing the Railway Board with powers of Central Government under section 2, the Central Government may, by notification in the Official Gazette, invest the Railway Board, either absolutely or subject to conditions—

- (a) with all or any of the powers or functions of the Central Government under the Indian Railways Act, 1890, with respect to all or any railways; and
- (b) * * *”

It is accepted by both parties that the Railway Board is acting under a notification issued in this behalf. The Railway Board is thus invested with all the powers of the Central Government. It was not necessary in this situation for the petitioner to implead the Union Government and it cannot be contended, as has been done by Mr. Shankar, that the petition should fail on this ground alone.

In Mr. Shankar's further submission, the petitioner being a limited company is not competent to bring a petition under Article 226 for the enforcement of a fundamental right under Article 19 of the Constitution. He has placed reliance on a Supreme Court authority of *State Trading Corporation of India Ltd. v. The Commercial Tax Officer* (5), where it was held that Citizenship Act includes only natural persons and not juristic persons like corporations and 'citizen' under Article 19 having the same meaning as in Part II, a corporation like the State Trading Corporation cannot move for the enforcement of the fundamental rights guaranteed to citizens under Article 19. For one thing, the present petitioner complains of an infraction of Article 14 which lays down on such limitation as in the contention of the learned counsel is imposed by Article 19. It has been the case of the petitioner that the Indian Observer has been singled out for discriminatory treatment and the action is consequentially violative of both Article 14 of the Constitution and section 28 of the

(5) A.I.R. 1963 S.C. 1811.

Indian Railways Act as no person can be denied equal protection of the laws. As has been observed by Mr. Justice Subba Rao in another case of the Supreme Court, *Calcutta Gas Company v. State of West Bengal and others* (6), at page 1047:

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“Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implication the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right.”

In that case also, the petitioner was a corporation, namely, the Calcutta Gas Company, and it was said that the right that can be enforced under Article 226 shall ordinarily be personal or individual right of the petitioner himself though in some of the writs this rule may have to be relaxed or modified. The question to be resolved, therefore, is whether the petitioner in the present case has a legal right which has been infringed by the respondent-Board. To that the answer must be in the affirmative. The ban has hurt the petitioner who rightfully asserts that he has been made the object of discriminatory treatment. As observed by Chief Justice, Das in the reference on the *Kerala Education Bill, 1957* (7), at page 981:—

“It should be borne in mind that in determining the constitutional validity of a measure or a provision therein regard must be had to the real effect and impact thereof on the fundamental right.”

In the result, this petition must be allowed and the restriction imposed on the sale of the Indian Observer belonging to the petitioner must be set aside. Considering all the circumstances, we do not award any costs.

R.S.

(6) A.I.R. 1962 S.C. 1044.

(7) A.I.R. 1958 S.C., 956.