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SAFEGUARDING INDIA'S NATIONAL SECURITY: THE ROLE OF PENAL PROVISIONS UNDER THE OFFICIAL SECRETS ACT, 1923

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ABSTRACT

National Security is a pivotal facet of a welfare State. When the citizens of a Country lead a secured life without any internal or external threat, a country is said to be secured. So as to achieve National Security, nation is prioritized over individual liberties. The legislature of India has enacted numerous legislations and provisions for the protection National Security. One of the prime legislations amongst them is the Official Secrets Act, 1923 which was enacted during the pre-independence era. Official Secrets Act is a law that protects the secrets of the Government of India. The present paper aims to understand and analyze the role of the Penal provisions contained in the Official Secrets Act, 1923, in protecting the Secrets concerning the National Security of India along with certain significant judicial decisions.

Keywords: Spying, Official Secrets, Espionage, India, National Security

OFFICIAL SECRETS ACT, 1923: A SHORT HISTORY

The Official Secrets Act, 1923 (hereinafter referred to as "OSA, 1923") is a colonial legislation that was passed during the British rule in India. During the tenure of Lord G. Curzon the Indian Official Secrets Act, 1904 was passed, to place a restriction on the freedom of Press. Post this, in the year 1923, the OSA, 1923 replaced the 1904 legislation and took the duty of governing all matters pertaining to Secrecy and confidentiality of the Government. The OSA, 1923 majorly provides for the punishment for Spying and other related offences as provided under the Act. Since the time of its passing, the Law has completed more than 100 years yet it still remains in existence.¹

¹ Dr. Annu Bahl Mehra & Dr. Suvesh Kumar, The Official Secrets Act, 1923: A Critical Review, Vol. 1, ILJ, 52, 2023

In the year 2023, the entire Criminal Justice System of India took a new shape after the three colonial Criminal Legislations were replaced by new Criminal Laws, yet the Official Secrets Act, 1923 remained in existence as the legislature in its wisdom decided to keep it untouched.

THE LEGISLATIVE INTENT AND AMENDMENTS

The legislative intent that could be gathered and understood through the line “it is expedient that the law relating to official secrets should be consolidated and amended”². The legislature intended to consolidate and amend the laws pertaining to official Secrets. When we notice the word “Amend”, we understand that the legislature found it wise to keep this word to make the law amenable for amendments in future. This 1967 Amendment to the OSA, 1923 was the most comprehensive amendment that amended various Sections of the Act.³

WHAT IS MADE PUNISHABLE UNDER THE ACT?

The Act makes “Disclosure of Secret information that affects National Security or National Interest” punishable. It is pertinent to mention that, the term “Official Secret” is undefined under the act. The person communicating the information or the person receiving the information both can be charged under the appropriate Penal provisions of the Act. It is noteworthy to mention the 1954 report of the Press Commission which stated that, between the periods 1931 to 1946, there was only one Prosecution under the OSA, 1923.⁴ The usage of the Act or the Penal provisions contained therein is not used on a daily basis like a Penal provision under the Bharatiya Nyaya Sanhita, 2023.

The relevant statistics would indicate that, across the length and breadth of India, on a single day multiple FIRs are filed under the Bharatiya Nyaya Sanhita, 2023 (the erstwhile Indian Penal Code, 1860), that is not the case with the OSA, 1923. A person is booked under the Penal provisions of the OSA, 1923 only when the specific act/omission satisfy the complete ingredients mentioned thereunder.

Section 3 is the first and foremost Penal provision of the legislation which punishes the act of Spying. Anyone could be charged with the commission of the acts defined under Clauses (a),(b)

² The Official Secrets Act, 1923, No. 19, Acts of Parliament, 1923 (India)

³ The Indian Official Secrets Act (Amendment) Act, 1967, No. 24, Acts of Parliament, 1967 (India)

⁴ Dr. Annu Bahl Mehra & Dr. Suvesh Kumar, The Official Secrets Act, 1923: A Critical Review, Vol. 1, ILJ, 53, 2023

and (c) of Sub-Section (1). A literal interpretation of the legislative language of Sub-Section (1), we understand what is made an offence, is the defined action and not the purpose for which such an action was done. To charge a person under this Sub-Section, the twin conditions that are required to be fulfilled are a) An act defined under the clauses of Sub-Section (1) b) The act defined should affect the Security of the Nation.

The term “Safety” is to be used in wide connotation. The acts are punishable if they affect the Sovereignty, Security and Integrity of India and the Security of the State or friendly relations with foreign States.

The Penalty is imprisonment for the acts committed under Sub-Section (1), but the period of Imprisonment differs. It is based on the nature of the act done in relation two instances specifically mentioned therein. If the acts are done in relation to a) any work of defense, naval, air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, then the person charged hereunder can be sentenced to imprisonment to a maximum period of 14 years, b) In other cases, he shall be sentenced to 3 years of imprisonment.

Sub-Section (2) lays down that, when a person is a charged under either of the clauses to Sub-section (1), regardless of whether those offences are proved or not, the person can be convicted if it appears that his purpose prejudicial to the Security of the Nation.⁵

Under Sub-Section (1) to Section 5, three ways of possessing any category of secret information are enumerated. Below mentioned are the three ways explained through illustrations. a) A, person is in possession certain category of items like secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place. If these items land in the hands of an enemy, that could pose a threat to the Sovereignty and Security of India. b) X, a government officer entrusts a secret document to Y in confidence. Access to the secret document by the enemy can threaten the security of India. c) B, a government officer, is in possession certain sketches pertaining to the Security of India. If these are disclosed to the enemy, the Security can be in jeopardy.

⁵ The Official Secrets Act, 1923, Section 3, No. 19, Acts of Parliament, 1923 (India)

These three illustrations are the crux of the concept laid down under Sub-Section (1). If A or Y or B, either of them, who are in possession of the Secret information, a) willfully communicates it to an unauthorized person b) uses the information for the benefit of any foreign power or in any other manner prejudicial to the Security of the Nation c) willfully retains it illegally or refuses to return it when ordered to d) fails to take reasonable care of the information or conducts himself in a way that endangers the safety, shall be guilty under this Section.

Another act which is made punishable under Sub-Section (2) of Section 5, is voluntarily receiving any secret information and the person at the time of receiving has knowledge that the information received by him is in contravention of the OSA, 2023.

Sub-Section (3) penalizes a person who directly or indirectly communicates any secret information relating to munitions of war, to any foreign power or in any other way which could be prejudicial to the Security of the nation.

Any person, found guilty of any of the offences as stated hereinabove, shall be punishable with imprisonment for a period of 3 years or with fine or with both.

A glance at the marginal head of Section 5 gives an idea that, Wrongful Communication, Possession, usage, etc. of any secret information, are the acts that are made punishable under this Section. Following the rule of Eiusdem Generis rule of Interpretation, the term “etc.” brings only that category of acts of the same kind within the ambit.⁶

When Section 6 is looked into, Sub-section (1) says the act of, a) using or wearing any uniform as mentioned under clause (a) unlawfully, to deceive b) making a false statement orally or in written c) forging, altering or tampering the documents mentioned under clause (c) d) impersonation or false representation e) using or possessing a seal of the departments mentioned under clause (e). Now, these are punishable within the meaning of Section 6(1). When a person does either of them, to gain admission or assist any other person gain admission to a prohibited place or for any other purpose, which could be a threat to the Security of the Nation, he is found guilty.

⁶ The Official Secrets Act, 1923, Section 5, No. 19, Acts of Parliament, 1923 (India)

If any person, for a purpose that affects the Security of the Nation, a) retains unlawfully any official document or willfully fails to return when ordered to b) allows any other person to have possession of any document or unlawfully possesses any secret document or willfully fails to restore it to the authority c) unlawfully sells any seal or stamp, he can be found guilty. A person, who is found guilty under this Section, can be punished with an imprisonment for a term extending to three years or with fine or with both.⁷

Section 10 specifically provision speaks about Penalizing those who harbor a Spy. Upon the satisfaction of the ingredients as mentioned under the Section, if any person is found guilty he can be sentenced to imprisonment for a period of 3 years or with fine or with both.

Though the marginal head of Section 10 says “Penalty for Harboursing Spies”, the entire Official Secrets Act does not define who is a Spy. It only says, if a person harbours another person who has committed an offence under Section 3, the act of harbouring would amount to an offence. The legislature has kept the term undefined deliberately so as to ensure that the scope of the Provision remains broad. This would also mean that a spy need not necessarily be a foreigner. It could be anyone; liability is based on the fulfillment of the ingredients and not based on the nationality of the person committing the act.⁸

Section 15 while speaking about the commission offences by Companies, lays down who shall be made liable. Proviso to Sub-Section (1) provides for an exception where the person charged under this Section can prove that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence and avoid liability.

Sub-Section (2) gives an overriding effect over Sub-Section (1) that is whenever a company is an accused under this Section, if it is proved that the Company committed the offence consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such person shall also be made liable and punished.⁹

⁷ The Official Secrets Act, 1923, Section 6, No. 19, Acts of Parliament, 1923 (India)

⁸ The Official Secrets Act, 1923, Section 10, No. 19, Acts of Parliament, 1923 (India)

⁹ The Official Secrets Act, 1923, Section 15, No. 19, Acts of Parliament, 1923 (India)

NOTEWORTHY JUDICIAL DECISIONS

1. **SAMA ALANA ABDULLA vs. STATE OF GUJARAT**¹⁰

In this case, the Hon'ble Supreme Court was considering the question of presumption under Section 3(2) of the Official Secrets Act, 1923¹¹ and held that the accused was in conscious possession of a map belonging to the Border Security Forces (BSF). Since the accused did not give an explanation as to why he was in possession of the Map, it has to be presumed that the map was collected by the Appellant for a purpose of prejudicial to the safety and Security of India.

2. **DALEEP SINGH CHANDRAWAT vs. STATE**¹²

In this case, the Accused was an officer posted in Joint Cipher Bureau under the Ministry of Defence. He conspired along with one Shah @ Sharma Nath, a Pakistan Intelligence Official and worked in an unauthorized manner and communicated defence secrets to foreign agents, which affected the sovereignty and Security of the Nation. On 13.03.2000, the Accused brought certain documents from his which he was likely to handover to the Pakistan Intelligence Official. He was kept under surveillance by the Committee Espionage Section of the Special Branch. On 14.03.2000 the Accused was caught red handed trying to send the secret documents through a courier. After a full-fledged trial, the trial court convicted him.

The Accused appealed to the High Court. The Hon'ble Delhi High Court after a thorough analysis of the all the relevant records, found the Accused-Appellant guilty under Section 3(1)(c) read with Section 9 of the Official Secrets Act, 1923. Hence, the orders of conviction passed by the Lower Courts were upheld and the Appeal stood dismissed.

3. **HARINARAYANSHA RUDALSHA TAILY vs. STATE OF GUJARAT**¹³

The Appellant in this case was a citizen of Nepal. He went to Pakistan and thereafter came to India. He turned out to be a Spy of Pakistan. He was in possession of certain documents like Map of restricted areas in Gujarat, Rajasthan and certain other documents pertaining to the armed forces of India.

¹⁰ Sama Alana Abdulla vs State of Gujarat, AIR 1996 SC 569

¹¹ The Official Secrets Act, 1923, Section 3(2), No. 19, Acts of Parliament, 1923 (India)

¹² Daleep Singh Chandrawat vs State, (2015) 3 DLT (Cri) 931 (DEL)

¹³ Harinarayansha Rudalsha Taily vs State of Gujarat, MANU/GJ/1258/2010

He was caught and charge sheet was filed against him. The Sessions Court convicted him under Section 3(1) and Section 9 of the Official Secrets Act, 1923 and sentenced to a rigorous imprisonment of 12 years each under both the provisions.

The Hon'ble High Court at paragraph 7 said, since the Appellant-Accused did not challenge his involvement, correctness of the Trial Court's Judgment cannot be looked into.

At paragraph 8, while talking about the quantum of punishment, the Court held that, relevancy of the nature of Crime is an important factor. The prime consideration is the impact of Criminal Activity on the Security of the Nation. The High Court thereby dismissed the Appeal.

4. MOLDIN vs. STATE OF RAJASTHAN¹⁴

The Additional S.P CID (Border Intelligence) received a secret information that the Appellant-Accused Moldin was involved in espionage activity and was sending important information relating to the Indian army, Indian Air force, Field firing range to the Pakistan Intelligence. He was arrested and the other legal procedures were completed.

After investigation the charge sheet was filed and the Sessions Court convicted him found the accused guilty of having committed the offences defined under Sections 3 and 9 respectively of the Official Secrets Act, 1923. He was convicted and sentenced to rigorous imprisonment for a period of 5 years.

The accused preferred an Appeal before the Hon'ble Rajasthan High Court. The High Court at paragraph 11 held "It is evident from the evidence of the Prosecution witnesses that the documents concerning safety and Security were recovered from the conscious possession of the Accused". Saying so, the High Court dismissed the Appeal of the Appellant-Accused.

CONCLUSION

National Security is of paramount priority in a Country. It is not just an abstract concept but a question that concerns with each and every citizen of the Country. The official Secrets Act, 1923, which is a colonial legislation, has stood the test of time in protecting the Secrets of India, particularly those concerning with the Security Affairs of India. The various Penal provisions

¹⁴ Moldin vs State of Rajasthan, 2007 CRI. L.J. 226

have stepped in to picture whenever India's Security has been was threatened. These Penal provisions of the OSA, 1923 have played a pivotal role, particularly when other nations' Spies attempt to commit espionage activities which could pose a threat to the national Sovereignty, Integrity and Security. In addition to this, the Courts also have conveyed through their Judicial Decisions that, the Official Secrets Act, 1923 is an efficient legislation which ably safeguards the National Security of India.

