

Emperor Vs. Jagardeo Ramsumer Tewari

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Court : Mumbai

Decided On : Jun-18-1925

Reported in : AIR1925Bom489; (1925)27BOMLR1043; 90Ind.Cas.311

Judge : Fawcett and ;Madgaonkar, JJ.

Appeal No. : Criminal Application for Revision No. 128 of 1925

Appellant : Emperor

Respondent : Jagardeo Ramsumer Tewari

Judgement :

Fawcett, J.

1. This is a rule which has been issued against the Jailor, Yeravda Jail, calling upon him, to show cause why the petitioner Jagardeo Ramaumer Tewari should not be brought before this Court to be dealt with according to law and why he should not be set at liberty, etc., in the exercise of this Court's power under Section 491, Criminal Procedure Code,

2. The main facts of the case are not in dispute. The father of the petitioner was born at the village of Ramdupati, which at that time was in the Mirzapur district of the United Provinces. But some thirty or forty years back he came from there to Bombay, where he kept buffaloes and Carried on a milkman's business. He had

several sons, the third of whom is the present petitioner, who is stated to be about thirty years old According to the affidavit which has been filed on petitioner's behalf and which is supported by other affidavits, the eldest son came to Bombay in about 1903. But after staying there for about twelve months he fell ill and went to his village, where he died. After that in 1909 Sahadev, the second son of the father Ramsumer, came to Bombay but only stayed there for about five months. He also fell ill and went to his village, and the father then brought his third son, the present petitioner] to Bombay in 1909 There is a dispute as to whether the petitioner really came to Bombay in 1909. In the affidavit made by Mr. Cauty, the Deputy Commissioner of Police, Bombay, he states that his information is that the petitioner came in or about 1914. But it is, I think, really immaterial whether he came in 1909 or 1914, so far as the main point in dispute in this case is concerned. The father Ramsumer subsequently became ill and returned to his native village where he died. After his death the business appears to have been carried on by the present petitioner with the assistance of some of his brothers, In 1911 there was a cession of territory by the Government of India to the Maharaja of Benares, and the ceded territory contains this particular village of Ramdupati, A copy of the instrument of transfer has been annexed to Mr. Cauty's affidavit, and the preamble of this shows that the cession was made with the approval of His Majesty's Secretary of State for India, with the object that there should be constituted a State under the suzerainty of His Majesty to be granted to the Rajas of Benares, subject to certain restrictions and conditions considered necessary for safeguarding to the residents of the ceded territories the rights and privileges they had enjoyed under the British administration. There are no doubt restrictions on the sovereignty that is conferred upon the Maharaja of Benares and his successors, but it has not been disputed before us that there has been in fact a change in the sovereignty which primarily affects the inhabitants of the ceded territory, i.e., affects their allegiance in a way that is recognised and I shall deal with later on.

3. It is contended for the petitioner that he was a British subject at the time of this cession and that he has not ceased to be a British subject. The importance of this is apparent, when reference is made to the definition of 'foreigner' which is contained in the Foreigner's Act III of 1864, as amended by Act III of 1915. There

is no doubt that the petitioner would fall under Clause (a) of this definition as being a 'natural born British subject at any rate prior to the cession of 1911, and that has not been disputed by the learned Advocate General for the Crown But the contention that is put forward on behalf of the Crown is that the petitioner has ceased to be a British subject, and therefore comes within the proviso to this definition which is as follows:-

Provided that any British subject who, under any law for the time being in force in British India, ceases to be a British subject shall thereupon be deemed to be a foreigner.

4. The Government of Bombay, in the exercise of powers conferred upon them by Section 4 of the Foreigner's Act, have issued an order to the petitioner to remove himself from British India. It is not necessary to recite what has happened upon that order, except to say that the petitioner did leave Bombay but was subsequently found in Andheri, a suburb of Bombay, was arrested and eventually sent to the Yeravda Jail. He questions the validity of this order of the local Government on the ground that he is not a foreigner. Some other points have been mentioned in the petition, but that is the sole point which has been pressed before us.

5. I do not think it necessary to go exhaustively into all the legal questions of nationality and change of status that arise in different cases of this kind. We have first of all to bear in mind that Section 2 of the Foreigner's Act enacts that:-

If a question shall arise whether any person alleged to be a foreigner and to be subject to the provisions of this Act is a foreigner or not, or is or is not subject to the provisions of this Act, the onus of proving that such person is not a foreigner, or is not subject to the provisions of this Act, shall lie upon such person.

6. If the rule that has been laid down in English cases as to the effect of cession on the question of the nationality of persons ordinarily resident in the ceded territory is followed and held applicable, then there can, I think, be no question that the petitioner must be held to have ceased to be a British subject. The main rule in a case of this kind is summarised in Halsbury's Laws of England, Vol. I, Article

696, page 317, as follows:-

Such treaties (that is treaties like the one that was made with the United States of America in 1783) may specifically regulate the future nationality of the inhabitants of the ceded territory, but in the absence of an express provision, a relinquishment of the government of a territory is not only a relinquishment of the right to the soil or territory, but also of the rights over the inhabitants of the country.

7. That seems obviously in accordance with common sense, because you cannot well have a sovereign without subjects; at any rate if there is a State, the ordinary idea of constitutional law is that there are subjects in that State who are ruled over by the sovereign, and naturally when a territory is ceded the inhabitants of that territory will become subjects of the sovereign to whom the territory has been ceded. Of course a question can arise as to whether a particular person is an inhabitant of the territory, or even if he is not an inhabitant, whether he has such a connection with the territory as to make him subject to this general rule about change of nationality upon cession. This question has been discussed in certain English cases of which the latest one is *In re Stepney Election Petition : Isaacson v. Durant* (1886) 17 Q.B.D. 54. In that case at page 60 Lord Coleridge C. J. very strongly rejected the contention that in all cases where conflicting duties of allegiance arise the subject has by general law, law which has been adopted into English law, a right of election of which sovereign he will become the subject. And with reference to the case of *Doe dem. Thomas v. Acland* (1824) 2 B. & C. 779 he says that the decision was not based upon any such right of election but on the ground ' that the King having set free the inhabitants of the States from their allegiance, they became aliens.' He goes on to say (p. 60):-

No doubt, if a man had chosen to leave the States newly recognised as independent, and had gone into England or the English dominions he would have remained what he was before, a British subject and within the allegiance of the British sovereign. But why Because he never became a citizen of the newly established and recognised States.

8. Then discussing the case of *Auchmuty v. Mulcaster* (1826) 5 B. & C. 771 he held that it does not help the claim to the alleged right of election. At first sight the

distinction between such a right of election and the method by which a man can leave a newly ceded territory and remain within the allegiance of his former sovereign seems somewhat fine; but, as I understand it, the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former sovereign; there must be conduct on his part, such as leaving the ceded territory and going to reside permanently in his former sovereign's dominions, to indicate his previous election. I think the general principle has been well expressed in Foote's Private International Jurisprudence, 4th Edn., at pp, 8 and 9, where he says, referring to the case of allegiance dissolved by cession, etc. :-

On such a dissolution, the resident inhabitants of the territory ceded, separated, or conquered lose their former nationality, and become subjects of the new State to which they are assigned or attached. It has been sometimes said that the inhabitants of the separated territory have it at their own election to determine to which Sovereign they shall bear allegiance in the future. There can be no doubt that such an option may be given by the express provisions of the treaty or statute by which the separation is governed, in which case a definite period is usually named within which the option must be exercised by quitting or remaining inhabitants of the ceded or separated territory. Where no such option is expressly given, the question has been treated by Lord Coleridge, O. J., as one of fact. When a Sovereign by treaty relinquishes his claim to the allegiance of the inhabitants of specified territories, it becomes a question of fact whether a particular individual remained after the cession (or the limited time) an inhabitant of the specified territory and became thereby a citizen of the State into which it passed as an integral part. In no case has it been held that any inhabitant of the ceded or separated territory has the right to remain an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation.

9. There is also a passage in Hall's International Law, 7th Edn., which I think may be appropriately cited as helping in the disposal of this particular case. At pages 611 to 613 he says:-

It has however been usual in modern treaties to insert a clause securing liberty to inhabitants of a ceded country to keep their nationality of origin. In the case of persons native of, and established in, the ceded territory, and even in the case of persons who are established in, without being natives of, the ceded territory, this liberty is commonly saddled with the condition that they shall retire within the territory remaining to their state of origin, a certain time being allowed to them to arrange their affairs and dispose of landed and other property which they may be unable to take with them.... Residence in foreign countries being a frequent incident of modern life, withdrawal from a ceded district is not conclusive of the intention of the person withdrawing to reject the nationality of the conquering state. It is therefore usual to exact an express declaration of intention, as a condition of preservation of the nationality of birth, from persons against whom there is a presumption of changed nationality-that is to say, from persons born within the territory and living there, and from persons born within the territory but absent at the date of annexation. [This last sentence applies to the petitioner, if, as alleged, he was absent in Bombay at the date of cession in 1911], There being no such presumption against persons born in another part of the state making the cession, the simple fact of withdrawal is in their case sufficient.

10. This seems to me to be reasonable and to supply cogent authority for saying that the mere fact of the petitioner and his father having carried on business in Bombay does not suffice to show that he has withdrawn himself from the operation of the general rule under which, as a former and still a periodical occasional inhabitant of this village of Ramdupati, he has since the date of cession become a subject of the Raja of Benares. We have not of course before us such materials as might be available if there had been a civil suit in which this point was in issue. But the admissions before us at any rate supply materials from which, I think, it can be properly concluded that this family has certainly not severed all connection with their village of Ramdupati. Admittedly they have certain ancestral land there, in which the petitioner has a share. I have already mentioned the fact that the father and various sons on falling ill returned to this village. An allegation has been made in Mr. Cauty's affidavit that the family of the petitioner is at present at Ramdupati and I agree with the learned Advocate General that it is significant that the counter affidavit contains no direct contradiction of this allegation or any

statement that the petitioner's family have in fact been brought to and kept in Bombay. I think that, if that were the case, it would certainly have been put as part of the petitioner's Case in the main petition, just as he has put the fact that for a number of years he and his father have carried on business in Bombay. As I have already said, the onus of showing that he has ceased to be a foreigner rests upon the petitioner, and if the ordinary rules of law upon this subject are applicable in this case, then, in my opinion, he has not satisfied that onus.

11. It was, however, urged by the petitioner's counsel that the common law of England embodying these particular rules on which I have relied is not a 'law for the time being in force,' in British India within the meaning of the proviso to Section 1 of the Foreigner's Act III of 1864, as amended by Section 2 of Act III of 1915. His contention is that a law to fall within this expression must be a statutory law, which alone can be said to be 'for the time being in force' in British India. I think, however, it is nowadays too late to raise such a contention. The Privy Council have recognised the validity of the common Law of England in British India in various cases. One of these is *The Irrawaddy Flotilla Company v. Bugwandas* I.L.R.(1891) Cal. 630 P.C., where their lordships observe (p. 625):

For the present purpose it is not material to inquire how it was that the common law of England came to every the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the Carriers' Act, 1865, an Act framed on the lines of the English Carriers' Act of 1830 (II Geo IV, and I Wm. IV, c 68).

12. And dealing as we are with this particular case under Section 491, Criminal Procedure Code, that is to say, as a High Court established by the Letters Patent and the successors of the former Supreme Court of Bombay, it is clear that the common law which was formerly administered by the Supreme Court is also part of the law to be administered by the present Court, unless it is superseded by statute or otherwise. Their lordships of the Privy Council in *Maharaja of Jeypore v. Rukmini Pattamanahadevi* : (1919)21BOMLR655 :-

They (the High Courts) are directed by the several charters to proceed where the law is silent, in accordance with justice, equity, and good conscience, and the rules

of English law as to forfeiture of tenancy may be held and have been held to be consonant with those principles and to be applicable to India.

13. Of course this common law can only be applicable when it is properly applicable to the society and circumstances of India. I cannot, however, conceive of any department of law in which the common law is more applicable than that part of constitutional law, which governs the question of nationality and the question of the status of British subjects. Naturally that would be part of the English common law which was brought into this country when the British obtained sovereignty in India. Thus ' in 1661 Charles II gave, by royal Charter to the Governor and Council of the several places belonging to the Company in the East Indies, power ' to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal, according to the laws of the kingdom, and to execute justice accordingly." (See Tagore Law Lectures 1872: The History and Constitution of the Courts and Legislative Authorities in India by Cowell, p. 16). Therefore I reject the contention that the English common law cannot be a part of the law for the time being in force in British India. There is no statute, so far as I am aware, which in any way affects its applicability, in this case, at any rate none such has been cited. In the circumstances of this case I find that the petitioner has failed to show that he has not ceased to be a British subject, in view of the cession of 1911 already mentioned. In my opinion, therefore, there is no proper ground for the exercise of our powers under Section 491, Criminal Procedure Code, which is sought by the petitioner. I would, therefore, discharge the rule Any question of costs can be considered later.

Madgavkar, J.

14. On January 10, 1925, an order was passed by the local Government against the petitioner under Section 3 of India Act III of 1864, ordering him as a foreigner to remove himself from British India, With this order he complied. But on March 19, he was found to have returned to British India and was arrested at Andheri. He is now in confinement in the Yeravda jail; and the legality of this confinement is questioned in this application, mainly on the ground that he is not a foreigner but

that he continues to be British subject.

15. The petitioner was born a British subject at Ramdupati, which, along with the adjacent villages, was on April 1, 1911, ceded and constituted as a Native State under the jurisdiction of His Highness the Maharaja of Benares. It is argued for the petitioner that he was a resident of Bombay on the date of the treaty and that apart from stray visits to Ramdupati, he has continued to carry on his father's business in Bombay and that he thus continues to be a British subject. The treaty, it is said, does not confer unrestricted powers such as the power of life and death on the Maharaja of Benares so as to create a new political entity. The words 'any law for the time being in force' in Section 2 of the amending Act III of 1915 apply only to statutes.

16. For the Crown it is argued by the learned Advocate General that the cession of territory under the treaty necessarily includes a change of sovereignty and allegiance and therefore the petitioner is a foreigner within the meaning of Act III of 1864 as amended by Act III of 1915.

17. Under Section 2 of the Act of 1864, the onus of proving that he is not a foreigner is expressly laid on the petitioner. And the substantial question therefore under the proviso to Section 2 of Act III of 1915 is whether the petitioner by virtue of the treaty of April 1, 1911, has or has not ceased to be a British subject.

18. Whatever the difficulties of locating sovereignty in the Austinian sense, the treaty clearly creates a political jurisdiction and a Political Agent previously non-existent. For all practical purposes, the latter appears to be a decisive test, unaffected by the various limitations on the Maharaja's powers such as those in Clause 17 in respect of jurisdiction over servants of the British Government and European British subjects or in Clause 25 in respect of death sentences. Kathiawar, to go no further, illustrates the point that such limitations of varying degrees are perfectly consistent with the existence of foreign political status, in the legal sense, both civil and criminal.

19. A certain amount of stress has been laid for the petitioner on the words 'under any law for the time being in force' to be found in Section 2 of Act III of 1915; and

the question was argued whether the word ' law' is restricted to statute law or whether it includes Common law. On general principles of interpretation, it is hardly open to the Courts to limit the word by the implicit addition of ' statute ' before it. And on broader grounds, whatever the case in the days of Machiavelli, it is now too late in the day to raise the question of the binding nature of treaties and the duty, in matters civil and criminal, of enforcing and abiding by their terms, incumbent on all the contracting Powers and their Courts, not less than in the case of laws passed by the legislature. Our reports are full of such oases, as for instance, from Kathiawar, in matters of succession, domicile and extradition. And it is not necessary to fortify them by recent illustrations of the enforcement by Courts in England of various clauses of the Treaty of Versailles. For the purposes of the present application, this treaty, in my opinion, is as much law binding on the Courts as any statute law of the legislature. And the only point for the petitioner is perhaps that the treaty does not in terms declare that the Indian subjects in the ceded territory have ceased to be British subjects.

20. But that a treaty of cession has by implication such effect has been amply shown in the judgment of my learned brother. In the case: of *In re Stepney Election Petition: Isaacson v. Durant* (1886) 17 Q.B.D 54 it is to be noted that the decision proceeded on the fact that on the death of William IV, the succession to the Kingdom of Hanover, unlike the succession to the Crown of Great Britain, was governed by Salic law. But whatever the legal aspect in so peculiar a case, not of treaty but of succession, speaking for myself, I should incline to the opinion that where, as in the present instance, the case is one of a treaty and of rights created thereunder, it would be open to a subject of the ceded territory, unless the treaty expressly forbade, to elect to continue his former nationality and to prove such election. And, in this opinion, I am supported by the cases of *Doe dem. Thomas v. Aaklam* (1824) 2 B. & C. 779 and of *Jephson v. Riera* (1835) 3 Knapp 130 as well as by the argument at page 58 in *In re Stepney Election Petition*. Further in the present treaty, Clause 22, which empowers a British subject to call upon the Maharaja within a year to acquire immoveable properties belonging to such subject, is, in my opinion, a clear indication that the subject here could so elect,

21. In the present case, therefore, the question reduces itself to whether the petitioner can show that on or after April 1, 1911, he elected to continue his nationality as British subject; or whether he accepted the altered nationality under the treaty. Here again the onus is, in my opinion, clearly on the petitioner not less than it would be in the case of domicile : 'The abandonment or change of a domicile is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence': *Huntley (Marchioness) v. Gaskell* [1906] A.C. 55 In the present instance it would appear that the homestead of the family of the petitioner and his brothers like their father's has continued to be Ramdupati, the lands are retained and the residence of the petitioner and his brothers and their family in Bombay was solely for the purpose of business The case is one of very common occurrence in the city of Bombay, and I agree with my learned brother that such residence of itself or a continuance of it, is not sufficient evidence of election or of continuance of the petitioner's former status as British subject.

22. Into the alleged hardship of the present case we are not competent to enter.

23. I agree, therefore, that the petitioner has not discharged the onus laid on him by law to show that he is not a foreigner; and the rule must be discharged.

24. The rule is accordingly discharged.

25. The learned Advocate General asks that under Clause (5) of rule 7 of the High Court Rules, Appellate Side, of 1920, the Court should allow costs against the petitioner on the Appellate Side scale. We think, however, that the petitioner had legitimate ground for seeking the Court's decision on the question whether he was or was not a foreigner, and in the circumstances we are not disposed to grant costs against him. The rule is, therefore, discharged without costs.