

The Stae Vs. Rashid and ors.

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Court : Madhya Pradesh

Decided On : Aug-16-1954

Reported in : 1955CriLJ157

Judge : Sathaye J.C.

Appellant : The Stae

Respondent : Rashid and ors.

Judgement :

ORDER

Sathaye J.C.

(1) This is a reference Under Section 432(1), Cr.PC from the Subordinate Judge-Magistrate, 1st class, Bhopal. The question referred is: 'Whether the Bhopal Cattle Slaughter (Restrictions) Ordinance, 1949, is 'intra vires' of the Chief Commissioner, Bhopal?'

(2) The question arose in a trial of four persons, the non-applicants, for an offence Under Section 10 of the Ordinance. The learned Magistrate is of the view that it is not 'intra vires' of the Chief Commissioner inasmuch as there is nothing in the Ordinance to indicate (a) that it was necessitated by any emergency, and (b) that it was made and promulgated for the peace and good Government of the Bhopal State or part thereof, as required Under Section 12, Bhopal Legislative Council Act, 1922, as amended by such Act (No. I of 1940), under which it was made and

promulgated by the Chief Commissioner.

(3) The Bhopal Cattle Slaughter (Restrictions) Ordinance, 1949, was promulgated by the Chief Commissioner, Bhopal, on 13-12-1949. A similar question in respect of the Bhopal Premises (Requisition and Eviction) Ordinance (30 of 1949) promulgated by the chief Commissioner on 30-8-1949, arose for consideration and decision by Shri Tribeni Saran, Additional Judicial Commissioner of this Court in - 'Bharat Pictures v. State of Bhopal', Misc. Civil Appln. No. 9 of 1950, D/- 17-2-1951 (Bhopal) (A), and the question has been very elaborately discussed with reference to the provisions of all the relevant laws, at pages 11 to 23 of the order, The learned A. J. C. held that the said Ordinance was not 'ultra vires'.

(4) The discussion of the law at the above pages has been very ably summarised by the learned Govt. Advocate in this Court. It runs as follows:

(a) Before the State of Bhopal merged in the Indian Union, His Highness the Nawab of Bhopal had, Under Section 12, Bhopal Legislative Council Act (4 of 1922), as amended by Act I of 1940, power to make and promulgate Ordinances in cases of emergency for the peace and good government of the State or part thereof and such Ordinances had the force of law until repealed by an order of His Highness the Nawab published in the Bhopal Gazette.

(b) The Indian Independence Act, 1947, came into force on 15-8-1947 and Under Section 2 of the Act, two dominions were constituted, namely, India and Pakistan, of the territories formerly known as the British India, but under Sub-section (4) of the section, the Indian States were free to accede to any of the two dominions. His Highness the Nawab of Bhopal acceded to the dominion of India on 14-8-1947, and this accession was accepted by the Governor General on 16-8-1947.

(c) In view of a large number of Indian States acceding to the Dominion of India in the similar manner, a law, by which the administration of such States could be taken over, was passed, namely, the Extra-Provincial Jurisdiction Act (47 of 1947), Under Section 4 of which the Central Government was empowered to make Orders by notification in the official Gazette for the effective exercise of such jurisdiction of the Central Government. On the strength of the above Act the

Government of India passed the Bhopal Administration Order, 1949, whereby the State of Bhopal was to be administered by the Central Government through a Chief Commissioner. Under Clause (5) of the Order, all laws in force in Bhopal State or any part thereof immediately before the commencement of this Order were continued to be in force until repealed or amended by competent Legislature or authority and it was also provided that all powers exercisable under the said laws by His Highness the Nawab, or the Government of the State, shall be exercisable by the Chief Commissioner.

Thus, when the State of Bhopal began to be administered as a Chief Commissioner's Province with effect from 1-6-1949, the Chief Commissioner was given all such powers as were being exercised by His Highness the Nawab and as such, the Chief Commissioner had the power to make and promulgate Ordinances for the peace and good government of the State or part thereof.

(d) In the meantime, the Government of India Act, 1935, was amended by the Constituent Assembly, by Act 1 of 1949, whereby Section 290A was added in the Government of India Act, This section empowered the Governor General to pass an order directing that a particular State shall be administered in all respects as if the State was a Chief Commissioner's Province.

In pursuance of this power under this section (Section 290A), the Governor General passed the States Merger (Chief Commissioners' Provinces) Order, 1949, and hence the Bhopal State was created a Chief Commissioner's Province with effect from 1-8-1949. By Clause 4 of this Order all the laws in force in the new Province immediately before 1-8-1949, including the Orders made under the Extra-Provincial Jurisdiction Act (47 of 1947) were expressly made to continue and, therefore, the power to make and promulgate Ordinances, conferred upon the Chief Commissioner under Clause 5 of the Bhopal Administration Order, read with Section 12, Bhopal Legislative Council Act of 1922, as amended by Act 1 of 1940, was again reserved to the Chief Commissioner by Clause 4 of the States Merger (Chief Commissioners' Provinces) Order, 1949, and hence even after the State of Bhopal began to be administered as a Chief Commissioner's Province, the Chief Commissioner had the power to make and promulgate Ordinances.

(5) It must, however, appear that whatever powers the Chief Commissioner may have had under the Bhopal Administration Order, 1949, issued Under Sections 3 and 4 of the Extra-Provincial Jurisdiction Act of 1947, they ceased and terminated as soon as the Bhopal State became a Chief Commissioner's Province Under Section 290A, Government of India Act. Clause (2) of Section 290A of the above Act clearly lays down that upon the issue of an Order under Clause (a) of Sub-section (1) of Section 290A, all the provisions of this Act (the Government of India Act) applicable to the Chief Commissioner's Province of Delhi shall apply to the State in respect of which the Order is made. Now under Clause (3) of Section 94, Government of India Act, a Chief Commissioner's Province shall be administered by the Governor General acting, to such extent as he thinks fit, through a Chief Commissioner to be appointed by him in his discretion. Again, Under Section 42, Government of India Act, as adapted by the India (Provisional Constitution) Order, 1947, the Governor General alone had the power to make Ordinances and that too only for six months.

In any case, the Chief Commissioner's Province being a creature of the Government of India Act, any power conferred upon the Chief Commissioner to pass Ordinances was repugnant to the provisions laid down in Sections 42 and 94(3), Government of India Act, as also to Section 290A(l)(a), Government of India Act. To be brief, it may be pointed out that since 1-8-1949, the Chief Commissioner of Bhopal had the same powers in the matter of making and promulgating Ordinances as the Chief Commissioner of Delhi, and as this latter Chief Commissioner had no such power to make and promulgate Ordinances for the State of Delhi, the Chief Commissioner of Bhopal also did not have any such power. It may be further pointed out that in so far as the State of Delhi was concerned, it was the Governor General alone who, Under Section 42, Government of India Act, as amended by the India (Provisional Constitution) Order, 1947, had the power to make and promulgate Ordinances and the law conferring such power upon the Chief Commissioner to pass Ordinances being in conflict with the provisions of Section 42, Government of India Act, must be held to be repugnant to the said section.

(6) It seems that my learned brother, Shri Tribeni Saran, was aware of this state of affairs and went so far as to concede and observe at page 23 as follows, viz.;

In my opinion, it is only a case of anomaly and not of repugnancy.

This opinion seems to have been founded on what he observes earlier at page 22 in the same paragraph, viz.:

The question of repugnancy arises when there are two provisions of law so contradictory that it will be impossible to carry out both of them, It is by unwarranted implication that it is presumed that a Chief Commissioner, since he is subordinate to the Governor General, cannot be invested with Ordinance making powers. It could have been the case if the Governor General had been dealing with a territory not previously governed by a sovereign ruler, but in the case of such territories as Bhopal and especially when all the powers of a Ruler have been delegated to the Chief Commissioner under a valid enactment, it was only left the Governor General to take cognisance of the fact. I do not see how the provisions of the Bhopal Legislative Council Act can be called repugnant to the provisions of the Government of India Act.

(7) With greatest respect for my learned brother, I am unable to persuade myself to agree. The very fact that Under Section 290A(2), Government of India Act, the Chief Commissioners of all the States, or groups of States,¹ in respect of which an Order Under Section 290A(1)(a) was passed, were assigned the same position as the Chief Commissioner of Delhi, in so far as the provisions of the Government of India Act were applicable to the Chief Commissioners, clearly points out that the Governor General had no intention to give the Chief Commissioners of other such provinces powers higher than his (Chief Commissioner, Delhi's) powers. The view expressed in the above quoted observations of the learned A. J. C. not only does not find support anywhere but runs counter to the very Order which the Governor General passed Under Section 290A (1)(a), Government of India Act, the effect of which was as laid down in Sub-section (2) of the section.

The Order having been made under a provision of the Government of India Act itself, could not be interpreted to suggest the view which runs counter to another

provision of the same Act, namely, Section 42, Government of India Act. In this view then it is apparent that the provisions of the Bhopal Legislative Council Act are repugnant to the provisions of the Government of India Act. The Bhopal Cattle Slaughter (Restrictions) Ordinance, 1949, is therefore 'ultra vires' of the powers of the Chief Commissioner, Bhopal.

(8) A faint reference is made by the learned Govt. Advocate to the Bhopal State Animal Preservation Act (7 of 1954), which received the assent of the President on 7-6-1954 and which is published in the Bhopal Gazette of 14-6-1954. It is said that the provisions of the Act are virtually the same as those in the Ordinance and though the Ordinance is not repealed by the Act, the penalty incurred in the former shall not be effected. The only answer to this suggestion is that it is irrelevant, as the prosecution against the non-applicants, is for an offence under the Bhopal Cattle Slaughter (Restrictions) Ordinance, 1949.

(9) Turning to the grounds stated by the learned Magistrate in his reference for examination of the question of the validity or otherwise of the Ordinance, the only question is whether the Ordinance need have stated that (1) it was necessitated by emergency, and (2) it was made or promulgated for the peace and good government of the Bhopal State or a part thereof, or whether this could be presumed under the law from the very fact that the Ordinance was made and promulgated. Section 12, Bhopal Legislative Council Act, 1922, as amended by Act 1 of 1940, is in terms substantially similar to those in section or para. 72 of Schedule IX of the Government of India Act, 1935.

In the matter of *Mrinal Kanti Ghose* AIR 1932 Cal 738 (B), a Special Bench of the Calcutta High Court laid down that-

The validity of the Ordinance rests neither upon proof of an emergency nor upon the recital of an emergency but upon the judgment of the Governor-General that immediate action was necessary.

In *'U Lun v. U Chit Hlaing'* AIR 1941 Rang 49 i'C), while dealing with the provisions of Section 42, Government of Burma Act, 1935, it has been held that-

Where therefore an Ordinance issued is expressed to be under the powers conferred by Section 42, it is implied that an opinion has been formed by the Governor and an individual judgment has been exercised by him.

In 'Emperor v. Benoari Lai Sarma' AIR 1945 PC 48 (D), it has been observed that-

Section 72 of Schedule IX of the Government of India Act, 1935, does not require the Governor General to state that there is an emergency or what the emergency is, either in the text of the Ordinance or at all assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists.

(10) On the authority of the above decisions, with which I am in respectful agreement, I am of opinion that the Ordinance, if it had been otherwise valid and 'intra vires' of the Chief Commissioner, need not have stated the ingredients referred to above and their existence must be presumed from the very fact that it was made and promulgated under a provision of law which was considered to empower him to do so. The Cattle Slaughter (Restrictions) Ordinance, 1949, could not, therefore, be held to be invalid on the grounds mentioned in the reference by the learned Magistrate,

(11) Nevertheless, as pointed out above in the earlier part of this order, the said Ordinance is 'ultra vires' of the powers of the Chief Commissioner, Bhopal and is, therefore, invalid. My answer to the reference is, therefore, as above.

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