

Memon Abdul Ajij Jiva Vs. State

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Court : Gujarat

Decided On : Mar-16-1951

Reported in : 1953CriLJ665

Judge : Shah, C.J. and; Chhatpar, J.

Appellant : Memon Abdul Ajij Jiva

Respondent : State

Judgement :

Chhatpar, J.

1. Both the above revision applications are being dealt together, as the facts and the points of law involved in the cases are similar. Both the applicants had migrated to Pakistan and had obtained temporary permits to visit India from the High Commissioner for India at Karachi. The permits in both the cases were for three months from 30th August 1948 to 29th November 1948. On the expiry of the period of the permits, the applicants did not return to Pakistan but over-stayed at Rajkot and they were consequently prosecuted, under Section 4 of Ordinance No. XVII of 1948 (Influx from West Pakistan (Control) Ordinance, 1948) promulgated by the then Governor General of the Dominion of India. Section 4 of the Ordinance reads as is under:

4. Penalty-Any person who contravenes the provisions of Section 3 or of any rule made thereunder shall be punishable with, imprisonment which may extend to one year or with fine which may extend to one thousand Rupees or with both such imprisonment and fine.

Section 3 controls admission into India of persons from West Pakistan, and provides that no person shall enter India from any place in West Pakistan whether directly or indirectly unless he is in possession of a permit. It also authorises the Central Government to make in its prescribing the authorities by whom permit may be issued the conditions to be satisfied by the application for such permits and the forms and classes of such permits and relating to other matters ancillary or incidental to the carrying out of the purposes of the Ordinance. In pursuance of the authority vested in the Central Government) rules have been framed. Rule 12 of which reads as under:

No person holding a temporary permit shall stay in India after the date of the expiry of such permit.

It is for the breach of this rule that the applicants were prosecuted under Section 4 of the Ordinance. Both of them were convicted and sentenced to were confirmed Rs. 100/- each. The conviction and sentence were confirmed on appeal. The applicants have now come in revision.

2. Mr. B.M. Buch, the learned Advocate for the applicants, has raised some legal points which require consideration. The first point urged by him is that this Ordinance No. 17 of 1943 is not applicable to the State of Saurashtra. It is common ground that the Ordinance came into force in August 1948, and before this date the State of Saurashtra had acceded to the Indian Dominion. Clause (2), Section 1 of the Ordinance: states 'It extends to the whole of India.' It is clear that by virtue of the accession the State of Saurashtra was included in the Dominion of India under Section 5 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order and other amendments. The Governor General in promulgating the Ordinance purported to extend his application to the whole of the Indian Dominion including the State of Saurashtra. The objection raised by the learned Advocate for the applicants however is that the Governor

General had no authority, to legislate by Ordinances so far as the territory of Saurashtra State is concerned on the ground that in the Instrument of Accession the State of Saurashtra had yielded authority to legislate only to the Dominion Legislature and not to the Governor-General. Clause 3 of the revised Instrument of Accession of the State of Saurashtra, which was signed by the Raj Pramukh of Saurashtra on 22.5.1948, reads as under:

I accept all matters enumerated in List I and List III of the Seventh Schedule to the Act (Government of India Act, 1935) as matters in respect of which the Dominion Legislature may make laws for the United State;

Provided that nothing contained in the said Lists or in any other provision of the Act shall be deemed to empower the Dominion legislature to impose any tax or duty in the territories of the United State or to prohibit the imposition of any duty or tax by the Legislature of the United State in the said territories.

Provided further that where a law of the United State with respect to one of the matters enumerated in the said List III contains any provision repugnant to the provisions of an earlier Dominion Law or an existing law with respect to that matter, then, if the law of the United State having been reserved for the consideration of the Governor-General of India has received the assent of the Governor General, the law of the United State shall prevail in the United State but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter:

Provided further that no Bill or amendment for making any provision repugnant to any Law of the United State, which, having been so reserved, has received the assent of the Governor General, shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor General.

The relevant entry in List I of 7th Schedule for the purpose of these cases is Entry No. 17, which reads as under:

Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons, who are not British

subjects domiciled in India, subjects of any Acceding State; pilgrimages to places beyond India.

It may be observed that the original instrument of Accession of the Saurashtra State contained similar provision yielding to the Dominion Legislature the power to make laws in relation to the entry No. 17 which alone is, relevant for the purpose of the present cases. The Governor General promulgated the Ordinance 17 of 1948 in exercise of powers under Section 42, Government of India Act. The learned Advocate for the applicants contends that the Instrument of Accession has authorised only the Dominion Legislature to make laws for the State of Saurashtra and which is distinct from the legislative authority vested in the Governor-General by virtue of Section 42, Government of India Act, 1935. The second point raised is that in any case the Ordinance is beyond the scope of the entry No. 17 reproduced above.

3. In support of the first point, the learned Advocate had relied upon a recent ruling of the Madhya Bharat High Court in the case of-Mohammad Zahural Huque v. State AIR 1950 Madh B 17 wherein the same question was considered by that Court on the interpretation of similar provisions in the Instrument, of Accession of that State and it was observed as under:

The learned Counsel for the applicant submitted that the arrest was illegal as the Ordinance made and promulgated by the Governor General of India had not the force of law in the State of Madhya Bharat. His Highness the Rajpramukh of the United State of Gwalior, Indore and Malwa States (Madhya Bharat) by an Instrument dated 19th July 1948 offered to accede to the Dominion of India. The Instrument of Accession was accepted by the Governor-General of India on 13th September 1948 and under Section 6, Government of India Act, 1935, the United State of Madhya Bharat should be deemed to have acceded to the Dominion of India on this date. The Instrument of Accession was published in the local Official Gazette dated 30th October 1948. It is provided by Clause (a) of Sub-section (1) of Section 6, Government of India Act, 1935, that a Dominion Authority (the Governor-General, the Dominion Legislature, the federal Court or any other) shall exercise such function as may be vested in it by or under the Act but subject

always to the terms of the Instrument of accession. In Article of the Instrument of Accession the Rajpramukh accepts 'all matters enumerated in List I and List III of Schedule VII to the Act as matters in respect of which the Dominion Legislature may make laws for the United State.' Thus, it is clear beyond the shadow of a doubt that of the several Dominion Authorities, the United State of Madhya Bharat has accepted the power of the Dominion Legislature only to make laws for it. The Governor General of India cannot, therefore, exercise in relation to the State the functions vested in him by Section 42, Government of India Act, 1935. He cannot make and promulgate an Ordinance having force in the State of Madhya Bharat.

It was urged by the learned Public Prosecutor that under Section 42 Government of India Act, an Ordinance made and promulgated by the Governor-General shall have the like force of law as an Act passed by the Dominion Legislature, and therefore the Ordinance No. 17 of 1948 should be deemed to be an Act of the Dominion I legislature. This simply means that an Ordinance, though not made by the Dominion Legislature shall have force of law. In relation to the United State, the question is which authority has made the law for it. The Dominion Legislature alone has the power under Article 3 of the Instrument of Accession to make laws for the United State. The Ordinance was published for 'general information' and in the official Gazette of the United State dated 14th August 1948. This fact can have no bearing on its having the force of law in the State. Under Section 1 the Ordinance extends to the whole of India, and India, as defined in Section 5, Government of India Act, 1935, includes an Indian State acceding to the Dominion of India in the manner provided in the Act. The manner of accession is laid down in Section 6 of the Act as explained above. So far as Ordinances made under Section 42 of the Act by the Governor-General are concerned, India would include only those acceding States whose Rulers have accepted by the Instruments of Accession the Authority of the Governor General to exercise his functions under the Act in relation to their States. I, for these reasons, hold that Ordinance No. 17 of 1948 made by the Governor General of India has not the force of law in the United State of Gwalior, Indore and Malwa States and the arrest of the applicant under it was illegal.

With due respect to the learned Judges, who decided that case, I am unable to agree with their view. The most important provision in the Instrument of Accession is contained in Clause 1, which reads as under:

I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of the Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the United State 'such functions as may be vested in them by or under the Government of India Act, 1935 as for the time being in force in the Dominion of India.' The underlining (here in ' ') is mine.

This clause corresponds to Clauses (1) and (2) of Section 6, Government of India Act, 1935. It delegates to the Dominion authorities mentioned therein i.e. the Governor General of India the Dominion Legislature, the Federal Court and any other Dominion Authority power to perform such functions as are vested in thorn by or under the Government of India Act, 1935; but such functions are to be exercised subject to the terms of the Covenant. Now one of the functions that the Governor-General can exercise is the issue of the Ordinances under Section 42 of the Act. This is no doubt a legislative function; an ordinance issued by him is on par with an Act of the Legislature by reason of the definition contained in Section 311(6) of the Act. Other functions vested in him are mostly of an executive nature. So that by Clause 1, Instrument of Accession, the Governor-General is authorised to perform all the executive and legislative functions which are vested in him by the Government of India Act. Now let us see whether there is anything in the Covenant to indicate that this power is limited in any manner. The learned Advocate for the applicants has relied upon Clause 3, Instrument of Accession, reproduced above and he argues that the intention was to delegate the power of legislation only to the Dominion Legislature and that too with the limitations contained in Clause 3. This argument is apparently untenable. The definition of the functions and their limits of the Dominion Legislature cannot be construed as a limitation of the functions of the Governor General. The learned Advocate for the applicants being confronted with this answer to his argument has contended that

the word 'functions' in Clause 1 means only executive functions. There is no justification for this interpretation. The word is used not only in relation to the Governor General but also to the Dominion Legislature and the Federal Court. Such a narrow meaning would lead to an apparent absurdity. It is clear to me that all the functions vested in the Dominion Authorities under the Act are delegated subject to the terms of the Instrument. It cannot for a moment be contended that issue of Ordinances under Section 42 is not a function vested in the Governor-General by the Act.

4. The learned Advocate for the applicants then relied upon Clause 9, Instrument of Accession, which reads as under:

Save as provided by or under this Instrument nothing contained in this Instrument shall affect the exercise of any powers, authority and rights enjoyed by the Raj Pramukh, or the validity of any law for the time being in force in the United State or any part thereof.

He has argued that the power to legislate by Ordinances is vested only in the Raj Pramukh by reason of a provision contained in the Covenant by which the Rulers of the former Kathiawar States merged into and formed the State of Saurashtra. This argument is on the face of it fallacious. Whatever powers of Raj Pramukh are reserved by this clause are subject to the provisions of the Instrument itself which is quite apparent by the opening words 'save as provided by or under this Instrument.' So that while in the Instrument of Accession although certain limitations have been put on the power of the Dominion Legislature as regards its legislative scope, apparently no restriction is placed over the legislative functions of the Governor General by issue of Ordinances. It might seem that this could not have been the intention of the parties to the Instrument of Accession; but Section 42. Government of India Act, itself contains a limitation on the powers of the Governor General and states:

but the power of making Ordinances under this Section is subject to the like restrictions as the power of the Dominion Legislature under this Act to make laws; and any ordinance made under this Section may be controlled or superseded by any such Act.

This portion of the Section read with Clause (2) of Section 6 of the Act leaves little doubt that the extent of the legislative power of the Governor General is subject to the same restrictions which apply to the Dominion Legislature. So that this apparent inconsistency is reconciled. I am therefore of opinion that Clause 1, Instrument of Accession, delegates to the Governor General the legislative power contained in Section 42 of the Act by issue of Ordinances.

5. The learned Advocate General has however laid stress on another aspect of the interpretation of the Instrument of accession. He argues that the words 'Dominion Legislature' contained in Clause 3 of the Instrument are used in a generic sense, meaning the legislative authority of the Dominion, and therefore it includes within its ambit the Governor General who is a legislative authority. He further argues that in any case the Governor General is part of the Dominion Legislature which comprises the Constituent Assembly and the Governor General whose assent to the bills is necessary to convert them into laws. He has relied upon the observations of the Calcutta High Court in the case of *Benoarilal v. Emperor* AIR 1948 Cal 285 (FB). This case went in appeal to the Privy Council (Judgment reported in *Emperor v. Benoarilal Sarma* 47 Bom L.R 260 (PC) wherein in interpreting what is an 'act of Legislature' it was held that an Ordinance of the Governor General was included in the definition and reference was made to Section 311(6), Government of India Act. This ruling does not help. The Governor General may be a legislature in the sense that legislative authority is vested in him; but the question is whether he is the 'Dominion Legislature' as understood in the Instrument of Accession. The words 'Dominion Legislature' have to be interpreted in the same sense in which it is used throughout in the Instrument of Accession. In Clause 1, several Dominion Authorities are specifically mentioned one of them being the Governor General, the second the Dominion Legislature and the third the Federal Court. The words 'Dominion Legislature' undoubtedly mean the Dominion Legislature as provided for in chapter III of the Government of India Act, which is a body distinct from the Governor General. The Governor General no doubt plays as important part in legislation. It is his assent which makes a bill passed by the Dominion Legislature a law. By himself he is a legislature only when exercising his legislative powers under Section 42. Section 32 of the Act which requires assent to a bill to be given by the Governor General

seems clearly to indicate that he is a distinct authority from the Dominion Legislature. I am therefore not in favour of accepting the arguments advanced by the learned Advocate General; but relying upon Clause 1, Instrument of Accession I hold that the power of the Governor General to legislate by Ordinances under Section 42 of the Act is not taken away by anything contained in the Instrument. I consequently hold that the Ordinance in question is valid.

6. The second part, of the objections relates to the interpretation of Entry No. 17 of List 1 in the 7th Schedule of the Government of India Act, 1935. This entry provides for making of laws relating to 'admission into, and emigration and expulsion from, India etc.' The learned Advocate for the applicants contends that the entry does not apply to persons who are not British subjects domiciled in India nor to subjects of any acceding State. This interpretation is obviously incorrect and not according to the apparent grammatical sense of the entry, I cannot read this entry as if there were a comma after the words 'Movements in India.' The words 'who are not British subjects domiciled in India nor to subjects of any acceding State' clearly govern the preceding clause beginning with 'including in relation thereto the regulation of the movements in India of persons.' In my opinion the entry authorises the legislative authority to promulgate the Ordinance in question, which relates to admission into India of persons from West Pakistan. It applies to the applicants, who admittedly have sought entry into India by permits.

7. The learned Advocate for the applicants has next argued that when the applicants were granted the permits, the rules under the Ordinance nominating the authority for issuing permits and prohibiting over-stay were not framed and therefore their over-stay in India could not be considered an offence. The date of the expiry of the permits is 29.11.1948, and it is admitted that the rules were in any case passed before this date; so that at the date of the offence the rules were in force. There is therefore no substance in. this objection.

8. No other question has been raised attacking the applicant's conviction, I therefore see no reason to interfere and dismiss the above two revision applications.

Shah, C.J.

9. I agree.

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