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Court : Rajasthan

Decided On : May-11-1953

Reported in : AIR1954Raj162

Judge : Wanchoo, C.J. and; Modi, J.

Acts : Constitution of India - Articles 226 and 265; Rajasthan Town Municipalities Act, 1951 - Sections 59

Appeal No. : Misc. Writ Appln. Nos. 356 and 357 of 1952

Appellant : Somath Mal and anr.

Respondent : State of Rajasthan and ors.

Advocate for Def. : Kansingh, Adv. and; Tejbux Surana, Adv. for Non-Petitioner Nos. 3 to 10

Advocate for Pet/Ap. : Hastimal, Adv.

Disposition : Petition partly allowed

Judgement :

Modi, J.

1. These are two writ petitions under Article 226 of the Constitution, and arise out of the same facts.

2. The petitioners are residents of Bhinmal and. describe themselves as citizens, voters and taxpayers in that town. The case of the petitioners is that opposite parties Nos. 2 to 9, who are members of the Municipal Board of Bhinmal and who will hereinafter be referred to as the Board, have been realising from the petitioners and others certain taxes which are mentioned in the schedule appended to their petition and which may briefly be described as

(1) octroi on certain articles e. g., cloth, grain, ghee, sugar and some others, if and when brought into the town of Bhinmal, and

(2) a Kharda lag which is a sort of house-tax, without any authority of law, and that such action on the part of the Board is unauthorised and illegal. The petitioners further alleged that the boundary limits of the Bhinmal Municipality had not been denned under any law at all. The petitioners therefore prayed that the opposite parties be restrained by the issue of a writ of prohibition or mandamus or any other writ or order from levying and collecting the taxes in question and that the money already collected from the petitioners in lieu thereof be directed to be refunded. It is stated on behalf of the opposite party No. 1, the State of Rajasthan, and the Municipal Board of Bhinmal that a Municipality was established in the town of Bhinmal by His Highness the Maharaja of the former State of Jodhpur under Council Resolution No. 5 dated 3-11-32, and that a terminal tax on all goods and parcels booked to Bhinmal by rail at the rate of 6 pies per maund was levied by that order. (Annexure 1). Later, by Council Resolution No. 14 dated 22-11-48, His Highness the Maharaja ordered that the proposal of levying octroi on goods imported into the Municipal limits of Bhinmal be sanctioned with effect from 1-12-1948, according to the proposed schedule (Annexure 4). So far as the Kharda lag was concerned, learned Assistant Government Advocate frankly conceded that he was unable to point to any authority under which this tax was being realised. It is claimed, however, that the levy of octroi, which is now being questioned by the petitioners, was being made tnder due authority of law. It was further stated that the boundary limits of the Bhinmal Municipality had been defined by the Municipality under its resolution dated 7-12-48. Certain additional pleas were also put forward on behalf of the opposite parties, viz.,

(1) that the petitioners had an alternative remedy by way of a civil suit which was equally convenient and effective,

(2) chat they had never made any demand for justice, and

(3) that the present applications had been made after great delay and, therefore, the petitioners were not entitled to apply for a writ of any kind and thereby invoke the extraordinary jurisdiction of this Court.

3. The first and the most important question for determination before us is whether, leaving aside the Kharda lag for the recovery of which there is admittedly no legal sanction, there exists any legal foundation for the recovery of the impugned taxes inasmuch as Article 265 of the Constitution lays down that no tax shall be levied or collected except by authority of law. It has been strenuously contended on behalf of the opposite parties that the Council Resolutions of 1932 and 1948 of the former State of Jodhpur are law, or, at any rate, have the force of law. We may point out at the very outset that authenticated copies of the Council Resolutions under reference have not been brought on the record, and, therefore, we have not had the opportunity of seeing them ourselves as we should have wished to do. In the case of Council Resolution of 1932, what we have before us is a copy of letter No. 3944 dated 16-1-33 from the Judicial Member, State Council, Jodhpur to the Hakim, Jaswantpura, in which it is stated that His Highness the Maharaja of Jodhpur was pleased (vide C. R. No. 5 dated 3-11-32) to sanction the establishment of a Municipality at Bhinmal, and then the letter proceeds to say that certain proposals relating to the constitution and the working of the Board had been sanctioned. It was stated, for example, that the Board would consist of eight members, that the Hakim of Jaswantpura was to be its President, and the Sub-Assistant Surgeon was to be an ex-officio member and Vice President and Executive Officer of the Board. A provision was further made for the funds of the Municipality, and it was directed that a terminal tax would be levied on all goods and parcels booked to Bhinmal by rail at the rate of 6 pies per maund with certain exceptions. Coming now to the resolution of 1948, which is the principal authority relied on by the opposite parties, we gave special opportunity to the learned Assistant Government Advocate to produce an authenticated copy of this

Resolution and we also granted him an adjournment for the purpose. This, however, proved to be of no avail, and it was submitted that although the original Resolution was not traceable, a copy of the said resolution was available and was produced for our perusal.

4. It reads as follows :

Resolution 14 : 'Resolved that the proposal of levying Municipal taxes in Bhinmal be approved at the proposed scale with effect from December 1, 1948.'

5. Now this Resolution may have been a sufficient authority for the collection of the taxes sanctioned thereby so long as the authority and jurisdiction of His Highness the Maharaja of Jodhpur remained in tact. It is a serious question, however, whether after the Constitution came into force on 26-1-1950, the resolution can be considered to be law or having the authority of law as required by Article 265 of the Constitution. There is no doubt that the Maharaja of Jodhpur was the sovereign authority in and for the former State of Jodhpur, and that he combined all sovereign powers -- legislative and executive and others, pertaining to the former State of Jodhpur---within himself. (See Government of Jodhpur Act, 1947). It is, therefore, natural enough that orders issued by and in the name of His Highness the Maharaja of Jodnpur, irrespective of the consideration whether they were executive or legislative, were binding throughout the territory of the former Jodhpur State. That position, in our opinion, has inevitably changed, mid, speaking of wxes, it is only taxes which have the authority of law he-hind them that can be levied or collected after the Constitution 01 India came into force. It is indeed common ground between the parties that the taxes in question are not being recovered under the Rajasthan Town Municipalities Act (No. 23) of 1951. The crux of the question, therefore, is whether the Resolution of 1948 authorising the levy of the taxes ill question was a legislative act or an act of a merely executive nature. We should like to say in this connection that the Resolution of 1932 might be considered to be a legislative measure. It was perfectly competent to a sovereign authority in the former State of Jodhpur either to frame a general law for the establishment and functioning of Municipalities in that State as a whole, or, to have made a separate Act for any one of the Municipalities. The Jodhpur Municipal Act,

1943, is an example of the latter kind. In other words, the Maharaja of Jodhpur could have enacted a separate Act for the Municipality at Bhinmal in which provisions for the constitution and the functioning of the Board might well have been incorporated. We may, therefore, have some justification for holding that the Resolution of 1932 was law or had the force of law and may be treated as such. The Resolution of 1948 appears to us, however, to stand on quite a different footing. The Municipality at Bhinmal was already in existence, and its composition or constitution stood already provided for. All that was sought to be done by the State Council by means of the Resolution of 1948 was to sanction certain proposals made by some subordinate authority for introducing certain taxes in that Municipality. We are unable to hold that this was enacting a law. If we look at the underlying scheme of the various Municipal Acts in force in different parts of India including the State of Rajasthan in the matter of municipal taxation, we find that the proposals in the first instance are required to be formulated by the municipality concerned and thereafter the sanction of the Government is obtained to the levy of the desired taxes. It is of course open to the Government to add to or subtract from the proposals made to it. Bearing this consideration in mind, we are of opinion that what happened in this case was that certain proposals for levying municipal taxes in Bhinmal were made to His Highness the Maharaja of Jodhpur, and these were approved under Council Resolution No. 14, dated 22-11-48. It is, therefore, difficult for us to accept the proposition that the Council Resolution No. 14 of 1948 was law. We are indeed inclined to the opinion that the said resolution was an executive act and not a legislative one.

6. We are fortified in the conclusion at which we have arrived above by certain considerations to which we shall presently refer. In the first place, although the former State of Jodhpur, had not quite modernised itself so far as its machinery of Government and the various organs thereof were concerned, it had made appreciable strides on the road to that objective. In this connection we may refer to the Government of Jodhpur Act, 1947, by which His Highness the Maharaja of Jodhpur provided for the closer association of the people of the State with the administration of the State.

7. In Chapter 3 of the Act, it was provided that there shall be a Legislature for the State of Jodhpur, which shall consist of His Highness the Maharaja and a Chamber to be known as the Jodhpur State Legislative Assembly. Section 25 of the Act provided that

'Subject to the provisions of this Act, the Assembly may make laws for the State of Jodhpur or any part thereof, and for the subjects or servants of His Highness the Maharaja wherever they may be.'

except in certain reserved matters which were provided for in Section 26 of the Act. Section 30 of the Act provided that in respect of the reserved matters, the Council of Ministers may frame any measure required for the purpose and every such measure shall have the force of law on receiving the assent of His Highness the Maharaja. Section 31 provided for the passage of legislation when the Assembly was not in session but where the Government was satisfied that circumstances existed which rendered immediate legislation necessary. Such measures on receiving the assent of His Highness the Maharaja were to have the force of law for a period not exceeding six months in the first instance and such period could be extended by another six months. Section 39 provided that when a Bill was passed by the Assembly it must be submitted by the Prime Minister for the assent of His Highness the Maharaja provided that where the Prime Minister considered it necessary, he was empowered to return the Bill for re-consideration by the Assembly. Section 40 provided for certified legislation with the assent of His Highness the Maharaja where the proposed legislation was essential for the good government, safety or franquillity of the State. Section 41 provided that all Bills before they become law shall be submitted for the assent of His Highness the Maharaja who may either assent thereto or withhold his assent therefrom, and further that a Bill on being assented to by the Maharaja shall be published in the Jodhpur Government Gazette and shall then become an Act and have the force of law. It would thus appear that a regular machinery was prescribed for the making of laws in the former State of Jodhpur by and under the Jodhpur Government Act, 1947. It so transpired, however, that, by a proclamation dated 31-8-1948, issued by His Highness the Maharaja of Jodhpur, so much of the Government of Jodhpur Act, 1947, as related to the Legislative Assembly, was declared inoperative. The

result was that in August, 1948, the machinery prescribed for the making of laws under the Government of Jodhpur Act, 1947, became, as such, extinct. It must be mentioned, however, that even before the Government of Jodhpur Act, 1947, was enacted and after the proclamation of His Highness the Maharaja dated 31-8-1948 was promulgated, the normal form for making laws in the former State of Jodhpur was nevertheless by means of Acts, Ordinances or Rules.

8. We may cite in this connection a few examples of the laws so made, such as the Marwar Limitation Act, 1927, the Marwar Legal Practitioners' Act, 1933, the Marwar Mines Act, 1914, Rules for Partition of Land, 1925, the Marwar Patta Ordinance 1921, the Marwar Tenancy Act (No. 39) of 1949, the Marwar Land Revenue Act (No. 40) of 1949, and we need not multiply instances. Besides, we would here draw attention to another but a very important feature of the legislative measures of that State, which was that all such laws were invariably published in the official gazette which was called the Marwar Gazette or later the Jodhpur Government Gazette, before such laws received legal effect. It is admitted by learned Assistant Government Advocate before us that the Resolution of 1948 and the schedule of taxes to which it refers were never published in the official gazette. This is indeed a very significant circumstance and leaves no doubt in our mind that the order of His Highness the Maharaja of Jodhpur contained in Resolution No. 14 of 1948 purported to be and was in reality and substance an executive act and not a legislative measure. We would respectfully reproduce here the observations of their Lordships of the Supreme Court in -- 'Harla v. State of Rajasthan', AIR 1951 SC 467 (A):

'In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a

decision reached in the secret recesses, of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence, therefore, of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential.'

9. We have already pointed out above that the normal method of publication of the laws of the former State of Jodhpur was their publication in the official gazette. We are, therefore, constrained, to hold that the Council Resolution No. 14 dated 22-11-1948, approving the levy of the impugned taxes in Bhinmal was not law and cannot be accorded the status of law within the meaning of Article 265 of the Constitution.

10. Learned Assistant Government Advocate drew our attention to -- 'Kasna v. Samirmalji', 1946 MLR 36 (B). where the learned Judges of the Chief Court, as it then was, of the former State of Jodhpur held that the Council Resolution No. 11 dated 14-9-1923 had the authority of law and it was further stated by the learned Judges that

'so far as this Court is concerned, it has consistently held that Council Resolutions have the authority of law and are binding on the courts.'

It is obvious that the generality of the language employed by the learned Judges should not lead us to think that they intended to say that every kind of Council Resolution had the authority of law. The learned Judges in that case had to deal with a resolution dated 14-8-23 passed by the State Council. There the Council laid down that the rule of limitation that a fresh application for execution of a decree presented after 30 years from the date of the decree would be barred did not apply to decrees passed before 28-5-1921. It was contended before the Chief Court that the introduction of Section 48 in the Code of Civil Procedure in 1926 definitely modified the position and barred the execution of the decree which was passed in 1893 A.D. This contention was repelled and 15 was held that the resolution of 1923 still held the field. We may point out that the Resolution in the

above cited case certainly related to the interpretation of a rule of law and in any case was in the nature of a judicial precedent, and therefore, provides no parallel to the resolution which is before us far consideration in the present case. Another case cited by the learned Assistant Government Advocate was -- 'Chouthmal v. State of Rajasthan', AIR 1953 Raj 73 (C). It was observed in that case that as the Municipal Board at Nawa had been functioning under some executive order of the Government of Jodhpur which was untraceable and the exact scope of that order and the powers, functions and duties of the Municipal Board of Nawa could not be discovered, such an order would occupy the status of law in Marwar under which the Municipal Board of Nawa came to be constituted and had been functioning. The argument of the learned Assistant Government Advocate was that the executive order of the Government relating to the constitution and functioning of the Nawa Municipal Board was considered to occupy the status of law, and that on the, same analogy the resolution of 1948 may be held to be law. This argument is fallacious. We may point out that in this case, the order under which the impugned taxes are being levied is not undiscovered, and we know to all intents and purpose, what the nature and content of that order was, and, therefore, we are of opinion that the observations made in the case of the Municipal Board at Nawa are not applicable to the Resolution of 1948, though they may be relevant about the Resolution of 1932.

Reliance was next placed on -- 'Gurdwara Sahib v. Piyara Singh', AIR 1953 Pepsu 1 (PB) (D). In that case, it was held that where in his capacity as the Ruler of the Patiala State, the Maharaja passed an executive order depriving a subject of his property and conferred the same on another, the civil courts had no jurisdiction to question the legality of such an order. The reasoning there adopted was that as regards all internal matters, the Ruler of the Patiala State was sovereign, and, therefore, the legality of any order made by him could not be questioned by the civil courts. The facts of that case are, in our opinion, distinguishable inasmuch as the act challenged there had been 'finalized and the possession of the property had already been taken over from the plaintiffs and handed over to the defendants and all this had been ordered and done while the Maharaja of Patiala was in full possession of his internal sovereignty over the Patiala State. Such an act could not, of course, be reopened after the Constitution came into force on any ground

whatsoever, because, the provisions of the Constitution, it is well settled, do not have and could not be given retrospective operation. The question before us is essentially of a different character. That question is, whether the executive order passed by His Highness the Maharaja of Jodhpur in the shape of the Council. Resolution of 1948 could furnish a sound basis for the levy and collection of the Municipal taxes on the footing of and in accordance with that resolution even after the Constitution had come into force as the recovery of taxes is still sought to be effected by virtue of that resolution. This, in our opinion, could be done only if it could be held that such a levy had the sanction of law behind it as required by Article 265 of the Constitution of India, and this is precisely the question which falls to be decided now and we have no doubt that we have the power to decide it. Now, we have already given our detailed reasons above why it is not possible for us to hold that the Council Resolution No. 14 dated 22-11-1948 was a legislative measure. It was merely an executive order and it did not possess the character and force of law. We, therefore, hold that the recovery of the taxes in question cannot be held to be justified on the basis of the aforesaid order in accordance with the requirements of Article 265 of the Constitution.

11. The petitions before us must succeed on another ground also viz., that the boundary limits of the Bhinmal Municipality were not fixed by the former State of Jodhpur and were therefore not certain and not known. It was laid down by the Council Resolution of 1943 that all goods imported by rail or road, into the municipal limits of the Bhinmal town, shall be liable to the taxes mentioned in the schedule. But which were these limits? It was submitted that the Board defined the limits of the Bhinmal Municipality by a resolution dated 7-12-48, but, this, in our opinion, is of no avail whatsoever as it was not the business of the Municipality to delimit its own boundaries, and it was only the State Government which could have done so. It was further brought to our notice by the learned Assistant Government Advocate that the limits of the Municipality have now been fixed by the Rajasthan State by an order dated 11-3-1953. Obviously this has been done after the present writ applications were filed before us, and cannot help the opposite parties. It is indeed elementary that before the schedule of taxes sanctioned under the Resolution of 1948 could receive legal recognition or operation, the limits of the Bhinmal Municipality must have been defined by or

under competent authority. As this was not done, we have no hesitation in holding that the levy or collection of taxes mentioned in the schedule was impossible, and therefore, the realisation of the taxes in question was and is illegal.

12. Learned Assistant Government Advocate next contended that the petitioners had made no demand for justice to the Government, and that they had made their petitions after great delay and, therefore, they were not entitled to any relief from this Court in the exercise of its extraordinary jurisdiction. Our attention has however been drawn to the fact, duly supported by an affidavit, that a representation was made on 25-8-50 and again on 1-10-52 to the Minister for Local Self-Government, in which it was contended, on behalf of the petitioners and certain other persons, that the taxes levied in the Bhinmal Municipality were illegal and should be stopped. This was, in our opinion, a sufficient demand' for justice which was made to the Minister concerned and if it did not result in due relief being granted to the petitioners, it was no fault of theirs. As regards the ground of delay, we think that there is no substance in this objection either. As the levy of taxes is without any authority of law, Article 265 of the Constitution clearly makes the levy or collection of such taxes absolutely unwarranted after the Constitution came into force and we hold that we are bound to take notice of the illegal exaction, and give the necessary relief to the petitioners to which they are, in our view, entitled. If the petitioners did not apply earlier, it was their own fault, ar.d the result of it naturally and necessarily has been that they have had to pay the impugned taxes in the meantime and such delay as has occurred is not a valid reason for refusing them relief hereafter. We may point out however, that we are not prepared to grant any relief to the petitioners by way of refund of the tax monies already collected from them. They must seek their remedy in this respect; by means of a suit, if so advised.

13. The only other point that remains to be considered is that the petitioners have an alternative remedy and that they could file a civil suit for obtaining the relief which they have sought by means of these writ petitions. There is no doubt that the peitioners could have filed a civil suit, seeking the same reliefs as they have applied for by means of their present applications. We are of opinion, however, that the Municipal Board in this case is clearly acting without due authority of law

and without any jurisdiction or in excess of its legitimate jurisdiction in recovering the impugned taxes, and we are further of opinion that in such a case, this Court is not fettered by the circumstance that an alternative remedy exists in issuing an order in the nature of prohibition. See -- 'Madan Gopal Kabra v. Union of India1, AIR 1951 Raj 94 (2) (E) and 'Rangraj v. Gram Panchayat Khinwel', AIR 1952 Raj 144 (P). There is, therefore, no force in this contention and we overrule it.

14. For the reasons mentioned above, we hold that the levy of the Kharda lag by the municipal Board of Bhinmal has not been shown to us to be covered by any authority whatever and that the levy of the other taxes in question is not sanctioned or supported by any law within the meaning of Article 265 of the Constitution, and they are illegal impositions, and consequently, we hereby allow these applications and direct that the opposite parties shall not levy or collect the taxes in question from the petitioners by virtue of Council Resolution No. 14 dated 22-11-1948. The prayer of the petitioners for the refund of the taxes already collected is rejected. The petitioners shall be entitled to receive the costs of these proceedings from the opposite parties. We assess the costs at Rs. 60 per hearing.

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