

In Re: Abdul Kadir

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Court : Chennai

Decided On : Nov-18-1955

Reported in : AIR1956Mad333; 1956CriLJ751

Judge : Ramaswami Gounder, J.

Appellant : In Re: Abdul Kadir

Judgement :

ORDER

Ramaswami Gounder, J.

1. These revisions are filed by the accused against his conviction and sentence in two cases arising under Ordinance 19 of 1944 called Railway Stores (Unlawful Possession) Ordinance, 1944.

2. Clause 3 of that Ordinance provides that whoever is found or is proved to have been in possession of any article of railway stores, shall unless he proves that the article came into possession with him lawfully be punishable with imprisonment for a term which may extend to five years or with fine or with both.

3. In this case some belts belonging to the railway company were found in the possession of P. W. 3's brother, who is the owner of a rice mill at Karur. According to the prosecution, these belts were purchased by P. W 3 from the accused. The trial Magistrate, as well as the Sessions Judge in appeal accepted his evidence,

as it was supported by the testimony of two other persons, P. Ws. 4 and 5.

There is no reason for this Court to interfere with the findings of fact, that is to say, that these belts were purchased by P. w. 3 from the accused. In other words, it must be taken to have been established that the accused was found to be in possession of railway stores within the meaning of Clause 3 of the said Ordinance.

4. But the learned Counsel for the accused, who is the present petitioner, contended that that ordinance was passed only for meeting certain emergency arising as a result of the last world war, that as that emergency has now been declared to have ceased with effect from 1-4-1946 this ordinance cannot be deemed to be in force beyond that date.

It will be seen that the ordinance in question was passed by the Governor General under Clause 72 of Sch. 9 of the Government of India Act, 1935, which provides that the Governor General may in cases of emergency make and promulgate ordinances for the peace and good government of British India, or any part thereof, and any ordinance so made shall for the space of not more than six months from its promulgation have the force of law, as an Act passed by the Indian Legislature.

That being so, the ordinance passed by the Governor General would ordinarily have force and validity only for a period of six months from its promulgation. But, by Clause 3 of the India and Burma Emergency Provisions Act of 1940, it was provided that Clause 72 of Sch. 9 of the Government of India Act, 1935, shall as respects ordinance made during the period specified in Section 3 of that Act have validity as if the words 'for the space of not more than six months from its promulgation' were omitted. That period would be from 27-6-1942 to 1-4-1946.

It will be seen that the Ordinance in question was passed by Governor General during that period, and that being so, having regard to the language of Clause 72 of Sch, 9 of the Government of India Act of 1935, and Clause 3 of Section 1 of the India and Burma Emergency Provisions Act of 1940, which took away the limitation of six months this ordinance passed by the Governor General will have the force and validity, if it was an Act passed by the Legislature, and that too of a

permanent character. There is nothing in the language of those sections, restricting the operation and validity of such ordinance during the period of emergency.

5. It is true that a Bench of this Court in *Thiagaraja Chettiar v. Emperor* AIR 1947 Mad 325 (A), observed as follows:

As regards the second contention, no doubt, an ordinance promulgated by the Governor General before 1-4-1946 is, by virtue of the provisions of the India and Burma (Emergency Provisions) Act, 1940, not restricted to six months, but will continue to have effect for the period provided, in the Ordinance or, if no period is provided, until the emergency is declared by the Governor General to have ceased to have effect.

6. This observation was quoted with approval by the same Bench in a subsequent decision in '*Mehdi v. Emperor*' 1947 MW.N. 105 (B). In the latter case the question arose whether a similar ordinance called Military Stores (Unlawful Possession) Ordinance, 33 of 1943 was in force after 1-4-1946. That was also an ordinance promulgated by the Governor-General under Clause 72 of Sch. IX of the Government of India Act, 1935. The learned Judges held,

In short the India and Burma Act conferred the power on the Governor General to make ordinances 'unrestricted in duration' for a certain period, a period that ended on 1-4-1946.

They were consequently of the opinion that Ordinance 33 of 1943 was still in force. This decision therefore is directly against the contention put forward by the learned Counsel for the appellant.

7. It will also be seen that in a decision of the Allahabad High Court in '*Sridhar Achari v Emperor*' : AIR1948 All182 , the earlier Bench decision of our High Court was distinguished and the view expressed in the latter Bench decision was followed. In this connection reference may also be made usefully to another decision of the Federal Court in '*J. K. Gas Plant . v. Emperor*' AIR 1947 P.O. 38 (D), in which their Lordships held:

In our opinion, the emergency on the happening of which an ordinance can be promulgated is separate and distinct from and must not be confused with the emergency which occasioned the passing of the Act and the clear effect of the words of the Act, on Clause 72, is that Ordinances promulgated under that subsection during the period specified in Section 3 of the Act, are subject to no time limit as regards their existence and validity unless imposed by the Ordinances, themselves, or other amending or repealing legislation, whether by Ordinance or otherwise. In our judgment, it is clear that the Second Lahore Tribunal did not cease to exist or to have jurisdiction in the case under appeal by reason of the expiration on 1-4-1946 of the period specified in Section 3 of the Act, in question.

In the present case, it will be seen that having regard to the existence of an emergency, the Governor General exercised his powers under Clause 72 of Sen. 9 of the Government of India Act, 1935, and promulgated an ordinance of a permanent character. It was not restricted in its scope to any specified period. It may be that on the expiry of the emergency the powers of the Governor General under that section were at an end.

But it does not follow that an ordinance, which has the effect of an Act of Legislature, passed in exercise of those powers could come to an end on the cessation of the emergency. The cases cited above are all against the contention put forward by the learned Counsel for the accused. That contention must be overruled, and it must be held that the ordinance in question is still in force.

8. The second contention put forward by the learned Counsel was that this ordinance, which was promulgated by the Governor General under Clause 72 of Sch. 9 of the Government of India Act, 1935, should be validated by being subjected to the procedure relating to ordinances as laid down under Article 123 of the present Constitution. That contention was based on a decision in 'Munnalal v. Harold R. Scott' : (1956) ILLJ474Cal . But, that related to a regulation framed under Section 266 Clause (3), Government of India Act of 1935, relating to civil services, corresponding to Article 320, Clause 3 proviso of the present Constitution.

Clause 5 of that Article requires that all regulations made under the proviso to Clause (3) by the President or Governor or the Rajpramukh of a State shall be laid for not less than 14 days before each House of Parliament or each House of Legislature of a State as soon as possible, after they are made and shall be subject to such modifications, whether by way of repeal or amendment.

It will be seen that Article 313 of the Constitution lays down that all the laws in force immediately before the commencement of the Constitution and applicable to any public services or any post which continue to exist after the commencement of the Constitution, shall continue in force 'so far as consistent with the provisions of this Constitution.' In the Calcutta decision cited above it was held that the Constitution had added to the old power a duty, and the duty was to lay the regulations before each House of Parliament or each House of Legislature of a State, in order that the Parliament or the House of Legislature may repeal or amend the regulations, if they feel minded to do so.

But, whatever may be the nature of the provisions or regulations relating to civil services, it is clear that when once an ordinance is passed under Clause 72 of Sch. 9, Government of India Act, 1935, it should be regarded as law enacted by a Legislature and of a permanent character. It is difficult to see why it should be subjected to the procedure relating to ordinances prescribed under Article 123 of the present Constitution. I, therefore, hold that the ordinance in question is still in force, and that the accused was properly convicted of the offence with which he was charged.

9. But, on the question of sentence, I consider that the imprisonment for a period of six months was excessive. The properties involved in the case were not of much value, and at the most they could be valued at about Rs. 200. I am also told that he has undergone imprisonment for a short period, and it will be enough if the imprisonment is reduced to the period already undergone, and instead a fine of Rs. 300 is imposed.

10. So, in both the cases, imprisonment is reduced to the period already undergone, but there will be a fine of Rs. 150 in each case, and in default of payment of fine, rigorous imprisonment for one month for each fine.

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