APPELLATE CRIMINAL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas.

1952
Oct. 16

STATE *v.* FAIJULLABHAI ABDULHUSSAIN.*

Influx from Pakistan (Control) Ordinance (No. 34 of 1948) s. 5—Influx from West Pakistan (Control) Act (XXIII of 1949) s. 5—Whether Ordinance is legislation by Dominion Legislature within the meaning of cl. 3 of Instrument of Accession—Government of India Act, 1935, ss. 6, 42, 5 (1)—Whether Ordinance had force of law in Baroda.

The accused, who was a resident of Baroda but who had gone to Pakistan, entered India on September 22, 1948, on a temporary permit for three months but did not return to Pakistan at the end of the period. He was prosecuted for an offence under s. 5 of the West Pakistan (Control) Ordinance No. 34 of 1948 and s. 5 of the Influx from West Pakistan (Control) Act, 1949. It was contended for the accused that (1) although under the Instrument of Accession the then Ruler of Baroda had agreed to accept matters specified in the Schedule to the Instrument as matters with respect to which the Dominion Legislature may make laws for the Baroda State, the Ordinance having been promulgated by the Governor-General and not the Dominion Legislature, it could not be regarded as law which bound the then State of Baroda; (2) that Baroda State did not form part of India as defined by the Government of India Act, 1935, and that therefore the Ordinance did not apply to the State until January 13, 1949, when under the orders of the then Baroda Government the Ordinance was extended to the said State with the result that on December 23, 1948, there was no law in force in Baroda which the accused had contravened by his overstay; and that (3) the Influx from the West Pakistan (Control) Act, 1949, did not apply because that Act came into force on April 22, 1949 and was not retrospective in its application;

Held, (1) that under s. 42 read with s. 6 of the Government of India Act, 1935, the powers of the Governor-General with respect to legislation by Ordinances being co-extensive with the powers of the Dominion Legislature to make laws, the power to make laws in respect of subjects mentioned in the Schedule to the Instrument of Accession vested also in the Governor-General who could function as the Dominion Legislature under certain circumstances; (2) that from the moment of accession on August 15, 1947, the State of Baroda became a part of the Union of India under s. 5 (*1*) of the Government of India Act and as the Ordinance in question extended to the whole of India on November 10, 1948, it also became on that date the law of the territory which formerly formed part of the Baroda State; and (3) that inasmuch as the Ordinance was applicable to the Baroda State when the accused overstayed the temporary permit, it was not necessary to consider the question whether the Influx from West Pakistan (Control) Act 1949 was retrospective or not.

*Criminal Appeal No. 280 of 1952 with Criminal Appeal Nos. 281 to 284 of 1952.

State v. *Abbas Ibrahim Yerunka*,[1] relied upon.

Mohomed Zahural Huque v. *State*,[2] dissented from.

1952

STATE v. FAIJULLABHAI ABDULHUSSAIN

Rajadhyaksha J.

Appeal against the Order of acquittal passed by N. D. Gehani, First Class Magistrate, Siddhpur.

The facts are set out in the judgment.

M. P. Amin, Advocate General with *H. M. Choksi*, Government Pleader, for the State.

A. S. Pradhan and *P. A. Pradhan*, for the accused.

RAJADHYAKSHA J. These are five appeals filed by the State of Bombay against the acquittal of 5 persons who were prosecuted under s. 5 of the Influx from Pakistan (Control) Ordinance No. 34 of 1948 and under s. 5 of the Influx from West Pakistan (Control) Act, 1949. The same point arises in all these five appeals. We shall, therefore, state the facts in respect of appeal No. 280 of 1952. In this appeal, the accused entered India on or about September 22, 1948, from West Pakistan under a temporary permit for three months. The temporary permit expired on December 23, 1948, but the accused did not return to Pakistan on or before that date. He was, therefore, alleged to have contravened the provisions of r. 12 of the Rules framed under s. 3 of the Influx from West Pakistan (Control) Ordinance No. 17 of 1948. He was prosecuted for having committed an offence under s. 4 of the West Pakistan (Control) Ordinance No. 17 of 1948. The accused contended that he was a permanent resident of the then Baroda State and had received a certificate to that effect from the Naib Suba of the Baroda State. He was arrested while he was attempting to get a permanent permit from the Government of India. Although the allegation against the accused was that he had contravened the provisions of the West Pakistan (Control) Ordinance No. 17 of 1948, the charge had to be subsequently amended when it was realised that Ordinance No. 17 of 1948 was replaced by Ordinance No. 34 of 1948 on November 10, 1948. When the accused was said to have committed an offence on December 23, 1948, Ordinance No. 34 of 1948 was in force. This Ordinance No. 34 of 1948 was replaced by the Influx from West Pakistan (Control) Act,

[1] (1951) Criminal Appeal Nos. 72 to 75 and 78 of 1951 decided by Rajadhyaksha and Dixit JJ. on June 22, 1951 (unrep.).

[2] [1950] A. I. R. M. B. 17.

1952

STATE v. FAIJULLA-BHAI ABDUL-HUSSAIN

Rajadhyksha J.

1949. This Act came into force on April 22, 1949, and, therefore, the cumulative charge against the accused was that he committed an offence under s. 5 of the Influx from Pakistan (Control) Ordinance No. 34 of 1948 and also under s. 5 of the Influx from West Pakistan (Control) Act, 1949.

The learned trial Magistrate before whom the case was tried took the view that the Influx from Pakistan (Control) Ordinance No. 34 of 1948 was a legislation by the Governor-General and therefore was not an act of the Dominion Legislature. The learned Magistrate argued that under the Instrument of Accession, the Ruler of Baroda had agreed to accept matters specified in the schedule to the Instrument of Accession as matters with respect to which the Dominion Legislature may make laws for the State. In substance, the learned Magistrate's view was, as the Ordinance was not promulgated by the Dominion Legislature, it could not be regarded as the law which bound the state of Baroda as it then existed. He was further of the opinion that even this Ordinance was not applicable to the Baroda State for the reason that Baroda State as it then existed did not form part of India as defined in the Government of India Act and that, therefore, the Ordinance was not applied to the State until January 13, 1949, when, under the orders of the Baroda Government, the Ordinance was extended to the Baroda State by virtue of the Instrument of Accession." The third reason why the learned Magistrate took the view that the accused was not guilty was that even the Influx from West Pakistan (Control) Act, 1949, did not apply because that Act came into force on April 22, 1949. His argument was that as the overstay after December 23, 1948, did not constitute an offence and was perfectly legal at the time, it cannot be said that that overstay became illegal and was therefore an offence by some subsequent legislation unless such subsequent legislation was retrospective in its effect. The learned Magistrate did not consider that the Act was retrospective in its application. He was, therefore, of the opinion that the accused had not committed any offence either under the Ordinance or under the Act. He accordingly acquitted the accused. It is against that order that the State of Bombay has come in appeal.

We are of the view that the Influx from Pakistan (Control) Ordinance No. 34 of 1948 was applicable to the Baroda State when the accused overstayed the temporary permit from December 23, 1948. In this view, it is not necessary to

consider what would have been the position under the Influx from West Pakistan (Control) Act, 1949, if the Ordinance did not apply and the overstay of the accused after December 23, 1948, was perfectly legal.

There is no dispute that Baroda acceded to the Dominion of India on August 15, 1947, though it appears that the instrument of accession was signed by the Ruler on September 13, 1948. So far as the application of Ordinance No. 34 of 1948 is concerned, it came into force on November 10, 1948. There is no dispute that the State of Baroda had acceded to the Dominion of India on that date.

The view taken by the learned Magistrate is that according to the instrument of accession, it is only the Dominion Legislature which could make valid laws for the State of Baroda after the accession of the State to the Dominion of India. He appears to consider that legislation by Ordinance by the Governor-General was not legislation by the Dominion Legislature and that, therefore, that legislation could not, under the instrument of Accession, apply to the State of Baroda. We think that this view is not correct. The draft of the Instrument of Accession can be found at page 165 of the White Paper on Indian States; and it has not been contended before us that the Instrument of Accession which was signed by the Ruler of Baroda was in any sense different from the draft which we find at page 163 of the White Paper. The relevant paragraphs of the Instrument of Accession are these:

"(1) 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 this my Instrument of Accession but subject always to the terms thereof, and for the purpose only of the Dominion, exercise in relation to the State of Baroda (hereinafter referred to as "this State" such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on the 15th day of August 1947 (which Act as so in force is hereinafter referred to as "the Act"). (2) I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State as far as they are applicable therein by virtue of this my Instrument of Accession. (3) I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State....."

Then the schedule to the Instrument of Accession enumerates matters with respect to which the Dominion Legislature may make laws for the State of Baroda. The matters are classified

1952

STATE v. FAIJULLA-BHAI ABDUL-HUSSAIN

Rajadhyaksha J.

under three heads: Defence, External Affairs and Com-ed under three heads: Defence, External Affairs and Communications. It is not disputed that the regulation of movement of persons coming into India from Pakistan is one of the matters which is included in the schedule. Reading these 3 clauses of the Instrument of Accession, it seems to us clear that by virtue of the Instrument of Accession, the Ruler of Baroda agreed that such functions as may be vested in the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority may be exercised by those authorities in respect of the Baroda territory. Mr. Pradhan argued that this clause merely declared the intention of the Ruler of Baroda, but had no further effect other than a declaration of such intention. It is true that cl. (1) does refer to the intent of the Ruler of Baroda to accede to the Dominion of India; but this declaration of the intention accepts the authority of the four Dominion authorities mentioned therein, functioning under the Government of India Act as it was in force in the Dominion of India on August 15, 1947. It would thus appear even from this clause that the authority of the Governor-General of India was recognised, as functioning within the ambit of the Government of India Act, 1935, whether the exercise of this authority was executive or legislative. It is undoubtedly true that cl. (3) states that the matters specified in the schedule were to be the matters in respect of which the "Dominion Legislature" could make laws for this State. The question therefore arises as to whether Dominion Legislature referred to in cl. (3) of the Instrument of Accession means only the two legislative chambers of the Government of India or whether it also includes the legislative power of the Governor-General under the Government of India Act.

In a matter which came before a Division Bench of this Court to which I was a party *State* v. *Abbas Ibrahim Yerunka*[1] we had to consider whether the powers of the Governor-General were co-extensive with the powers of the Dominion Legislature. In considering that point, the following observations were made by me:

"Section 42 of the Government of India Act, as amended, lays down the powers of the Governor-General for promulgating Ordinances for the peace and good Government of the Dominion in cases of emergency. That section gives him power to promulgate an Ordinance for a space of not more than six months and it lays down: 'that the power of mak-

([1]) (1951) Cr. Appeal No. 72 of 1951 (with Cr. Appeal Nos. 73, 74 75 and 78 of 1951). decided by Rajadhyaksha and Dixit JJ, on June 22, 1951 (unrep.)

ing 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'. Mr. Kotwal has laid special emphasis on the words 'under this Act' and his contention is that although by reason of the Indian Independence Act, the Dominion Legislature was vested with the full powers of legislation, including the powers which were formerly vested in the British Parliament, so far as the power of the Governor-General to issue Ordinances was concerned, it was restricted to the powers which the Dominion Legislature had under the Government of India Act and subject to such restrictions as were laid down on the powers of the Dominion Legislature by the Government of India Act. His argument is that after the Indian Independence Act, the Dominion Legislature became vested with two kinds of powers—those powers which were formerly in the British Parliament and not included in any of the three Lists in the Seventh Schedule to the Government of India Act, and the powers which the Federal Legislature possessed and which were vested in the Dominion Legislature. He contends that the Governor-General's powers of legislation were only confined to such powers as the Dominion Legislature had in respect of the items contained in Lists I and II in the seventh schedule to the Government of India Act and did not extend to the powers which the Dominion Legislature obtained by virtue of the Indian Independence Act, such powers being those which were vested in the British Parliament prior to the enactment of the Indian Independence Act. It is true that the words 'under this Act' do lend themselves to an argument such as the one submitted to us by Mr. Kotwal. But on reading s. 42 of the Government of India Act, it seems to us that the Dominion Legislature became possessed of the full powers of legislation, and that therefore as there was no restriction whatever on the powers of the Dominion Legislature, there could be no restriction on the Governor General to legislate with respect to them. Section 6 of the Indian Independence Act vests full powers of legislation in the Legislature of the Dominion, including the power to make laws having extra-territorial operation. Further, under sub-s. (*2*) of s. 8, 'except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under sub-s. (*1*) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935' and then the subsection goes on to specify as follows: 'The provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly." Although therefore s. 42 does use the words 'the power of the Dominion Legislature under this Act', we are inclined to take the view that what is meant thereby is powers under the Government of India Act, as modified or extended by the Indian Independence Act, and that therefore by the words 'under this Act' it was not intended to exclude from the purview of the legislation by the Governor-General the powers with respect to subjects about which the Dominion Legislature could legislate after the Indian Inde-

1952

STATE v. FAIJULLA-BHAI ABDUL-HUSSAIN

Rajadhyaksha J.

pendence Act came into force. Section 42, read with s. 6, of the Government of India Act, in our opinion, makes the powers of the Governor-General and of the Dominion Legislature co-extensive. If after the passing of the Indian Independence Act, the Dominion Legislature had full power to legislate with respect to all subjects except those which fell under the Provincial List, irrespective of any restrictions placed by the various Entries, then the powers of the Governor-General would be equally extensive. As there would be, after the passing of the Indian Independence Act, no restriction on the powers of the Dominion Legislature to legislate with respect to the admission into, and emigration or expulsion from, India even with respect to the Indian Nationals or persons domiciled in the Dominion of India, there would be no restriction on the powers of the Governor-General to legislate in a similar way by promulgation of an Ordinance."

The view, therefore, that we took was that the powers of the Governor-General with respect to the legislation by Ordinances was co-extensive with the powers of the Dominion Legislature to make laws. In that view, it seems to us that reading cl. (*1*) and cl. (*3*) of the Instrument of Accession together, the reference to the Dominion Legislature in cl. (3) of the Instrument of Accession means reference also to the legislative power of the Governor-General which was vested in him under the Government of India Act, 1935. It is true that the view which we are taking is in conflict with the view taken by the Madhya Bharat High Court in *Mohamed Zahural Haque* v. *State*[1]. Here the learned Judges had to consider the applicability of influx from West Pakistan (Control) Ordinance No. 17 of 1948 to the State of Madhya Bharat and the learned Judges took the view that the United States of Madhya Bharat had accepted the power of the Dominion Legislature only to make laws for it. They observed as follows (p. 18):

"The Governor-General of India cannot, therefore, exercise in relation to the State the functions vested in him by s. 42 of the 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 s. 42 of the 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 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 art. 3 of the Instrument of Accession to make laws for the United State."

With respect we think that the learned Judges have given a

[1] (1950) A. I. R. M. B. 17.

somewhat restricted interpretation to the expression Dominion Legislature as it appeared in cl. (3) of the Instrument of Accession. In a sense it could be said that the expression "matters with respect to which Dominion Legislature may make laws for this State" is descriptive of the matters in respect to which the Ruler has acceded to the Dominion of India. But in respect of subjects which are mentioned in the Schedule, the power to make laws not only vested in the Dominion Legislature, but in another authority also, namely, the Governor-General of India who can function as the Dominion Legislature under certain circumstances. We do not think it could have been intended that although both the Governor-General of India and the Dominion Legislature may make laws for the Dominion of India, the Ruler accepted only the authority of Dominion Legislature to make laws with respect to matters covered by the Instrument of Accession. The expression "Dominion Legislature" as it appears in cl. (3) of the Instrument of Accession, in our opinion, is a compendious way of referring to all the law-making authorities of the Dominion including the Governor-General of India. We are, therefore, of the opinion that the learned Magistrate was in error in thinking that the Ordinance No. 34 of 1948 which was promulgated by the Governor-General did not have application to Baroda State although the Ruler of Baroda had acceded to the Dominion of India with respect to matters which are admittedly covered by the schedule to the Instrument of Accession.

The second argument which has weighed with the learned Magistrate is that although the Ordinance was promulgated on November 10, 1948, it was not actually brought into force in the State of Baroda till January 13, 1949. Therefore, the learned Magistrate thinks that as there was no law in force on December 3, 1948, the overstay by the accused after that date did not amount to contravention of any law and, therefore, did not constitute an offence. We think that the learned Magistrate is wrong in this view. Under s. 5 (1) of the Government of India Act "the Dominion of India established by the Indian Independence Act of 1947 shall as from the 15th day of August 1947, be a Union comprising (a) .....(b).....(c) the Indian States acceding to the Dominion in the manner hereinafter provided; and (d)....." Therefore, from the moment of accession, the Indian State acceding to the Dominion of India becomes a part of that Dominion. The

1952

STATE v. FAIJULLA-BHAI ABDUL-HUSSAIN

Rajadhyaksha J.

Ordinance No. 34 of 1948 extends to the whole of India. It must, therefore, follow that the Ordinance extends to the State of Baroda which, on the 15th day of August 1947, became a part of the Union of India with respect to matters covered by the Instrument of Accession. Therefore, from the day on which the Ordinance No. 34 of 1948 became law of the land, it also became the law of the territory which formerly formed part of the State of Baroda and, therefore, the Ordinance became the law of the State of Baroda on November 10, 1948. It was, therefore, not necessary in law that the Ordinance should have been applied to that particular State by any notification of the Government of Baroda. Actually this Ordinance was published in the Adnyapatrika by the Sar Suba office, Bandobasti Branch, under its Notification No. 6 of December 21, 1948. Even the notification of January 13, 1949, reads as follows:

> "It is hereby notified under orders of the Baroda Government that the Influx from Pakistan (Control) Ordinance, 1948 (No. XXXIV of 1948) promulgated by the Governor General of India and republished in the Adnyapatrika by the Sar Suba office, Bandobasti Branch, under its Notification No. 6 of December 21, 1948 extends to the Baroda State by virtue of the Instrument of Accession."

It will be noticed that the fact of the extension has merely been notified under this Notification. The extension took effect, in our opinion, from the moment the Ordinance was promulgated and what this Notification of January 13, 1949, did was to bring to the notice of the public the fact that, under the Instrument of Accession, the Ordinance was applicable to the State of Baroda. It is not correct to say that the Ordinance only became law of the Baroda State only on and after January 13, 1949. We are, therefore, of the opinion that the learned Magistrate did not take the correct view in holding that the Ordinance was not applicable to the State of Baroda on December 22, 1948. In this view we think that the respondent in this appeal and those in the other four appeals are technically guilty of having committed an offence under s. 5 of the Ordinance No. 34 of 1948.

The offence in our opinion is more or less of a technical nature. We had suggested to Government through the learned Government Pleader whether it was worthwhile proceeding with these appeals in view of the fact that the State of Baroda is now merged in the State of Bombay and all the

laws applicable to Bombay are also now laws applicable to what was formerly the territory of Baroda State. We do not think that there may be many cases of this type, but we have been informed by the learned Government Pleader that Government are not able to state at the moment as to how many such cases are pending and they particularly wanted an interpretation of the Ordinance No. 34 of 1948 in its applicability to the territories which were formerly in the State of Baroda especially in view of the judgment of the High Court of Madhya Bharat to which we have already made reference. We also understand that even while the investigation in these cases was pending, the respondents in these cases had produced before the Baroda State authorities evidence of their being resident of the State of Baroda and the matter was under consideration when these prosecutions were launched. Even after these prosecutions, although Government could have taken action to remove the respondents under s. 7 of the Influx from Pakistan (Control) Ordinance No. 35 of 1948, (on the assumption that the Ordinance applied) they have been allowed to remain in the State of Bombay for nearly four years. In view of this, we think that Government should consider whether it is at all desirable or necessary to take any further action in respect of their removal from the State of Bombay.

In the result, we set aside the order of acquittal passed by the learned Magistrate in all the cases in appeal. We convict them under s. 5 of the Influx from Pakistan (Control) Ordinance No. 34 of 1948 and sentence each of them to pay a fine of Rs. 20 or in default of payment of fine to undergo simple imprisonment for one week.

Order set aside.

K. B. a.