
(1964) 07 MP CK 0013

In the Madhya Pradesh High Court

Case No : Civil First Appeal No. 17 of 1960

Govindrao Balwantrao Mahadik

APPELLANT

Vs

Krishnarao Daulatrao Mahadik and Another

RESPONDENT

Date of Decision : 15-07-1964

Acts Referred:

Constitution of India, 1950 — Article 372

Citation : AIR 1966 MP 32 : (1965) JLJ 154

Hon'ble Judges : P.R. Sharma, J;N.M. Golvalker, J

Bench : Division Bench

Advocate : Chitley and P.L. Inamdar, for the Appellant; R.R. Tiwari and B.D. Sharma, for the Respondent

Final Decision : Allowed

Judgement

1. This is a defendant's First Appeal against the judgment and decree dated the 25th of April, 1960 passed by the 2nd Addl. District Judge Gwalior, in Civil Original Suit No. 6 of 1960.

2. The suit was filed by Major Krishnarao Mahadik for possession of a house situate at Dal Bazar, Lashkur, which was on the date of the suit in the occupation of the defendant No. 1 Govindrao Mahadik. It was alleged that Govindrao Mahadik had executed a mortgage-deed in respect of this house in favour of defendant No. 2. The Gwalior Bank Prop., M/s Bidhichand & Sons on 9-8-1945. The plaintiff claimed cancellation of this deed. He based his claim in respect of the house on an order (Ex. P/2) dated 12-11-1942 of the then Maharaja of Gwalior State. The defendant challenged the plaintiff's title to the house in dispute and pleaded that the plaintiff had misconstrued the order of the then His Highness. The suit proceeded ex parte against the defendant No. 2. The Gwalior Bank.

3. The trial Court held that the house in dispute belonged to the plaintiff and that the defendant No. 1, Govindrao Mahadik had no right to mortgage it with the

defendant No. 2, The Gwalior Bank. It, therefore, decreed the suit. The defendant has now come up in appeal against the decree passed by the trial Court.

4. The trial Court, relying on a decision of this Court in *The State of Madhya Bharat Vs. Behramji Dungaji and Co.*, held that since the order Ex. P/2 of His Highness the Maharaja of Gwalior State has the force of law, the plaintiff's title to the house in dispute was unassailable. It also held that Ex P/2 being a subsequent Durbar order had the effect of over-riding the previous order Ex. D/3 under which the defendant was allowed to remain in possession of the house during his lifetime. Lastly it was held by the trial Court that since the mortgage of the house by defendant No. 1, Govindrao Mahadik in favour of defendant No. 2. The Gwalior Bank was made on 9-8-1945 after the ownership of the house had, under the Durbar Order dated 12-11-1942 (Ex. P/2) vested in the plaintiff, it could not have any legal effect. At any rate the mortgage was not binding on the plaintiff.

5. The only question which arises for consideration in this appeal is whether the order Ex. P/2 of the then Maharaja of Gwalior could be enforced in the Municipal Courts of the former State of Madhya Bharat and now of Madhya Pradesh. On the formation of the State of Madhya Bharat all laws which were in force in the various integrating States were continued in force, and on the coming into force of the Constitution of India, by Article 372 all laws which were in force in the States were continued until they were altered or repealed by competent legislation. The ruler of Gwalior was an absolute monarch, and his orders whether legislative, executive or judicial in character were binding on the subjects of the Gwalior State. But the taking over of the sovereign power of the ruler of Gwalior by the State of Madhya Bharat amounted to an "act of state". The effect of such State succession was considered by the Supreme Court in *Promod Chandra Deb and Others Vs. The State of Orissa and Others*, and after reviewing the decisions both of the Privy Council as well as the earlier decisions of the Supreme Court, it was held that whether the "act of state" has reference to public or private rights the result is the same; namely that it is beyond the jurisdiction of Municipal Courts to investigate the rights and wrongs of the transaction and pronounce upon them. The Municipal Courts of the new sovereign have the power and jurisdiction to investigate and ascertain only such rights as the new sovereign has chosen to recognise or acknowledge, by legislation, agreement or otherwise.

Where the right sought to be enforced was created by an order of the former ruler, which was made in exercise of his legislative function, the order would continue to be effective even after the coming into force of the Constitution of India by virtue of Article 372 till it is repealed or amended by competent legislation. The distinction between administrative orders and laws passed by an absolute ruler as supreme legislature of the State is of vital importance for the purpose of determining their continued efficacy after the coming into force of the

Constitution since the Constitution makers decided to continue only laws as distinguished from administrative orders. What survives the Constitution and is continued by Article 372 are those laws which could trace their origin to the exercise of legislative power. The same was the position under Ordinance No. 1 of 1948 which was passed on the formation of the State of Madhya Bharat. What it continued was only laws, ordinances, rules, regulations etc., having the force of law which were made in the exercise of statutory power.

This position has now been placed beyond the pale of controversy by a recent decision of the Supreme Court (See *State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala*, . It was held in the aforesaid case that the definition of "existing law" in Article 372 of the Constitution would not include administrative orders, which derive their force from executive authority, and were made either for the convenience of the administration, or for the benefit of individuals--though the power to make laws as well as these orders was vested in the same authority the absolute ruler. The subjects of a ruler were no doubt bound before the merger to obey not only laws but all orders of the ruler. But the Supreme Court made it clear in *Maharaja Shree Umaid Mills Ltd. Vs. Union of India (UOI)*, and *Bengal Nagpur Cotton Mills Vs. Board of Revenue, Madhya Pradesh and Others*, , that where the sovereign expressed himself not in a rule of law but in an agreement it could not be enforced in the Municipal Courts of a successor State. It was pointed out that law is the result of a legislative process, and the result must be intended to bind as a rule of conduct, it must not for example be a contract or a grant or a gift.

In short an order of an absolute ruler must in order to be treated as a law purport to be issued in exercise of a statutory power. If an order made during the regime of a sovereign exercising absolute powers is enforced and fully given effect to, it would obviously be unnecessary to examine its true character. But what was sought in the present suit was the enforcement by the Municipal Courts of the successor State of the order passed by the quondam Ruler of Gwalior. The position does not now admit of any doubt that such an order can be enforced in the Municipal Courts of the successor State only if the order is a law as distinguished from administrative or executive orders. The observations made in an earlier decision in *Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others*, to the effect that in the case of an absolute Ruler like the Maharana of Udaipur it is difficult to make distinction between an executive order or a legislative command issued by him, have been explained in its latest decision by the Supreme Court to mean that so long as the territory of Udaipur and the shrine were under the sovereign of the Maharana the distinction between commands, legislative and executive was academic, for all orders and commands of the Rulers had to be obeyed alike; but it was observed that since the merger of the State with the Union of India, the question whether the "firman" was a mere executive order or a legislative enactment assumed vital importance. If the command was merely executive, unless the rights created thereby were recognised by the successor State, they had no validity and no reliance could be

placed upon them in the Municipal Courts. If the command was legislative, the laws of the former States having been continued upon merger, the legislative command retained vitality and remained unimpeachable (Per Shah J. in State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala, . It was also observed by the learned Judge that a law must follow the customary forms of law-making and must be expressed as a binding rule of conduct.

6. We have, therefore, to examine the Durbar Order in order to see if it has legislative content. It runs as under:

"Gujarish approved. This house really belongs to Major Sardar K. D. Mahadik and Sardar Angre issued the letter referred to above in contravention of my orders dated 26-10-1942. It is, therefore, hereby ordered that the house in question should be handed over to Major Sardar K. D. Mahadik, in whom the ownership is vested."

This order merely declares that the ownership of the disputed house really vested in Sardar K. D. Mahadik.

7. Now it is clear from the plaint itself that the house in dispute, which is situated at Dalbazar, Lashkar, was on the date of the suit in the possession of defendant No. 1 Govindrao. It was no one's case, and rightly so, that the house constituted a part of the Jagir. The Ruler of Gwalior was not exercising any legislative function when he passed the order Ex. P/2. He did not purport to follow the customary forms of law-making prevalent in Gwalior State, nor did he lay down any binding rule of conduct. All that the order required was that the house, which was in the possession of defendant No. 1, should be handed over to the plaintiff, who was declared to be entitled to it. If this order had been carried out during the continuance of the Gwalior State, and nothing further remained to be done in order to give it full effect the matter would have been difficult. Whether the Courts of the Gwalior State were bound by the order of the Ruler, and would have given effect to it, is a matter I am not called upon to decide But on merger of the Gwalior State into the State of Madhya Bharat only such orders of the Maharaja of Gwalior and for that matter of the Rulers of all covenanting States, could be enforced in the Municipal Courts as were legislative in character.

In the case of a right to property based purely on an executive or administrative order of a former Ruler, there was no title capable of being enforced in the Court of the Successor State, until that right had been recognised by it. In the present case the order is on the face of it not legislative in character. It is nothing more than a grant or gift to the plaintiff of property which was in the possession and under the enjoyment of defendant No. 1. It was suggested that the order amounted to a confiscation of the defendant's property. This suggestion cannot be accepted, for the simple reason that the order did not at all purport to confiscate any property to the State. It was purely a grant or a gift in favour of the plaintiff, and the right conferred under it having not been recognised by the States of Madhya Bharat or Madhya Pradesh it cannot be enforced in the

Municipal Courts of the successor States. In *Amodu Tijani v. Secy. Southern Nigeria* 1921 AC 399 : (AIR 1921 PC 212), it was no doubt observed that a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners. Again in *West Rand Central Gold Mining Co., v. Regem* (1905) 2 K. B. 391, it was observed that obligations of conquering States with regard to private property of private individuals, particularly land, as to which the title had already been perfected before the conquest or annexation, are altogether different from obligations which arise in respect of personal rights by contracts. But the Privy Council explained in *Secy. of State v. Rustam Khan* 68 IA 109 :(AIR 1941 PC 64) that "all that can be properly meant by such a proposition is that according to the well understood rules of International law, change of sovereignty by cession ought not to affect private property, but no Municipal Tribunal has authority to enforce such an obligation. The Municipal Courts can enforce only such rights and obligations as are by law or otherwise recognised by the State to which they owe their origin and judicial power

8. I am, for the reasons stated above, of the opinion that the order Ex. P/2 is not a law and that the right conferred under it having not been recognised by the successor State, it cannot be enforced in the Municipal Courts.

9. The result is that this appeal is allowed, the judgment and decree passed by the trial Court are hereby set aside, and the suit is dismissed with costs throughout.