

ALLAHABAD HIGH COURT

Maqbulunissa

Vs.

Union of India

Misc. Appln. No. 848 of 1951

(Sapru, Mukerji and Chaturvedi, JJ.)

14.01.1953

JUDGMENT

Sapru, J.

1. This application which has been presented to this Court under Article 226 of the Constitution, has been referred to the Full Bench by two learned Judges of this Court by their reference order dated 15th September 1952.

2. The applicants who number four persons, namely, Shrimati Maqbul-un-nisa, Razia Begum, Iqbal Ahmad and Sarkar All have applied to this Court for a writ in the nature of 'mandamus' or alternatively for directions or orders directing the opposite parties to forbear from giving effect to the order asking the petitioners to leave India or getting their order executed by their subordinate officers. The question is whether the relief of the nature claimed by the applicants should be granted in this case

3. A few facts may be given shortly. Akhtar Ali left India for Pakistan in 1947. He wanted his wife, Razia Begum, who is applicant No.2 before us, to accompany him to that country. After some hesitation, she decided to go with her husband to Pakistan. Maqbul-un-nisa is the mother of Razia Begum. She was also eventually prevailed upon to accompany Akhtar Ali. 'The adopted son of Maqbal-un-nisa, Iqbal Ahmad as also the son Sarkar Ali, who is about 6 years old, and who is under the guardianship of Razia Begum, also accompanied Akhtar Ali. On reaching Pakistan, Akhtar Ali decided to leave for England and left the petitioners unprovided for. The petitioners wanted to return as early as possible, but in the meantime the permit system was introduced. Having failed to obtain a permit for permanent re-settlement, the petitioners came back to India in September 1949 on a three months' temporary permit.

4. In 1949 the Deputy Commissioner of Unnao was moved by the petitioner for permission to

live permanently in India as Indian nationals. The Deputy Commissioner recommended their application for a permanent re-settlement to the State Government; but, in view of the fact that their temporary permit was to expire shortly, they had to go back to Pakistan. Thereafter, they came back to India in the early part of 1949 on a regular permit issued by the High Commissioner's office and their case is that since then they had been living in their village when quite suddenly on 17-5-1951 the petitioners 1, 3 and 4 received a letter intimating that their permit had been cancelled and ordering them to leave India within a fortnight. Later Petitioner No.2 received a communication from the State Government on 10-1-1951 directing her to proceed to Pakistan. They have now come up to this Court for a writ of 'mandamus', direction or order, directing the Union of India and the State Government not to carry out their order.

5. The first point that we have to consider is a preliminary objection which has been raised to the hearing of this application by the learned Additional Standing Counsel, Shri B.K. Dhaon, In an argument characterised by considerable ability Shri Dhaon has contended that this Court has, under Article 226 of the Constitution, no power or authority to issue a writ, direction or order against the Union Govt. as that Govt. is not situate within the jurisdiction of this Court. He has further contended that an order or direction against the State Government will be ineffective as the State Government is, under the Constitution, bound to give effect to the direction of the Union Government. His contention is that the State Government should not be placed in a position where it has to choose between the orders of this Court and that of the Union Government.

6. The argument which has been advanced by Mr. Dhaon rests upon the interpretation that he has placed upon Article 226(1) of the Constitution which we reproduce below :

"Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs including writs in the nature of 'habeas corpus, mandamus', prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

7. His contention is that this Court has power only to issue writs to any person or authority, including in appropriate cases any government, only if that government is situate within the jurisdiction of this Court. This argument completely ignores the words "any government". They indicate that the founding fathers knew that more than one government would function within the same territory. The assumption on which Mr. Dhaon's argument proceeds is that the Union Government is situate only in Delhi which is the capital of this country and where the President and the Union Government function. This argument is based, in our opinion, upon a misapprehension of the nature of the Constitution under which this country functions. The Constitution, is, as is well-known, of a 'quasi' federal nature. In the constitutional arrangements

embodied in the Constitution, as a perusal of the three lists show, there is a distribution of powers among the various State Governments and the Union Government, though on certain occasions and for certain purposes the Union Government has been given certain rights of interference. We may point out that the Union Government has been given under the arrangement embodied in the Constitution exclusive powers with regard to the subjects comprised in list I. It has been given concurrent powers of legislation in regard to List III and the State Government have, normally speaking, full powers in regard to Lists II and III. The executive power of the Union Government is co-extensive with the Union legislative powers and that of the State Government with the State legislative powers. The executive power of the Union Government is indicated in Article 73 and that of the State in Article 162 of the Constitution. It is thus clear that both the executive and the legislative powers of the Union Government extend throughout the territory of India in respect of matters which are to be found in Lists I and III. Even in regard to List II, it can in certain conceivable circumstances extend throughout the whole of India. In these circumstances, we do not think that it can be said that the Union Government functions only in Delhi merely because its capital is situate at Delhi. The analogy between a government and a corporation or a joint stock company which has its domicile in the place where its head office is situate is misleading. To hold that the jurisdiction of this Court does not extend to the Union Government as it has its capital at Delhi and must be deemed to have its domicile at Delhi would be to place the Union Govt. not only in respect of the rights conceded in Part in but for any other purpose, also, beyond the jurisdiction of all State High Courts except the Punjab High Court. This could not have been the intention of the founding fathers. A perusal of the Constitution will show that there is no provision in the Constitution for the location of the Capital. In a quasi federal state with the vast powers which the Union Government possesses, it cannot be said that it functions only at a particular place It must be borne in mind that the power of this Court under Article 226 of the Constitution is not limited to only that class of cases where a fundamental right has been infringed. There is in that sense a distinction between Article 32 of the Constitution which gives power to the Supreme Court to intervene where there is an allegation that fundamental rights have been violated and Article 226 where the Court can give relief not only in cases where fundamental rights have been violated but also in those where, for any other reason, it may be just and expedient for this Court to interfere. It is well-known that in exercising the powers which have been vested in this Court under Article 226 of the Constitution this Court takes into account the historic back-ground of those writs mentioned in Article 226. In our opinion, the jurisdiction of this Court to intervene under Article 226 depends not upon where the Headquarters or the Capital of the Government is situate but upon the fact of the effect of the act done by Government, whether Union or State being within the territorial limits of this Court. For this reason, we think that the observations of Harries, C.J. and Banerjee, J., in the case of - *Lloyds Bank Ltd. v. Lloyds Bank Staff Association*¹, can have no reference to a case like the present one. They are to the following effect :

"It was faintly suggested at the outset that a 'Mandamus' could issue against the Government of India which is a respondent in this matter restraining that Government

from giving effect to the award. Article 226 of the Constitution expressly allows Writs in the nature of prerogative writs to issue against Government which is a departure from English practice. That Government must, however, be located in the territory over which the Court exercises jurisdiction and in my view the Government of India cannot be said to be located in the State of West Bengal and therefore Writs under Article 226 cannot issue against it at the instance of this Court."

If the reasoning of the learned Judges is correct and the interpretation placed upon it by Mr. Dhaon, then the only High Court which can issue writs against the Union Government is the Punjab High Court. For even the Supreme Court can only issue writs where some fundamental right has been infringed. To go thus far would be to infer an intention on the part of the founding fathers to endow only the Punjab High Court with

¹ unreported D/-17-1-1951 (Cal)(A)

the power of issuing writs, directions or orders calculated to control the administrative vagaries of the Union Government. Obviously, therefore, the reasonable interpretation to place upon Article 226 of the Constitution is to make the test of residence of the applicants and the effect of the order on the applicants the supreme test in deciding whether the Court has or has no jurisdiction in dealing with the writ application. Reference was made by Shri Dhaon to one other case of the Calcutta High Court where this case was followed. On a careful reading of the observation of Harries, C.J. and Banerjee, J., we find that the cases in which this observation has been relied upon were all cases in which the effects of the orders of the Union Government were not operative within the jurisdiction of the Court.

8. We may also refer to the observations of Harnam Singh, J. in the case of - '*Jupiter General Insurance Co. Ltd. v. Bajagopalan*²', That learned Judge says :

"in exercising jurisdiction under Article 226 the High Court acts in 'personam' and looks to the fulfillment of its order to the person of the respondent. Hence the mere fact that the acts sought to be restrained under Article 226 are to be done by the respondent outside the territorial jurisdiction of the High Court cannot deprive the High Court of its jurisdiction to issue writ under Article 226, when the respondent him-self is within its territorial jurisdiction."

9. In our opinion, it cannot be said that the opposite-party No.1, the Union of India, is not within our territorial jurisdiction as it has been given authority throughout the length and breadth of this country. For this reason we do not look upon this case as laying down a principle which is not in harmony with the one which has commended itself to us. On a consideration of the various arguments which have been advanced by Shri Dhaon, we are clear, in our opinion, that this Court has jurisdiction to entertain this application. This point does not appear to have been raised before the Bench, but we have allowed it to be heard as the whole case has been sent to us for disposal.

10. We now come to the merits of the application. What the applicants are seeking by this application is to secure from this Court in effect a declaration of their legal status as citizens of India. This court has consistently taken the view that the powers of issuing writs, orders or directions should not be utilized for giving what is in essence a declaratory relief. For it is well-known that writ proceedings are in the nature of summary proceedings where issues are decided on affidavits.

11. Learned counsel for the State has invited our attention to the order of Government directing the prosecution of the applicants, if they refuse to obey the order directing them to leave this country. He has given us an assurance on behalf of Government that no order of actual deportation will be made against them unless proceedings have been taken under Section 5 of the Influx from Pakistan (Control) Act, 1949. There is in these circumstances, no immediate apprehension of the applicants being deported. In view of this assurance, we consider it unnecessary to go into the question whether the applicants have established their claim that they are citizens of India. That will be a matter which will have to be gone into by the criminal court in the proceedings instituted against them.

² AIR 1952 Pun 9

12. It may be that there are other remedies also open to the applicants, but certainly what is not open to them is to seek relief under Article 226 of the Constitution.

13. Our attention has been drawn to the remarks of the Bench referring this case in regard to a decision dated 22-11-1951 given in 'Criminal Misc. Appln. No.2281 of 1951(C)', to which one of us was a party. That application proceeded upon the basis that the applicant was the holder of a permit for permanent return and he could not, in view of the case of - '*Shabbir Husain v. State of Uttar Pradesh*³', , be deported from India. The learned Judges merely said that the judgment was binding on them. They did not go into any further question as learned counsel for the State stated that in view of the finding of the Court that the applicant was, having regard to that judgment, a citizen of India, the state authorities would, so long as that finding stood, take no steps to deport the applicant. It may be remarked that the question whether the applicant migrated to Pakistan within the meaning of Article 7 of the Constitution was a question which had not been argued before that Bench and upon that question the Bench did not give any opinion.

14. Mr. Mustafa, who appears for the applicants and who has argued the case with ability, prays that this Court may be pleased to direct the authorities to grant some time to the petitioners to make arrangements, if they so desire, to go back to Pakistan. We have no doubt that, if any such request is made by the applicants to the proper authorities, it will be considered by them on its merits.

15. For the reasons given above, we dismiss this application. In all the circumstances of the case we make no order as to costs.

16. The stay order is discharged.

Application dismissed.

³ AIR 1952 All 257